

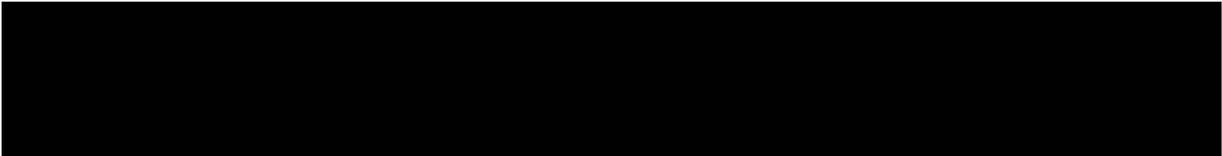
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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 154 52522 Office: CALIFORNIA SERVICE CENTER Date: OCT 01 2008

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

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 black ink, 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 rejected.

The petitioner owns and operates three restaurants. It desires to extend the stay and change the employment of the beneficiaries as housekeepers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from May 1, 2008 to November 30, 2008. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could be made. The director determined that the petitioner had failed to make a timely filing as the beneficiaries are not currently in H-2B status. Furthermore, the director determined that the petitioner had filed the current petition subsequent to the "final receipt date," January 2, 2008, for which new H-2B worker petitions requesting employment start dates prior to October 1, 2008 had to be filed. The director's decision to deny the petition has now been appealed to the AAO for review.

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 petition was filed on May 14, 2008. The director determined that the petitioner failed to make a timely filing as the beneficiaries were not currently in H-2B status and denied the petition. The California Service Center incorrectly advised the petitioner that the decision could be appealed to the AAO.

The regulation at 8 C.F.R. § 214.1(c)(5) states:

Decision in Form I-129 or I-539 extension proceedings. Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service [Citizenship and Immigration Services]. There is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539.

The regulation cited above precludes the AAO from considering any appeal that is filed pursuant to the denial of an application for extension of stay. Accordingly, the appeal has to be rejected.

The director also determined that because the beneficiaries were out of status at the time of filing the petition, they are subject to the numerical limitation on petition filings.

The determination of whether the beneficiaries are subject to the cap relies upon the determination of the beneficiaries' legal status at the time of filing which is outside the scope of the AAO's jurisdiction. The AAO notes that if the beneficiaries were not in valid status at the time of filing, then the beneficiaries would be subject to the numerical limitation, as found by the director.

ORDER: The appeal is rejected.