

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D4

FILE: EAC 05 054 51788 Office: VERMONT SERVICE CENTER

Date: JUN 14 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 summarily dismissed.

The petitioner is a landscaping company that filed this H-2B petition in order to employ the beneficiary as a groundskeeper for the period March 14, 2005 to November 14, 2005. The director denied the petition on the basis that the temporary labor certification from the Department of Labor (DOL) "was not obtained prior to filing the petition."

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

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 (Petition for Nonimmigrant Worker) was filed on December 11, 2004 without either a temporary labor certification or a DOL notice detailing the reasons why such certification cannot be made. Prior to the director's decision, the petitioner submitted to the Vermont Service Center a temporary labor certification from the DOL. However, as noted in the director's decision, DOL issued this certification on December 29, 2004, a date 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.

Neither the statute nor regulations allow for the acceptance of a labor certification issued subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. Citizenship and Immigration Services regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(12). 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).

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

The only information that the petitioner submits about the basis of the appeal is this statement in its March 22, 2005 letter that is submitted on appeal:

[The petitioner] is in receipt of your decision in the above captioned matter. Since it is our company's first time requesting such a petition, we did not completely understand the process. Due to inexperience we have filed the paperwork in the wrong order. The paperwork has been resubmitted using the proper groundlines. Please allow this letter to serve as a request for an appeal.

The petitioner fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As the petitioner counsel presents no additional evidence on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

The burden of proof in this proceeding 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.