U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: EAC 06 082 51632 Office: VERMONT SERVICE CENTER Date: JUL 14 2006

IN RE: Petitioner: [redacted]
Beneficiary:

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, 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 operates a landscaping business. It desires to employ the beneficiary as a landscaper pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(a) for seven months. The director determined that the petitioner had not submitted a temporary agricultural labor certification, Form ETA 750, from the Department of Labor (DOL), or notice stating that such certification could not be made when the petition was filed and denied the petition.

On appeal, the petitioner requests an extension to submit the temporary agricultural labor certification. A copy of an uncertified Application for Alien Employment Certification (Form ETA 750) was submitted with the appeal.

The regulation at 8 C.F.R. § 214.2(h) provides, in part:

> (5) *Petition for alien to perform agricultural labor or services of a temporary or seasonal nature (H-2A)*:
>
> (i) *Filing a petition* - (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.

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

> (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 January 23, 2006 without a temporary agricultural labor certification that had been certified by the DOL or notice detailing the reasons why such certification could not be made. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition may not be approved.

On February 22, 2006, the director requested the petitioner to submit a temporary labor certification issued by the DOL (Form ETA 750). The petitioner did not submit the requested evidence. On appeal, the petitioner requested an extension to submit such evidence. However, neither the statute nor regulations allow for the acceptance of a labor certification subsequent to the filing of the petition. 8 C.F.R. § 103.2(b)(1). 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).

Beyond the decision of the director, the petitioner has not established eligibility for H-2A classification. H-2A classification applies to an alien who is coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature. 8 C.F.R. § 214.2(h)(1)(ii)(C). For this reason also, the petition may not be approved.

"Agricultural labor" includes all services performed on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife. 20 C.F.R. 655.100(c)(1)(i)(1).

The term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities or orchards. 20 C.F.R. 655.100(c)(1)(i)(5).

The Petition for a Nonimmigrant Worker (Form I-129) has been filed for H-2A classification as a landscaper. As a landscaper, the beneficiary will be responsible for cleaning up the job site, trimming branches, loading and maintaining equipment and general yard work and labor. The beneficiary's duties do not include "agricultural labor" as defined. Therefore, the beneficiary cannot be classified as an H-2A agricultural worker.

Beyond the director's decision, the petitioner has not provided documentation to establish that the beneficiary qualifies for the job offer as specified on Form ETA 750. The beneficiary has not been shown to possess the requisite education, and other special requirement, specifically, first aid certification, stipulated on the copy of Form ETA 750. 8 C.F.R. § 214.2(h)(5)(v). **Absent such evidence, the petition may not be approved.**

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.

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