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DIVISION OF APPELLATE SERVICES

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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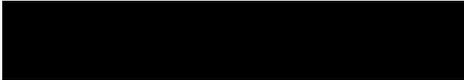


Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:



Beneficiaries:

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

The petitioner is a corporation that operates a retail bakery. It desires to employ the beneficiaries as fast food workers for ten months. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made at the time of filing the petition, and denied the petition.

On appeal, the petitioner does not dispute the fact that its Petition for a Nonimmigrant Worker (Form I-129) was filed prior to the DOL's determination on whether or not to approve a temporary labor certification. Rather, the petitioner requests that its petition be granted because it submitted the approved certification prior to the director's decision on the petition, and because, in the past, it has fully complied with the relevant regulations on employing aliens.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii) states in pertinent part:

(C) 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 . . . within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv). . . .

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 Form I-129 was filed on December 10, 2004 without a temporary labor certification, or DOL notice detailing the reasons why such certification cannot be made. In January 2005, the Vermont Service Center received the petitioner's original labor certification application (Form ETA 750) and a Request for Premium Processing (Form I-907). The DOL's certification is valid from March 20, 2005 to December 20, 2005. The Form ETA 750 indicates that, although the petitioner applied for a temporary labor certification on November 15, 2004, DOL did not make its determination to approve certification until January 5, 2005. Thus, although the petitioner applied for temporary labor certification prior to filing the petition, a determination was rendered after the petition was filed.

The AAO acknowledges that the petitioner filed its application for labor certification prior to filing the Form I-129. However, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states:

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.