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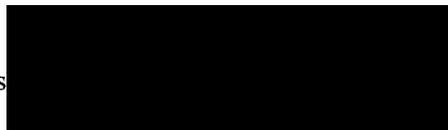
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FILE: EAC 04 231 50360 VERMONT SERVICE CENTER

Date: JUN 15 2005

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 summarily dismissed.

The petitioner is a medical doctor who desires to continue to employ the beneficiary as a live-in nanny for one year after the expiration of the September 1, 2003 to September 1, 2004 period that was previously approved pursuant to the first H-2B petition filed on behalf of this beneficiary.

The director denied the present H-2B petition on the basis that the petitioner had not submitted with the petition either a temporary labor certification from the Department of Labor (DOL) or a DOL notice stating that such certification could not be made.

The evidence of record establishes that the petitioner filed the Petition for a Nonimmigrant Worker (Form I-129) prior to a DOL determination on whether or not to approve a temporary labor certification. Therefore, the director's decision to deny the petition comported with the pertinent Citizenship and Immigration Services regulations. 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). . . . [Italics added.]

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulates that an H-2B petition "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. Further, 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.* [Italics added.]

CIS 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). CIS regulations do not provide for amendment of a petition once it has been filed, other than by the filing of a new petition with fee. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

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).

Section 3 of the Form I-290B bears a statement to the effect that the petitioner has filed a temporary labor certification application with DOL and will forward a copy of DOL's determination as soon as it is received. The only other information that the petitioner submits about the basis of the appeal is a copy of the application for temporary labor certification (Form ETA 750) upon which he is awaiting DOL's determination. The form indicates that it was not signed by the petitioner until February 2005, which is months after the filing of the Form I-129 in August 2004.

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 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. The petition is denied.