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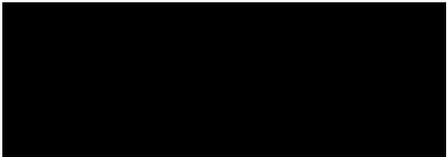


FILE: LIN 01 270 55571 Office: NEBRASKA SERVICE CENTER Date: FEB 19 2004

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

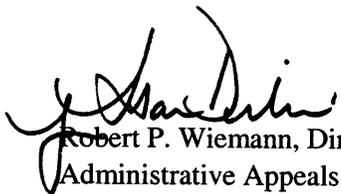
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

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: This is a motion to reconsider the Administrative Appeals Office's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decision affirmed.

The petitioner operates a school. It desires to extend its authorization to employ the beneficiary as its director 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. On appeal, the Administrative Appeals Office (AAO) affirmed the director's decision.

On motion, counsel states that the AAO did not address the failure of the director to allow the petitioner the time it was originally provided to respond to the request for additional evidence.

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 was filed on October 9, 2001, without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Counsel states that the director did not provide the petitioner an opportunity to provide the additional evidence that had to be received no later than March 4, 2002. However, the director's decision states that on January 15, 2002, the request for additional evidence letter was returned to the director, and no further evidence was submitted with the letter.

Upon review, the petitioner was given the opportunity to submit the required evidence; however, the petitioner elected to return the request for additional evidence letter prior to March 4, 2002, without the requested evidence. Therefore, a decision was rendered based on the record. *See* 8 C.F.R. § 103.2(b)(14). Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

Further, counsel states on motion that the AAO failed to address the delay in timely processing the H-2B visa that was granted for one year. Counsel states that by the time the beneficiary entered the United States, there was only two months left on the H-2B employment authorization and it would have been virtually impossible to process a second labor certification within two months. Counsel states that the H-2B visa approval should have been extended for an additional 12 months due to the delay in its initial processing. However, neither the statute nor the regulations allows for an extension of time to complete a certification.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed.

ORDER: The order of August 3, 2002 dismissing the appeal is affirmed. The petition is denied.