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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 05 048 50287 Office: VERMONT SERVICE CENER Date: SEP 09 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 construction company. It desires to employ the beneficiary as a construction laborer for one year. 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 at the time of filing the petition, the Application for Alien Employment Certification (Form ETA 750) was waiting to be approved by the United States Department of Labor.

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 December 8, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. On February 1, 2005, the director requested the petitioner to submit a temporary labor certification issued by the Department of Labor (Form ETA 750) or a notice detailing the reasons why such certification cannot be made. The director's decision states that in its response to the director's request for evidence, the petitioner submitted Form ETA 750 that had not been certified by the DOL. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On appeal, the petitioner submitted the final determination notice from the DOL, dated May 16, 2005, and a copy of the original approved labor certification that is valid from May 16, 2005 through December 31, 2005. Although the petitioner applied for a temporary labor certification, a determination was not rendered until May 16, 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 petition cannot be approved for another reason. In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

The nontechnical description of the job on Form ETA 750 reads:

Unskilled general labor to perform manual labor duties. Duties include pushing wheelbarrows, hand shoveling, breaking asphalt and concrete, lifting forms.

The services to be performed by the beneficiary are ongoing and the petitioner's need for the beneficiary to perform these services has not been shown to be intermittent and temporary.

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.