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**U.S. Citizenship
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34

FILE: WAC 06 024 51355 Office: CALIFORNIA SERVICE CENTER Date: **JUN 26 2006**

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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be denied.

The petitioner operates a janitorial service. It desires to employ the beneficiary as a custodial helper pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for 11 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 it is still waiting for the approval of the labor certification.

As discussed below, the AAO agrees with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record supports the director's decision to deny the petition. The AAO will dismiss this appeal.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country

....

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 October 26, 2005 without a temporary labor certification, or notice detailing the reasons why such certification could not be made. Absent such evidence, the petition could not be approved.

On January 16, 2006, the director requested the petitioner to submit a copy of the executed ETA 750, Alien Employment Certification, that was certified by an official of the United States Department of Labor, along with other evidence to establish eligibility for H-2B classification. In its response to the director's request for evidence, the petitioner requested an extension to submit all evidence. However, neither the statute nor regulations allow for the acceptance of a labor certification nor any initial evidence required by regulation or

by the instructions on the form subsequent to the filing of the petition. 8 C.F.R. § 103.2(b)(1). 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).

Beyond the decision of the director, the petitioner has not established the temporary nature of the employment.

The petitioner seeks approval of the proffered position as an intermittent need. To establish that the nature of the need is "intermittent," the petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4). The petition clearly indicates that the petitioner currently employs six employees. The petitioner has not established through the evidence presented that it occasionally or intermittently needs the beneficiary's services or labor for short periods. For this additional reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

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