

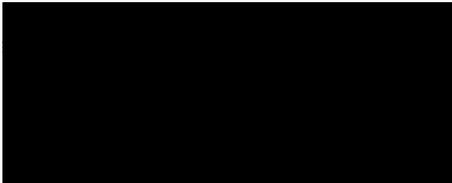
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FILE: EAC 05 800 09548 Office: VERMONT SERVICE CENTER Date: OCT 04 2005

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



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 engages in the design and installation of decorative hardscape surfaces for exterior decking and patios, pools, landscaping and driveways. It desires to employ the beneficiaries as segmental paving installers for eight and one-half months. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made and denied the petition.

On appeal, counsel states that a Vermont Service Center (VSC) officer indicated that the H-2B petition would be approvable despite the gap in the dates between the petition's filing and the DOL certification. Counsel also states that if a petitioner has filed the temporary labor certification application and made every effort to obtain a timely determination, but it was only held up by the DOL's inability to process the application within a reasonable time, Citizenship and Immigration Services (CIS) should accept the H-2B petition without the final determination. Counsel further states that there is no conceivable legitimate government purpose in having a temporary seasonal worker program but allowing only employers whose seasonal need begins in the first quarter of the year to use it. Finally, counsel states that the decision is procedurally defective because the Premium Processing unit did not follow its own regulations requiring the issuance of a request for evidence or a notice of intent to deny.

Upon review, the director erred in denying the petition without issuing a request for evidence for the labor certification or intent to deny the petition. The director should have afforded the petitioner an opportunity to provide the temporary labor certification. Nevertheless, the AAO will not remand this matter to the service center to allow the petitioner to submit the temporary labor certification, as the final determination notice and a copy of the labor certification is contained in the record of proceeding.

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 January 3, 2005 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification

from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

The final determination notice from the DOL that was submitted with the Request for Premium Processing Service is dated January 13, 2005 and a copy of the original approved labor certification is valid from March 15, 2005 through November 30, 2005. Although the petitioner applied for a temporary labor certification on November 17, 2004, prior to the filing of the petition, a determination was not rendered until January 13, 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.

Counsel states on appeal that it would be fair to have the same policy for H-2B petitions as for H-1B petitions. Counsel explains that when a petitioner has filed the temporary labor certification application and made all efforts required of it to obtain a timely determination, but it was only held up by the DOL's inability to process the application within a reasonable time, CIS should accept the H-2B petition without the final determination. However, 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).

Counsel states that a VSC officer stated that the H-2B petition would be approvable despite the gap in the dates between the petition filing and the DOL certification. Counsel asserts that the VSC should be required to honor the representation and approve the petition. Counsel further states that in this system, the federal government is granting all H-2B numbers to winter employers and prohibiting all others from access, because the numbers are used up before they can even begin the process. None of these arguments allow CIS to deviate from the law and regulations which require that the labor certification be approved, or a notice issued detailing why such certification cannot be approved, prior to the filing of the petition.

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.