U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

FILE: SRC 06 035 50858 Office: TEXAS SERVICE CENTER Date: MAR 24 2006

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

The petitioner operates a hotel. It desires to employ the beneficiary as a housekeeper for nine months. The director determined that the petitioner had filed the instant petition using a labor certification that had already been utilized for the maximum allowable number of alien workers and denied the petition.

On appeal, the petitioner states that it petitioned for 28 workers from Manila, however, all 28 openings were not filled. The petitioner also states that with the beneficiary, it will have only 23 workers in the United States and five individuals pending interviews at the Embassy. The petitioner contends that it will not be over the 28 workers that were approved in the petition [SRC-05-256-53672].

The instant petition was filed on November 14, 2005. The record indicates that the beneficiary is currently in the United States in H-2B status. The beneficiary entered the United States to work for [redacted] as a room attendant under the approved petition, WAC-05-061-51330. This petition was valid from March 11, 2005 until October 31, 2005 and a copy of the beneficiary's I-94 Departure Record shows that the beneficiary was authorized to remain in the United States until October 31, 2005.

The regulation at 8 C.F.R. § 214.2(h)(2)(i) states in pertinent part:

> (D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. . . .

The regulation at 8 C.F.R. § 214.2(h)(2) states in pertinent part:

> (iii) *Named beneficiaries.* . . . If all of the beneficiaries covered by an . . . H-2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with a copy of the same labor certification. Each petition must reference all previously filed petitions for that labor certification.
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> (iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H-2B petitions that are approved for a group, or H-2B petitions that are approved for unnamed beneficiaries, or approved H-2B petitions where the job offered to the alien(s) does not require any education, training, and/or experience. . . .

The petitioner followed the proper procedure and filed Form I-129, Petition for a Nonimmigrant Worker, on November 14, 2005, to request H-2B classification and extension of the beneficiary's stay in the United States. In a letter submitted in support of the appeal, the petitioner explained that it wanted to utilize the labor certification in its previously approved petition, SRC-05-256-53672. The petitioner states in its letter dated January 17, 2006 that it utilized 27 of the 28 approved visa allocations; therefore, one visa allocation remained available for usage by the petitioner.

The record of proceeding contains the labor certification (Form ETA 750) and the final determination notice that indicates the petitioner was approved for 28 housekeepers for the period from October 1, 2005 through June 30, 2006. The petitioner also submitted a list of the individuals that it claims have utilized the approved petition to enter the United States. However, the record of proceeding does not contain a copy of the approval notice (Form I-797B) for the petitioner's previously approved nonimmigrant petition, SRC-05-256-53672. Instead, it contains a copy of Form I-797B for [redacted], the beneficiary's former employer. The petitioner has not provided employment records or other documentary evidence to establish that only 27 of the 28 approved nonimmigrant visas have been issued. Consequently, the petitioner has not established that a petition has been approved for 28 H-2B nonimmigrant workers in which the one remaining number can be utilized for the beneficiary in the instant petition. Simply 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)). Absent such evidence, CIS cannot utilize the labor certification the petitioner filed with SRC-05-256-53672 for the current petition.

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.