U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: EAC 05 065 53629 Office: VERMONT SERVICE CENTER Date: AUG 0 2 2006

IN RE: Petitioner: [redacted]
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:

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 45 unnamed beneficiaries as counter attendants for a period of nine and a half months, the petitioner, which is engaged in the food services industry, 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 not established a temporary need for the beneficiaries' services.

On appeal, the petitioner contends that the director erred in denying the petition, and that its need for the beneficiaries' services is in fact seasonal.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.

The test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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 shall 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.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R.§ 214.2(h)(6)(ii)(B)(*2*).

On appeal, the petitioner submits two letters from the Buffalo Niagara Convention & Visitors Bureau, a letter from the Niagara Tourism and Convention Corporation, information regarding the New York Thruway, and two bar graphs showing that the company's sales and payroll are higher during the nine and a half months of requested employment than during the rest of the year. While the petitioner may have a seasonal need for the services of the beneficiaries, the petitioner here has not met its burden of proof. No financial documentation such as tax or sales receipts are submitted; there is no evidence to support the bar graphs submitted by petitioner. 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, the letters and bar graphs submitted on appeal are simply copies of the documents the petitioner submitted in response to the director's request for evidence.

Therefore, the petition may not be approved.

The petitioner also claims that Citizenship and Immigration Services (CIS) has approved similar H-2B petitions in the past. 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 cases were similar to the instant petition or were 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).

Beyond the decision of the director, the petition may not be approved for an additional reason.

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 must 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 29, 2004 without a temporary labor certification or notice detailing the reasons such a certification could not be made. Absent such evidence, the petition cannot be approved, as noted above.

Although the petitioner did obtain a final determination on January 13, 2005 detailing the reasons certification could not be made and submitted it to the director, the failure to procure this document prior to filing the H-2B petition precludes CIS from approving the petition. 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).

For this additional reason, the petition may not be approved.

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.