

DA



U.S. Citizenship
and Immigration
Services



FILE: WAC 04 029 50907 Office: CALIFORNIA SERVICE CENTER Date:

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

SEP 28 2004

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:



PUBLIC COPY

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

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

The petitioner operates a competitive training facility for horses. It desires to employ the beneficiary as a horse show groom for one year. The director determined that the petitioner had not submitted a temporary labor certification (Form ETA 750) 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 petitioner did not submit a certified Form ETA 750 because this application, although submitted and filed with the Employment Agency, had not been certified. Counsel also states that the complete process of the Form ETA 750 is approximately two-three years. An acknowledgement letter from the Employment Development Department (EDD) has been submitted with the appeal.

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 November 12, 2003 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.

Counsel states that the approximate processing time for the Form ETA 750 is two-three years. However, neither the statute nor the regulations allows for the approval of an H-2B petition for temporary employment based on the filing of an application for permanent labor certification. The AAO verified that the acknowledgement letter submitted by counsel as evidence of the delay in the labor certification process relates to the beneficiary's application for permanent employment in the United States. The petitioner has not shown that it applied for a temporary labor certification on behalf of the beneficiary as required by the regulations.

This petition cannot be approved for an additional reason. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is seasonal and recurs annually.

The dates of the intended employment for the beneficiary are from November 5, 2003 until November 5, 2004. Counsel submitted a copy of the 2004 Competition Search Results to demonstrate the petitioner's need for the beneficiary's services. Counsel states that it is evidence of the horse shows through the 2004 season. However, the petitioner has not indicated which competitions it will be attending to justify the need for the beneficiary's services for one year. The petitioner has not established that its need for the beneficiary's services is seasonal and temporary.

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.

ORDER: The appeal is dismissed.