

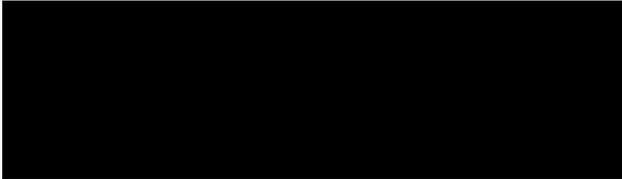
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U.S. Department of Homeland Security
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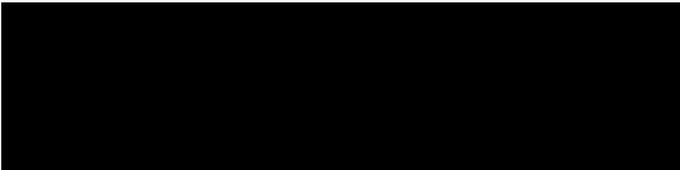
Date: JUL 25 2005

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:



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 the beneficiaries as laundry workers for a period of ten months, the petitioner, a motel beach resort, 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. § 101(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 October 8, 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. As such, the director issued a request for evidence (RFE) on December 29, 2004, requesting either the temporary labor certification or a notice detailing why such certification could not be made.

In response to the director's RFE, the petitioner submitted the temporary labor certification. The final determination notice from the DOL is dated December 8, 2004, and the temporary labor certification is valid February 15, 2005 through December 15, 2005. Therefore, the final determination was issued subsequent to the filing of the H-2B petition on October 8, 2004. Thus, the director denied the petition.

On appeal, counsel asserts that the petitioner was "put into a bad position" due to the confluence of several factors: the limitation on the number of H-2B approvals that Citizenship and Immigration Services (CIS) is permitted to grant each year, the DOL requirement that a temporary labor certification be filed no more than 120 days prior to the requested start date, and understaffing at DOL offices leading to delays in processing the temporary labor certification.

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, and there is no provision in the statute or regulations for discretionary relief from this requirement. 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).

Counsel also notes that the director's RFE requesting the temporary labor certification or notice detailing the reasons such certification cannot be made did not specify that the certification must bear a certain date. However, the AAO finds that the director's RFE was adequate. Pursuant to 8 C.F.R. § 103.2(b)(8), the director properly issued an RFE upon finding that the record lacked initial evidence. In this case, the petition was improperly filed, and even if the RFE had contained phrasing such as that suggested by counsel, it would not have cured the deficient filing.

Counsel 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). However, this contention 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 cases referenced by counsel were similar to this petition or were approved in error, no such determination may be made without review of the original records in their 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).

Counsel also asserts that labor certifications are unnecessary in the local labor market because there has been a labor shortage "for at least the past six years." However, temporary labor certification is required by the regulation.

Finally, counsel states that denial of this case will harm the petitioner's business. However, as noted above, there is no provision in the statute or regulations for discretionary relief from the temporary labor certification requirements.

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.