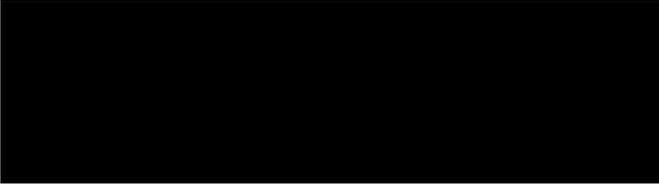


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AUG 03 2005

FILE: SRC 05 044 50200 Office: TEXAS SERVICE CENTER Date: AUG 03 2005

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:

SELF-REPRESENTED

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 director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In order to employ 70 unnamed beneficiaries as landscapers for a period of eight months, the petitioner, a landscape maintenance firm, endeavors to classify them as temporary nonagricultural workers 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).

The director denied the petition on the basis that the petitioner had failed to obtain a temporary labor certification from the Department of Labor (DOL), or a notice stating that such certification could not be made, prior to filing the H-2B petition.

On appeal, the petitioner contends that the director erred in denying the petition.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states the following:

The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv) of this section.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states the following:

After obtaining a determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by the labor certification determination and supporting documents, with the director having jurisdiction in the area of intended employment.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulates that an H-2B petition for temporary employment in the United States 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.

The instant H-2B petition was received at the service center on December 3, 2004 without a temporary labor certification or notice detailing the reasons such a certification could not be made. The petitioner submitted the temporary labor certification a few weeks later. The final determination notice from the DOL is dated February 1, 2005, and the temporary labor certification is valid March 1, 2005 through October 31, 2005. Therefore, the final determination was issued subsequent to the filing of the H-2B petition on December 3, 2004. The petition must therefore be denied, and the director was correct to do so.

On appeal, the petitioner contends that the regulations require only that a petitioner *apply* for temporary labor certification prior to filing a petition.

However, neither the statute nor the regulations cited above allow for the acceptance of a temporary labor certification obtained subsequent to the filing of an H-2B petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A nonimmigrant 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).

On appeal, the petitioner asserts that the petition should be approved because it was not the intent of Congress nor the purpose or objective of the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) to deny a petition merely because it was not accompanied by a final determination on the labor certification when the petition was filed. However, the petitioner has not supplied Congressional legislative history of the applicable law or related floor statements to substantiate this claim. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

The petitioner also asserts that it is in compliance with General Administrative Letter No. 1-95 (GAL I-95), which was issued by the DOL on November 10, 1994. However, GAL 1-95 is irrelevant in this proceeding, as there has been no assertion that the DOL erred in its adjudication of the temporary labor certification. Moreover, even if there were such an assertion, the AAO would not be the proper forum for its resolution.

The petitioner next contends that the petition should be approved because CIS has approved similar H-2B petitions in the past (when the temporary labor certification was certified subsequent to filing the H-2B petition). The petitioner includes copies of I-129 receipt and approval notices, as well as copies of temporary labor certifications (the AAO notes that all of these notices appear to be issued to employers other than the petitioner).

However, each nonimmigrant proceeding is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988). Moreover, the AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Next, the petitioner contends that the late filed and certified temporary labor certification should be accepted because the petitioner submitted the certification as an H-2B amendment. The AAO notes that the instant petition consists of two submissions: (1) the first submission, which contained the Form I-129 and filing fee, was received on December 3, 2004; and (2) the second submission, which contained the late filed and certified temporary labor certification, was received on February 11, 2005. The petitioner labeled the cover letter to the second submission as an "amendment" and stated the following: "Please consider this as a formal request to amend the originally filed I-129H to include [p]etitioner's current labor certification attached hereto."

As indicated above, a petitioner must establish eligibility as of the date of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978)

The proper procedure for correcting the error would have been to file a new Form I-129, with proper filing fee. Thus, the petitioner's submission, while entitled an "amendment," was not an amendment as contemplated by the regulations.

Finally, the petitioner submits a copy of an e-mail from the service center, dated July 18, 2004. In this e-mail, an immigration information officer notifies an attorney, who inadvertently filed an H-2B petition without including the temporary labor certification, that the director would match the missing document to the file.¹

The AAO notes that this e-mail is not a primary source of law. Moreover, the e-mail does not support the petitioner's argument. The e-mail does not state that a petitioner is relieved from the regulatory requirement that the temporary labor certification be certified prior to the filing of the H-2B petition. It simply states that when a petitioner forgets to include the final determination with the H-2B submission, and submits it at a later date as an attachment, the director will match it to the file.

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

ORDER: The appeal is dismissed. The petition is denied.

¹ The AAO notes that it does not appear as though the service center sent this e-mail in conjunction with the instant case.