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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

JUN 01 2005

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiarie

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:

[redacted]

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation that does business as a construction contractor specializing in the design and installation of decorative hardscape surfaces for exterior decking and patios, pools, landscaping, and driveways. It filed the H-2B petition in order to employ the beneficiaries, for approximately eight months, as "a seasonal workforce of tradespeople skilled in work with exposed aggregate, terrazzo, and installation of segmental paving and wall systems."

Quoting relevant regulations at 8 C.F.R. 103.2(b) and at 8 C.F.R. §§ 214.2(h)(6)(iii)(C), (iv), and (vi), the director denied the petition on the basis that, at the time it filed the petition, the petitioner had not obtained from the Department of Labor (DOL) a temporary labor certification or notice stating that such certification could not be made.

On appeal, counsel files a brief and allied documents that include: affidavits from two counsel of the law firm representing the petitioner; a printout from the American Immigration Lawyers Association (AILA) Internet site, concerning an August 5, 1998 liaison meeting between AILA and the Vermont Service Center; a printout of an AILA Internet site document entitled "INS Adjudications Liaison Minutes (3/01)"; and a copy of a Memorandum from William R. Yates, Associate Director of Operations, U.S. Citizenship and Immigration Services (CIS), *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID),* HQOPRD 70/2 (February 16, 2005). The brief presents four arguments as to why the AAO should sustain this appeal and approve the petition. Each argument will be addressed separately.

Counsel does not dispute the accuracy of the following statements by the director as to the factual foundation of his decision:

> This petition was filed [on] December 30, 2004. The Labor Certification was filed on November 17, 2004 with the Department of Labor and was not granted until January 13, 2005.
>
> The labor certification was not obtained prior to filing the petition. . . .

Counsel, however, presents additional facts in its brief and allied documents. The AAO has considered all of them, and accepts the chronology of events presented by counsel. However, the AAO finds that the additional facts do not demonstrate that the director erred in his application of the relevant regulations to the facts in this case.

As his first argument (brief, at pages 4-5), counsel contends that the petition should be approved because he detrimentally relied upon a service center officer's statement to the effect that DOL's rendering a temporary labor certification determination after the submission of the H-2B petition would not be an obstacle to approval.

Neither a service center director nor his or her subordinates have the authority to contravene pertinent regulations. The director correctly applied the CIS regulations regarding the relative timing of DOL temporary labor certification determinations and H-2B petition filings. These regulations contain no provision for waiving or

excusing the requirement that an H-2B petition be filed after DOL renders its determination. Counsel cites no precedent for this argument, and it is without merit.

The heading of counsel's second argument (brief, at pages 5-7) reads:

> [CIS] has a long standing policy that H-1B petitions with a gap between filing date and DOL certification date may be approved, and it should follow the same for H-2B petitions.

This argument is also unsubstantiated.

Counsel presents no authority for his assumptions that the H-1B regulation is "an analog regulation" of the H-2B regulation and that H-1B procedures are relevant to H-2B petitions. Counsel presents no evidence that such a "long standing [H-1B] policy" existed at the time the present petition was being processed. The only relevant documentation are the two printouts from the AILA Internet site. Pages 4 and 5 of the August 5, 1998 AILA printout is an AILA summary of a question-and-answer exchange between AILA and the service center more than six years ago, on September 11, 1997; and that summary cites no regulation, policy letter, or any other authority to support counsel's assertion that the supposed "long standing policy" existed when the present petition was filed. The printout of AILA's March 2001 liaison minutes is four years old, and does not discuss H-1B practices during the period relevant to this petition. Furthermore, AILA printouts of its summaries of discussions with agency officers have no precedential weight. 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)). Furthermore, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's next argument (brief, at pages 7-9) is that the director's decision violates public policy, in that it "exacerbates the unconstitutional nature of the H-2B program." Counsel presents no case law or other precedential authority to support this allegation. Furthermore, determinations on public policy and the constitutionality of duly enacted regulations, such as those cited by the director, are outside the scope of the director's authority on this H-2B petition, and they are not a subject for the AAO's review, which focuses on whether the director's decision complied with the relevant CIS regulations.

The final argument (brief, at pages 10-12) is that the director's decision "was procedurally improper and unlawful because the Premium Process unit failed to follow its own regulations requiring issuance of the NOID (Notice of Intent to Deny)." Counsel discusses the regulation that governs the processing of Premium Processing requests, at 8 C.F.R. § 103.2(f), and the aforementioned Yates memorandum. Contrary to counsel's interpretations, however, these sources do not support his argument.

The regulation at 8 C.F.R. § 103.2(f)(1), which is partially reproduced in the brief, states:

> *Filing information.* A petitioner or applicant requesting Premium Processing Service shall submit Form I-907, with the appropriate fee to the Director of the service center having

> jurisdiction over the application or petition. Premium Processing Service guarantees 15 calendar day processing of certain employment-based petitions and applications. The 15 calendar day processing period begins when the Service receives Form I-907, with fee, at the designated address contained in the instructions to the form. The Service will refund the fee for Premium Processing Service, but continue to process the case, unless within 15 calendar days of receiving the application or petition and Form I-907, issues and serves on the petitioner or applicant an approval notice, a notice of intent to deny, a request for evidence, or opens an investigation relating to the application or petition for fraud or misrepresentation.

The pertinent portion of the regulation at 8 C.F.R. § 103.2(f)(3), *Fees for Premium Processing Services,* states:

> [I]f the Service fails to process a petition or application with the 15 calendar day period, the fee for Premium Processing Services will be automatically refunded to the petitioner or applicant, and the Service will continue to process the application/petition on the premium processing track.

Counsel misinterprets the regulation as precluding denial of a petition that is on the Premium Processing track unless an RFE or a NOID has been issued, or a fraud/misrepresentation investigation has been initiated. As evident in the plain language of the excerpts above, the regulation only mandates that the premium processing fee be returned if none of four conditions (approval, RFE, NOID, or investigation) are met within 15 days of filing the Form I-907 with fee.

Counsel also misinterprets the Yates memorandum as requiring the service center to issue a NOID in this case.

First, counsel asserts that "the premium process regulations are clearly an example of" the type of case to which the Yates memorandum refers to as requiring a NOID. As earlier stated herein, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, as already discussed, the provisions at 8 C.F.R. §§ 103.2(f)(1) and (3) clearly indicate that a NOID is not required prior to a denial decision in all petitions on the Premium Processing track.

Second, the facts clearly identify this case with those situations which the Yates memorandum recognized as not requiring an RFE, a NOID, or initiated investigation prior to the issuance of a denial. There is no regulatory provision for excusing or waiving the failure of the petitioner here to obtain a DOL determination prior to filing the H-2B petition, as required by the regulations that the director quoted. The regulations quoted by the director are an absolute bar to approving the petition under the facts of this case. The Yates memorandum recognizes the futility of issuing an RFE or NOID in such a situation. For example page 2, has this comment about situations where a petition may be denied without an RFE or NOID:

> On one end of the spectrum, 8 C.F.R. § 103.2(b)(8) provides that an application or petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. Clear ineligibility exists when the adjudicator can be sure that an applicant or petitioner cannot

> meet a basic statutory or regulatory requirement, even if the filer were to be given the opportunity to present additional information.

Also at page 2, the memorandum provided three examples to indicate that an RFE or NOID would not be appropriate in situations where "additional evidence or explanation could not perfect the filing." Such is the case here.

It should also be noted that the Yates memorandum expressly acknowledged that issuing an RFE or NOID is discretionary, except when mandated by regulation. Furthermore, the Yates memorandum does not have the force of a regulation. As therein stated, it is only meant as guidance to CIS adjudicators. Also, *see* the Notice at page 6 that the memorandum "is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural." As there was clear evidence of ineligibility in that the approval date of the labor certification post dated the filing date of the petition, no RFE was required under 8 C.F.R. 103.2(b)(8). 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). *See also* 8 C.F.R. § 214.2(h)(6)(vi)(A).

The AAO finds that the director's decision was correct, and that none of the evidence and arguments presented on appeal merit any relief.

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. The petition is denied.