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

PUBLIC COPY

[redacted]

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FILE: WAC 05 040 52108 Office: CALIFORNIA SERVICE CENTER Date: MAY 29 2008

IN RE: Petitioner: [redacted]
Beneficiaries:

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.

James Blanzinga

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied although the matter is moot due to the passage of time.

The petitioner engages in landscape maintenance. It desires to employ the beneficiaries as landscape laborers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b) from March 15, 2005 to November 30, 2005. The director determined that the petitioner had not provided sufficient evidence to establish an emergent situation with regard to petitioning for unnamed beneficiaries and denied the petition.

On appeal, the petitioner submitted additional evidence for consideration which included its response to a request for evidence, a copy of its 2004 and 2005 final determination letter from the Department of Labor (DOL), a copy of its Application for Alien Employment Certification (Form ETA 750), a copy of the petitioning entity's bylaws, a copy of a chart showing the total number of seasonal/peakload temporary employees from 2000 through 2004 and the names of the beneficiaries included in the petition.

As discussed below, the AAO does not agree with the findings of the director. The evidence of record supports the petitioner's reason for not naming the beneficiaries at the time of filing the petition. The petitioner states in a letter submitted with the petition that its inability to recruit potential workers was due to time restraints. The petitioner explained that recruiting workers from Mexico and obtaining their personal information requires travel to Mexico and remaining there for a number of days. The petitioner's inability to recruit potential workers due to time restraints is a valid business reason (*See*: Memorandum from Thomas Cook, Acting Assistant Commissioner, INS Office of Programs, *Clarifications of Memo Dated July 5, 2001 Regarding Certain H-2B Adjudication Issues*, HQ 70/6.2.9 (June 11, 2001). However, upon careful review of the entire record of proceeding, the AAO finds that the petition cannot be approved for another reason. The AAO will dismiss this appeal.

Section 101(a)(15)(H)(ii)(b) of 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 November 24, 2004 without a temporary labor certification that had been certified by the DOL, or notice detailing the reasons why such certification could not be made. On appeal, the petitioner submitted the final determination notice from the DOL that is dated January 14, 2005 and a copy of the original approved temporary labor certification that is valid from March 15, 2005 through November 30, 2005. Although the petitioner makes reference to its ETA 750 pending at the United States DOL, a determination was not rendered by the DOL until January 14, 2005, subsequent to the petition's filing date. Consequently, the petition cannot be approved.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states:

> 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.

In this case, the petitioner obtained a labor certification determination subsequent to the filing of the petition. Neither the statute nor regulations allow for the acceptance of a labor certification obtained subsequent to the filing of the petition. 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).

It is noted that the petitioner requested the beneficiary's services from March 15, 2005 to November 30, 2005. Therefore, the period of requested employment has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 the Immigration and Nationality Act, 8 U.S.C.§ 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied although the matter is moot due to the passage of time.