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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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DEC 07 2004

FILE: LIN 04 049 53160 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

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 The director's decision will be withdrawn although the petition is now moot.

The petitioner engages in the business of freight transportation. It desires to employ the beneficiary as a tractor-trailer truck driver for a period of four months. The director determined that the regulations did not allow the substitution of one beneficiary for another.

On appeal, the petitioner's representative states that the petitioner was approved for 36 H-2B visas on November 20, 2003. The petitioner's representative also states that the petitioner only employed 23 of the 36 workers that were approved. The petitioner's representative requests that the beneficiary be allowed to change and extend his H-2B visa.

The record contains a copy of the Notice of Action, Form I-797, showing the petitioner had been approved for 35 H-2B workers from November 19, 2003 until April 15, 2004. In a letter dated December 8, 2003, the petitioner requested the substitution of one of the 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. . . .

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. Since the regulations do allow for a change of employers if the beneficiary is maintaining his previously authorized nonimmigrant status in the United States, the director should have considered the petitioner's request. However, this petition cannot be approved for additional reasons.

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 December 11, 2003 without the current 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 (December 25, 2003 until April 15, 2004) has passed. Therefore, the petition is denied.

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