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

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PUBLIC COPY

U.S. Citizenship and Immigration Services

D4

[redacted]

FILE: LIN 05 039 51493 Office: NEBRASKA SERVICE CENTER Date: JUN 13 2005

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 six unnamed beneficiaries as landscape laborers for a period of eight and a half months, the petitioner, a landscape maintenance 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 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 November 24, 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 February 1, 2005, requesting either the temporary labor certification or a notice detailing why 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 February 14, 2005, and the temporary labor certification is valid March 15, 2005 through November 30, 2005. Therefore, the final determination was issued subsequent to the filing of the H-2B petition on November 24, 2004. Thus, the director denied the petition.

On appeal, the petitioner contends that the regulations require only that a petitioner *apply* for temporary labor certification prior to filing a petition.

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. 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).

The petitioner asserts that the petition should be approved because it was not the intent of Congress nor the purpose or objective of the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) to deny a petition merely because it was not accompanied by a final determination on the labor certification when the petition was filed. However, the petitioner has not supplied Congressional legislative history of the applicable law or related floor statements to substantiate this claim. 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, where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

The petitioner also asserts that it is in compliance with General Administrative Letter No. 1-95 (GAL I-95), which was issued by the DOL on November 10, 1994. However, GAL 1-95 is irrelevant in this proceeding, as there has been no assertion that the DOL erred in its adjudication of the temporary labor certification. Moreover, even if there were such an assertion, the AAO would not be the proper forum for its resolution.

The petitioner includes copies of two unreported AAO decisions and asserts that these decisions support its contention that a temporary labor certification need not be certified prior to filing the H-2B petition. However, these decisions in fact undermine the petitioner's assertion. In the first decision, the AAO noted that "the petition must be accompanied by a current or new DOL determination." Thus, upon filing a petition, the final determination must be present (i.e., the temporary labor certification must be certified). In the second case, the AAO noted that a temporary labor certification could not be accepted because it had been certified several days after the H-2B petition was filed.

The petitioner 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). The petitioner includes copies of I-129 receipt and approval notices, as well as copies of temporary labor certifications (the AAO notes that all of these notices appear to be issued to employers other than the petitioner).

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 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).

Finally, the petitioner submits a copy of an e-mail from the service center, dated July 18, 2004. In this e-mail, an immigration information officer notifies an attorney, who inadvertently filed an H-2B petition without including the temporary labor certification, that the director would issue an RFE for the missing document rather than deny the petition.[1]

The AAO notes that this e-mail is not a primary source of law. Nevertheless, the e-mail does not support the petitioner's argument. The e-mail does not state that a petitioner is relieved from the regulatory requirement that the temporary labor certification be certified prior to the filing of the H-2B petition. It simply states that when a petitioner forgets to include the final determination with the H-2B submission, the director will issue an RFE. The director did so on February 1, 2005.

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.

[1] The AAO notes that it does not appear as though the service center sent this e-mail in conjunction with the instant case.