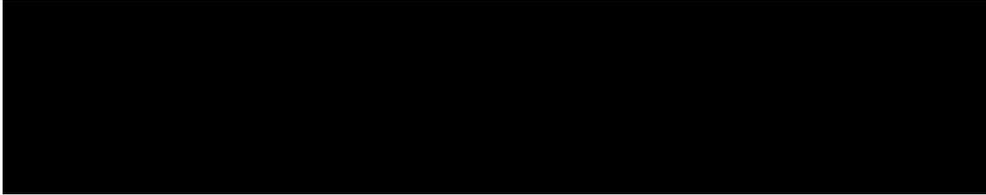




U.S. Citizenship
and Immigration
Services

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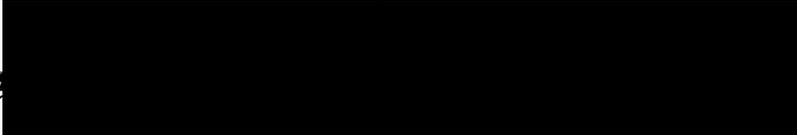
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FILE: EAC 05 038 51936 Office: VERMONT SERVICE CENTER Date: OCT 31 2005

IN RE: Petitioner:
Beneficiary:



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 operates a restaurant and lounge located on the island of Nantucket. It desires to employ the beneficiaries as line cooks for nine 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, the petitioner states that the original petition was filed incorrectly due to the “cap” related confusion and third party involvement. The petitioner also states that the workers are still needed.

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 November 16, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On January 19, 2005, the director requested the petitioner to submit a temporary labor certification issued by the DOL (Form ETA 750). In its response to the director’s request for evidence, the petitioner submitted the Form ETA 750 certified by the DOL. The final determination notice from the DOL is dated January 14, 2005 and the original approved labor certification is valid from March 15, 2005 through December 15, 2005. The petitioner applied for a temporary labor certification on November 16, 2004 and a determination was not rendered until January 14, 2005, subsequent to the petition’s filing date.

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).

The petitioner states that at the time of its application, there were no local workers available. The petitioner states further that there are still no workers available. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

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.

This decision is without prejudice to the filing of a new petition accompanied by the proper documentation and fee.

ORDER: The appeal is dismissed.