

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

Identifying data deleted to
prevent identity unwarranted
invasion of personal privacy

D4

DEC 07 2004



FILE: LIN 04 110 53008 Office: NEBRASKA 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a musician who desires to extend his authorization to employ the beneficiary as a bass player for one year. 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 and denied the petition.

On appeal, counsel states that the Application for Alien Employment Certification (Form ETA 750) was filed with the DOL in Michigan, who forwarded the case to its Chicago regional office. Counsel explains that she received a phone call informing her that the Chicago regional office had forwarded the case to the Texas Workforce Commission (TWC), Texas. Counsel submits a letter from the TWC rejecting the application because the job opportunity was not for a Texas worksite. Counsel states that since the mistakes were made by the DOL offices, the beneficiary is entitled to the extension of his H-2B classification.

The regulations stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on March 8, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On appeal, counsel states that because of the mistakes made by the DOL, the petitioner did not obtain the required labor certification before March 9, 2004. However, any errors that the petitioner feels occurred during the labor certification process should be addressed to the DOL. Neither the statute nor regulations allow for the acceptance of a labor certification obtained subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

This decision is without prejudice to the filing of a new petition accompanied by the proper documentation and fee.

ORDER: The appeal is dismissed.