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U.S. Citizenship
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Services

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FILE: EAC 05 046 50939 Office: VERMONT SERVICE CENTER Date: **SEP 13 2006**

IN RE: Petitioner:
Beneficiaries:



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, Chief
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 and the petition will be denied.

The petitioner engages in landscape maintenance. It desires to employ the beneficiaries as landscape laborers 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 a period of 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 prior to the filing date of the petition and denied the petition.

On appeal, the petitioner states that the regulation only requires that a petitioner apply for a temporary labor certification prior to filing a petition. The petitioner further states that under the regulation a petitioner is not required to obtain a labor certification determination prior to filing Form I-129 with the director.

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 December 6, 2004 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 February 16, 2005, the director requested the petitioner to submit a temporary labor certification issued by the Department of Labor (Form ETA 750). In a subsequent letter, the petitioner stated that it was submitting Form I-907, Request for Premium Processing, and requested that the director amend its petition to include its labor certification. The final determination notice from the DOL is dated January 31, 2005 and a copy of the original

approved labor certification is valid from March 15, 2005 through December 10, 2005. Although the petitioner applied for a temporary labor certification on November 16, 2004, a determination was not rendered until January 31, 2005, subsequent to the petition's filing date.

Therefore, the director issued a notice of intent to deny, dated February 25, 2005, that afforded the petitioner 30 days from the date of the notice to submit a certified Form ETA 750 from the Department of Labor issued prior to the petition's filing date or notice stating why such certification could not be made. The director also requested the birth dates of the two beneficiaries listed on the instant petition.

In response to the director's notice of intent to deny, the petitioner submitted a copy of its most current labor certification and the requested names and birth dates for the two beneficiaries. The petitioner also stated that it complied with the regulations because it obtained a labor certification.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states that:

After obtaining a determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by the labor certification determination and supporting documents, with the director having jurisdiction in the area of intended employment.

In this case, the petitioner obtained a labor certification determination subsequent to the filing of the petition. Absent a labor certification issued prior to the petition's filing date or notice stating why such certification could not be made, the petition may not be approved.

On appeal, the petitioner states that a petitioner is not required to obtain a labor certification determination prior to filing Form I-129 with the director. The petitioner also requested that the originally filed I-129 petition be amended to include the petitioner's current labor certification. However, 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 argues that it was not the intent of Congress nor the purpose or objective of the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) to deny a petition merely because it was not accompanied by a labor certification determination when it was filed. However, the petitioner has not explained the Congressional legislative history of the applicable law or related floor statements to substantiate its statement. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

The petitioner noted that CIS has approved other petitions that had the same facts for which the instant case was denied. However, each nonimmigrant proceeding is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not

been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm.1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S. Ct 51 (2001).

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.