



U.S. Citizenship  
and Immigration  
Services



D4

FILE: WAC 05 040 52067 Office: CALIFORNIA SERVICE CENTER Date: JUN 09 2005

IN RE: Petitioner: [Redacted]  
Beneficiaries: [Redacted]

H2B

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

BY PUBLIC COPY  
Identity tag data released to prevent clearly unwarranted invasion of personal privacy

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the business of landscape maintenance. It desires to employ the beneficiaries as landscape laborers for seven and one-half months. The director determined that the petitioner had not provided sufficient evidence to establish an emergent situation that would allow the director to waive the names of the temporary nonimmigrant workers at the time of filing the petition.

On appeal, the petitioner states that it has a seasonal and temporary need for the alien workers. The petitioner also states that it will satisfy the requisite requirement for named beneficiaries.

The regulation at 8 C.F.R. § 214.2(h)(2)(iii) states in pertinent part:

*Named beneficiaries.* Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Service's Headquarters. . . .

The Petition for a Nonimmigrant Worker (Form I-129) was filed on November 24, 2004. In its notice of intent to deny, dated February 7, 2005, the director afforded the petitioner 30 days from the date of the notice to submit the names of the beneficiaries. The petitioner was also required to submit a certified Form ETA 750 from the Department of Labor.

On appeal, the petitioner submitted Supplement-1, a form that is attached to Form I-129, containing the names of 22 workers that intend to enter the United States to work temporarily for the petitioner as H-2B landscape laborers. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's intent to deny. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The petition cannot be approved for another reason.

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 Petition for a Nonimmigrant Worker (Form I-129) was filed on November 24, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. In its notice of intent to deny, dated February 7, 2005, the director states that the petition was not accompanied by the required temporary labor certification, Form ETA 750.

On March 17, 2005, the petitioner submitted the appeal with its current temporary labor certification issued by the Department of Labor (Form ETA 750). The final determination notice from the DOL is dated January 14, 2005 and a copy of the original approved labor certification is valid from March 15, 2005 through November 1, 2005. The petitioner applied for a temporary labor certification on November 17, 2004, and a determination was not rendered until January 14, 2005, subsequent to the petition's filing date.

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

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.

Neither the statute nor regulations allow for the acceptance of a labor certification obtained subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A 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 Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.