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

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

FILE: SRC 04 057 52236 Office: TEXAS SERVICE CENER Date: AUG 2 5 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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

The petitioner engages in the business of telecom services. It desires to employ the beneficiary as a marketing representative for nine months. 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 the Application for Alien Employment Certification and the prevailing wage request were mailed to the Department of Labor on April 27, 2004.

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 December 18, 2003 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. On February 26, 2004, the director requested the petitioner to submit a temporary labor certification issued by the Department of Labor (Form ETA 750) or a notice detailing the reasons why such certification cannot be made. In its response to the director's request for evidence, the petitioner submitted a temporary labor certification (Form ETA 750) that had not been certified by the DOL. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

The petition cannot be approved for other reasons. The petitioner has not established that the beneficiary qualifies for the job offer as specified on Form ETA 750. The record, as it is presently constituted, does not contain evidence of the beneficiary's one year of training and four years of experience in the job offered as required in the position on Form ETA 750. 8 C.F.R. § 214.2(h)(6)(vi)(C).

Further, in determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified. The services to be performed by the

beneficiary are ongoing and the petitioner's need for the beneficiary to perform these services has not been shown to be seasonal.

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.