

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

DY

DEC 07 2004

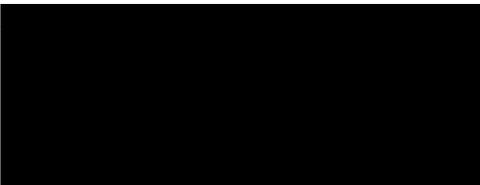


FILE: SRC 04 037 50621 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the business of freight transportation. It desires to employ the beneficiary as a long distance tractor-trailer truck driver for six months. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL), or notice stating that such certification could not be made. The director also determined that substitution of beneficiaries is not within the jurisdiction of Citizenship and Immigration Services (CIS).

On appeal, the petitioner's representative states that the petitioner was approved for 186 H-2B visas. The petitioner's representative also states that since there was only two weeks validity left on the petitioner's approval notice, it was necessary to employ workers who were already in the United States. The petitioner's representative asserts that there was not enough time to get workers from outside the United States. The petitioner's representative contends that since the beneficiary already had a work visa that was about to expire, he was asked to work for the petitioner.

The record contains a copy of the Notice of Action, Form I-797, showing the petitioner had been approved for 44 H-2B workers from October 15, 2003 until October 30, 2003. In a letter dated October 30, 2003, the petitioner requested the substitution of one of its previously approved workers, whose visa had not been issued, with the beneficiary named in this petition. The beneficiary named in this petition is currently in the United States, in H-2B status, working for another employer.

The regulation at 8 C.F.R. § 214.2(h)(2)(i) states in pertinent part:

(D) Change of employers. If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. . . .

In this case, the beneficiary is in the United States and seeks to change his employer. The regulations do allow for a change of employers if the beneficiary is maintaining his previously authorized nonimmigrant status in the United States. The petitioner followed the proper procedure and filed Form I-129 to request H-2B classification and extension of the beneficiary's stay in the United States on November 20, 2003. However, the validity period of the previously approved petition expired on October 30, 2003, prior to the filing date of the current petition, and therefore, no substitution can be made. This petition may not be approved for another reason.

The regulations at 8 C.F.R. § 214.2(h)(2)(i) states in pertinent part:

(E) Amended or new petition. . . . An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor (DOL) determination. . . .

The Petition for a Nonimmigrant Worker, Form I-129, was filed on November 20, 2003 without the new DOL determination. To remand this case to the director for further action and consideration would have no practical effect because the period of requested employment (October 30, 2003 until April 30, 2004) has passed. Therefore, the petition is denied.

ORDER: The petition is denied because the matter is moot due to the passage of time.