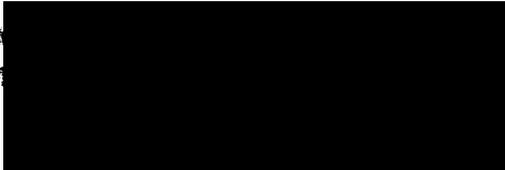


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FILE: SRC 05 198 52062 Office: TEXAS SERVICE CENTER Date: OCT 04 2005

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:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a nail and hair salon. It desires to employ eight of the beneficiaries as nail technicians and one as a live-in domestic worker for one year and one month. 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, the petitioner states that she did request a labor certification from the DOL since April 4, 2005 and has not heard anything. The petitioner also states that a press release, dated January 27, 2005, by United States Citizenship and Immigration Services (USCIS) indicates that under the proposed one-step process, most employers will no longer be required to file for a labor certification from the DOL before filing a petition with the Department of Homeland Security.

Upon review, the director erred in denying the petition without issuing a request for evidence for the labor certification or notice detailing why the certification could not be made. 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 petitioner explains on appeal that he still has not heard anything from the DOL. The petitioner also submits an uncertified copy of its labor certification with the appeal.

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 July 19, 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.

On appeal, the petitioner submitted an uncertified copy of its labor certification. The petitioner states that she did request a labor certification from the DOL since April 4, 2005 and has not heard anything. 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).

This petition cannot be approved for an additional reason. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

The petitioner seeks the services of the beneficiaries on a peakload basis. The petition indicates that the dates of the intended employment for the beneficiaries are from November 2005 to December 2006. The petitioner has not explained why he needs the beneficiaries for over one year. Further, the newspaper advertisement for the position states "Manicurist/Pedicurist needed for private salon in FL." The job is not advertised as a temporary position. The petitioner has not established that the need for the beneficiaries' services is temporary.

As always, 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.