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

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PUBLIC COPY

[redacted]

V4

FILE: EAC 06 214 51118 Office: VERMONT SERVICE CENTER Date: JAN 18 2007

IN RE: Petitioner:
Beneficiaries: [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:

[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, 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 traveling carnival business. It desires to extend its authorization to employ the beneficiaries as circus laborers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for a period of four months. The beneficiaries will be performing services at various sites in Utah and Arizona. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner had not established that its need for the beneficiaries' services is temporary. The director determined that the petitioner had not established that its need meets the regulatory definition of temporary services or labor as described in 8 C.F.R.§ 214.2(h)(6)(ii) and denied the petition.

On appeal, counsel states that the workers would be used for less than ten months. Counsel also advises that it will not file further briefing or evidence in this case.

Upon careful review of the entire record of proceeding, the AAO agrees with the reason the director denied the petition. The petitioner's previous temporary labor certification was granted and valid from September 1, 2005 until August 1, 2006. The petitioner is presently requesting an extension of its authorization to employ these workers from August 1, 2006 until November 25, 2006. The beneficiaries will be performing the same duties described on its previously approved labor certification. Therefore, the petitioner is requesting that the beneficiaries remain in the United States for a period of 15 months. Further, in its letter dated June 29, 2006, the petitioner states that its carnival shows begins in late January and run through fall, ending in late November each year. The evidence and explanation given by the petitioner does not establish that the petitioner's need for the beneficiaries' services is seasonal and temporary.

Beyond the decision of the director, the petition cannot be approved for another reason that was addressed in the director's request for additional evidence.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . .

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 July 17, 2006 with a temporary labor certification (ETA 750A) that was valid from September 1, 2005 until August 1, 2006. The petition indicates that the dates of intended employment are from August 1, 2006 until November 25, 2006. An extension of stay for the beneficiary of an H-2B petition may be authorized for the validity of the labor certification or for a period of up to one year. 8 C.F.R.§214.2(h)(15)(ii)(C). The labor certification submitted with Form I-129 was not valid for the period of intended employment indicated on the petition.

On July 27, 2006, the director requested the petitioner to submit a temporary labor certification issued by the Department of Labor (Form ETA 750A) for the dates of employment indicated on the petition. In response to the director's request, counsel submitted a copy of the final determination notice from the DOL dated August 10, 2006. The Form ETA 750A indicates that the petitioner was requesting temporary labor from August 1, 2006 until November 25, 2006. The notice states that the Application for Alien Employment Certification, Form ETA 750A, has not been certified and is being returned. Neither the statute nor regulations allow for the acceptance of a notice detailing the reasons why the labor certification could not be made that is dated subsequent to the filing of the petition. This notification must be issued prior to the petition's filing and should accompany the petition at the time of filing. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this additional reason, the petition can 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.