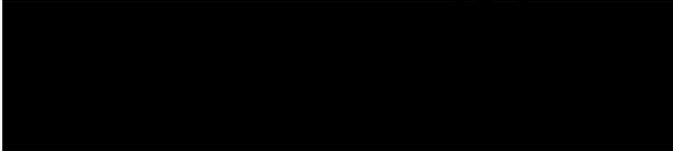


identity information related to:  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

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FILE: SRC 04 087 53058 Office: TEXAS SERVICE CENTER Date:

AUG 22 2005

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:

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.

In order to employ 40 unnamed beneficiaries as landscapers for a period of ten months, the petitioner, a landscaping 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 H-2B petition, agreeing with the Department of Labor (DOL) that the petitioner had failed to demonstrate a good-faith effort to locate available American workers.

A review of the record finds that the DOL denied the labor certification on the basis that the petitioner had not demonstrated a good-faith effort to hire applicants referred to the petitioner by the DOL. In its final determination denying the labor certification, the DOL stated the following:

The only reported efforts by the employer to contact the qualified [and] available U.S. workers was via certified mail. There is nothing in the case record that documents any other efforts by the employer to contact the workers by telephone. More than certified mail is required to demonstrate an employer's 'good-faith' effort to seek out and employ available qualified U.S. workers for the 740 [sic] job opportunities requested in this application for foreign labor certification.

In consideration of the 32 U.S. workers who applied and the lack of acceptable efforts by the employer to contact those workers, I cannot certify that a sufficient supply of qualified available U.S. workers is not available in the area of intended employment.

The petitioner filed the instant petition with CIS and, pursuant to 8 C.F.R. 214.2(h)(6)(iv)(E), provided the basis for why it believed the DOL's final determination was incorrect. The petitioner asserted that it had filed petitions in the same manner in previous years and been approved, that in contacting the applicants via certified mail it had "tried everything imaginable to hire U.S. workers," and that the company was "not willing to hire illegal aliens" to perform the duties.

In response to the director's request for additional evidence, the petitioner submitted instructions from the Texas Workforce Commission (TWC) regarding the manner in which petitioning employers in Texas should document the results of their recruitment. The petitioner emphasized the portion of the instructions reading "[a]lthough not required, it is suggested that you contact each applicant via 'certified, return receipt requested' mail. This will provide proof of your good faith efforts."

The petitioner interpreted those statements as meaning that certified mail was the only required method of contact, stating the following:

The standard of sending 'certified, return receipt requested' mail is the norm and most States acting for the USDOL require it (see attached example for Texas). Georgia does not require the extreme step of sending [c]ertified [m]ail to be taken (attached). We just wanted to do everything we could to find any US domestic worker. We simply cannot find any legal US workers who will take the job.

The AAO notes that the Georgia DOL, in its instructions, did not specify the method to be utilized by petitioning employers to contact applicants. It stated that the application must contain a statement from the

employer listing the names of the applicants, date the employer interviewed the applicants, the name and job title of the interviewer, and the reason the applicants were not hired.

The director denied the petition, stating the following:

The evidence submitted does not overcome the reasons for denial stated in the DOL letter. The petitioner has not shown that certified mail is the only required method of contact for the applicants to the job announcements. The Service agrees with the DOL and concludes that a good faith effort by the employer would and or should also include an attempt to contact via telephone the applicants who responded to the job announcements.

The petitioner's appellate brief is virtually identical to the petitioner's letter of support submitted at the time the petition was initially filed. The only new information submitted on appeal is the following two statements:

This is a Federal program each state must apply the same Federal Laws as directed by the USDOL and title 8 CFR [sic].

The U.S.D.O.L. Certification and INS approvals for the past years clearly show that there is no requirement for the employer to call the applicants, only send certified letters [sic].

The director was correct to deny the petition. The petitioner has not demonstrated that it made a good faith effort to contact the applicants referred by the DOL. Since the petitioner is located in Georgia, the instructions from the TWC are irrelevant to this proceeding. However, those instructions do not stand for the proposition cited by the petitioner. The TWC instructions specifically state that certified mail is not necessary, but only suggested as a method of verifying good faith attempts to contact applicants. In this case, the petitioner did not send letters via certified mail as a method of verifying good faith attempts to contact the applicants. The petitioner did not attempt to call any of the applicants and set up interviews or make other good faith efforts to contact the 31 applicants who responded to the advertisement. Rather, those letters via certified mail *were* the petitioner's attempt to contact the applicants.

Nor do the instructions from the Georgia DOL support the petitioner's contention that contacting applicants via certified mail alone is sufficient. As noted above, that those instructions state that an application must contain a statement from the employer listing the names of the applicants, date the employer interviewed the applicants, the name and job title of the interviewer, and the reason the applicants were not hired. The fact that such details regarding the interviews are required assumes that such interviews will be attempted in good faith.

The petitioner's assertion that each state must apply the same federal laws is not persuasive. First, it was the United States DOL-Employment and Training Administration, and not the Georgia DOL, that issued the final determination on the labor certification (i.e., it was a federal agency that issued the determination, not a state agency). Also, the petitioner does not identify any statute or regulation that it considers to be applied inappropriately.

Finally, the petitioner's assertion that the instant petition should be approved because similar cases have been approved in the past fails.

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).

The petitioner has not demonstrated a good faith effort to locate United States workers, and the AAO will not disturb the director's denial of the petition.

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.