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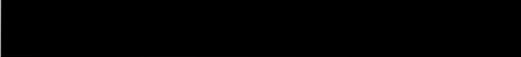
U.S. Citizenship
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Services

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FILE: SRC 06 134 52735 Office: TEXAS SERVICE CENTER Date: **JUN 29 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:



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, Chief
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 and the petition will be denied.

The petitioner operates a resort. It desires to extend its authorization to employ the beneficiary as a busser 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 two years. 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 copy of the approved labor certification from the DOL will be submitted. Counsel also states that a brief and/or evidence will be sent to the AAO within 30 days. To date, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete

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 the 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 March 24, 2006 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 March 29, 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, counsel states that the original certified labor certification was previously submitted to Citizenship and Immigration Services (CIS). Counsel also requested that CIS secure a duplicate as per CIS Interoffice Memorandum, HQPRD70/6.2.8, dated September 23, 2005. However, this memorandum pertains to a request for a labor certification in conjunction with an I-140 petition filed with CIS where the original labor certification has been irretrievably lost or destroyed.

On appeal, counsel states that a copy of the approved labor certification from the DOL will be submitted. To date, counsel has not submitted a copy of the certified labor certification application. Moreover, neither the statute nor regulations allow for the acceptance of a labor certification 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 a peakload need. To establish that the nature of the need is "peakload," the petitioner must demonstrate that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The petition indicates that the period of intended employment is from "approval to two years". Therefore, the petitioner has not shown that its need for the beneficiary's service is peakload and temporary. 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.