

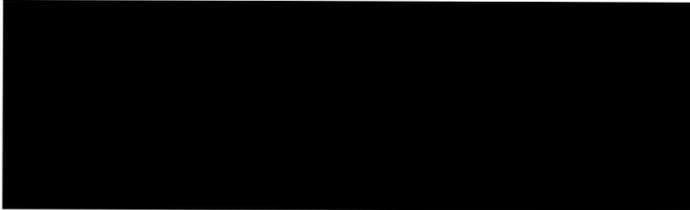
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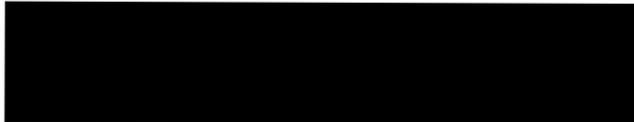
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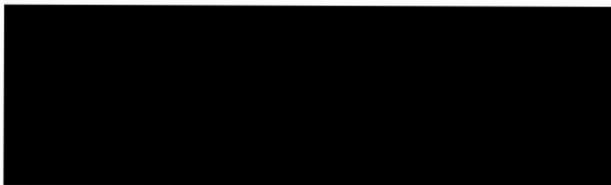
FILE: EAC 05 013 53561 Office: VERMONT SERVICE CENER Date: **MAR 22 2006**

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, 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 engages in the business of manufacturing plastics. It desires to employ the beneficiary as a technician 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, counsel states that the interpretation of the statute and pertinent regulations by CIS is incorrect. Counsel also states that he will submit a brief within 90 days. To date, no such brief and/or evidence have been submitted to the AAO. Therefore, the record is considered complete.

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 19, 2004. In his decision, the director states that the petition was submitted without the required certification or the Department of Labor's notice stating that such certification could not be made. On March 24, 2005, the director requested the petitioner to submit a certified temporary labor certification (Form ETA 750) issued by the Department of Labor (DOL). In response, the director states that the petitioner submitted another copy of the Form ETA 750 without the requested certification. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

Counsel's letter, dated October 15, 2004, states that Form ETA 750, Part A & B, were submitted upon filing the Form I-129. Upon review, the AAO found that the dates of the intended employment on the Form ETA 750 are different from the dates of intended employment listed on the instant petition. The final determination notice, dated July 14, 2003, indicates that the Form ETA 750 had not been certified. The Form ETA 750, which was filed on May 6, 2003, gives the exact dates of the intended employment as July 14, 2003 until July 13, 2004. The instant petition gives the dates of intended employment as October 23, 2004 until October 23, 2005.

In this case, the petitioner has not submitted an appropriate notice detailing the reasons why such certification cannot be made or application for labor certification certified by the DOL covering the period of the beneficiary's intended employment, October 23, 2004 until October 23, 2005. The labor certification application

submitted was not certified by the DOL and gives the dates of intended employment as July 14, 2003 until July 13, 2004. Accordingly, the petitioner did not submit a labor certification or notice detailing the reasons why such certification cannot be made for the period of intended employment listed on the instant petition. Accordingly, the petition is denied.

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 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 a one-time occurrence 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.