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U.S. Citizenship and Immigration Services

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FILE: EAC 05 015 52908 Office: VERMONT SERVICE CENTER Date: AUG 04 2005

IN RE: Petitioner:
Beneficiary: [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.

Robert P. Wiemann, Director
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.

The petitioner operates a wholesale food business. It desires to employ the beneficiary as an office and sales assistant for one year. 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 and denied the petition.

On appeal, the petitioner states that it did not know about the labor certification and has filed the labor certification through the local authority, the New York State Department of Labor on January 6, 2005.

Upon review, the director erred in denying the petition without issuing a request for evidence for the labor certification or notice detailing why the certification could not be made. The director should have afforded the petitioner an opportunity to provide the temporary labor certification. Nevertheless, the AAO will not remand this matter to the service center to allow the petitioner to submit the temporary labor certification, as the regulations do not allow the submission of a temporary labor certification subsequent to the filing of the petition.

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 October 21, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

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.

On appeal, the petitioner states that he did not know about the labor certification and that it was filed on January 6, 2005. Neither the statute nor the regulations allows for an extension of time to complete a certification. 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).

This petition cannot be approved for another reason. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petition indicates that the employment is seasonal and that the dates of intended employment are from November 1, 2004 until October 31, 2005. The petitioner states that it needs the beneficiary's services for "distribution in Korean communities for holiday season." The petitioner has not explained what the beneficiary will be distributing and the holiday season the petitioner is referring to since the employment is for one year and encompasses all of the holidays. The petitioner has not established that the need for the beneficiary's services is seasonal and temporary. Consequently, a claim that a temporary need exists cannot be justified.

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.