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U.S. Citizenship
and Immigration
Services

D4

[redacted]

JUN 22 2005

FILE: EAC 05 049 52262 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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 landscape maintenance company. It filed the H-2B petition in order to employ the beneficiaries as landscape laborers for the period March 1, 2005 to December 15, 2005.

Quoting relevant regulations at 8 C.F.R. § 103.2(b) and at 8 C.F.R. §§ 214.2(h)(6)(iii)(C) and (iv), the director denied the petition on the basis that, at the time it filed the petition, the petitioner had not obtained from the Department of Labor (DOL) a temporary labor certification or notice stating that such certification could not be made.

The record establishes these salient facts: (1) the petitioner filed its application to DOL for temporary labor certification (Form ETA 750) in November 2004; (2) the service center accepted the Form I-129 (Petition for Nonimmigrant Worker) for filing in December 2004; (3) on January 13, 2005, DOL issued the temporary labor certification, which the petitioner subsequently submitted to the service center; and (4) the director denied the petition on March 4, 2005, after the service center received the certification.

On appeal, the petitioner acknowledges that the petition was filed prior to the date that DOL made its determination on the application for temporary labor certification. The petitioner argues that Citizenship and Immigration Services (CIS) regulations permit an H-2B petitioner to submit a temporary labor certification after the petition was filed, provided that, as here, the Form ETA 750 was submitted to DOL prior to the filing of the petition.

Contrary to the petitioner's contention, the relevant CIS regulations clearly preclude approval of an H-2B petition that was filed prior to the DOL determination on the related ETA 750.

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.

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. [Italics added.]

The petitioner cites no authority to support its assertion that the director's decision conflicts with Congressional intent. 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)). Furthermore, the relevant regulations are unambiguous. They clearly support the director's denial of the petition, and the petitioner's interpretation is inconsistent with the language of the regulations.

The petitioner's contention that the director's decision conflicts with regional service centers' policy is also without merit. The petitioner's submissions on this point are insufficient to establish the existence of the policy that the petitioner asserts; and, as just noted above, a petitioner's unsubstantiated statements have no evidentiary weight. Furthermore, neither a service center director nor his or her subordinates have the authority to contravene pertinent regulations. The fact that a service center representative may have provided inaccurate information about filing requirements does not affect the authority and applicability of the regulations. The decisive fact is that the director correctly applied the regulations regarding the relative timing of DOL temporary labor certification determinations and H-2B petition filings.

The petitioner's contention that it is entitled to have submission of the temporary labor certification treated as an amendment to the petition is erroneous. 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).

The petitioner's assertion of compliance with DOL's General Administrative Letter No. 1-95 (GAL I-95) is not relevant to this proceeding, where the matter for determination on appeal is whether the director complied with CIS regulations governing H-2B petitions.

In the letter that it submits on appeal, the petitioner asserts that CIS has previously approved similar petitions in situations where DOL determinations on the ETA 750 were made after the petition had been filed. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound

to follow the contradictory decision of a service center. *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).

The director's decision was correct, and the evidence and arguments presented on appeal do not merit relief.

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.