

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

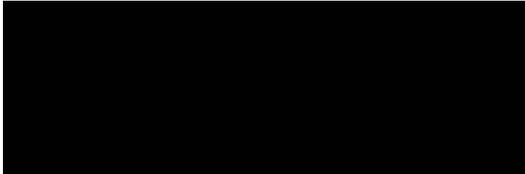
U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

DL



FILE: WAC 08 106 51206 Office: CALIFORNIA SERVICE CENTER Date: JUN 11 2008

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(a) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a)

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.

for *Michael T. Kelly*
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 is engaged in the tobacco farming business. It desires to employ the beneficiaries as broadleaf tobacco workers pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(a) from May 5, 2008 until December 15, 2008. The director denied the petition, based upon his finding that the petitioner had not submitted a temporary agricultural labor certification, Form ETA 750, from the Department of Labor (DOL), or notice from DOL stating that such certification could not be made.

The petitioner states that he is filing the appeal because the alien labor certification was not included in the original submission. The petitioner submitted the approved ETA 750 on appeal.

Upon careful review of the entire record of proceeding, the director's decision to deny the petition is correct. Therefore, the AAO will dismiss the appeal.

The regulation at 8 C.F.R. § 214.2(h)(5)(i) states:

(A) *General.* An H-2A petition must be filed on Form I-129. The petition must be filed with a single valid temporary agricultural labor certification. However, if a certification is denied, domestic labor subsequently fails to appear at the worksite, and the Department of Labor denies an appeal under section 216(e)(2) of the Act, the written denial of appeal shall be considered a certification for this purpose if filed with evidence which establishes that qualified domestic labor is unavailable. An H-2A petition may be filed by either the employer listed on the certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the certification.

(D) *Evidence.* An H-2A petitioner must show that the proposed employment qualifies as a basis for H-2A status, and that any named beneficiary qualifies for that employment. A petition will be automatically denied if filed without the certification evidence required in paragraph (h)(5)(i)(A) of this section and, for each named beneficiary, the initial evidence required in paragraph (h)(5)(v) of this section.

The petition was filed on March 4, 2008 without a temporary agricultural labor certification by DOL or any documentation regarding a DOL denial of an application for temporary certification related to the present petition. Absent such temporary labor certification from the DOL, or notice detailing the reasons why such certification cannot be made, the petition may not be approved.

The original approved temporary labor certification was received by the California Service Center on April 30, 2008. The temporary labor certification is valid from May 8, 2008 through December 15, 2008. The temporary labor certification was received by the Department of Labor's National Processing Center on March 25, 2008 and a final determination was not rendered until April 8, 2008, 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 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.

This decision is without prejudice to the filing of a new petition accompanied by the proper documentation and fee.

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