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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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JUL 06 2009

FILE: WAC 08 153 52389 Office: CALIFORNIA SERVICE CENTER Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 and the petition will be denied although the matter is now moot due to the passage of time.

The petitioner is a hotel that seeks to employ the beneficiaries as housekeepers 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 the period from May 19, 2008 to October 31, 2008. The director determined that the petitioner had not submitted the original copy of the temporary labor certification from the Department of Labor (DOL) at the time of filing the petition, and denied the petition. [1]

On appeal, the petitioner states that the original certified labor certification from DOL was sent to the director in reply to a request for evidence, dated June 5, 2008. The petitioner submitted a photocopy of the RFE dated, June 5, 2008, with a photocopy of the documentation submitted with the RFE. The petitioner acknowledged that the original Form ETA 750 was not submitted with the original petition but was submitted in response to the director's request for evidence, dated June 5, 2008.

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

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[1] The Department of Homeland Security (DHS) published the H-2B Nonagricultural Temporary Worker Final Rule in the Federal Register on December 19, 2008. The final rule became effective on January 18, 2009. *See* 73 FR 49109. This final rule amends DHS regulations regarding temporary nonagricultural workers, and their U.S. employers, within the H-2B nonimmigrant classification. The current Petition was filed with United States Citizenship and Immigration Services (USCIS) on May 5, 2008, prior to the date the new H-2B regulation came into effect. Under general rules of legal construction, a substantive, non-curative, adverse change in administrative rules is not to be applied retroactively unless the language of both the administrative rule and the statute authorizing the rule requires such a result. *Uzuegbu v. Caplinger*, 745 F.Supp. 1200, 1215 (E.D. La. 1990).

> 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.

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).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on May 5, 2008 without the original certified temporary labor certification but instead with a photocopy of the certification.

On May 5, 2008, the petitioner filed the Form I-129. On appeal, the petitioner indicated that it forgot to forward the original labor certification with the initial petition but instead sent the original copy in response to the director's request for evidence, dated June 5, 2008. The petitioner submitted the June 5, 2008 RFE and a photocopy of the petitioner's response. In reviewing the cover page of the RFE, it appears that this RFE is for a different case number filed by a company named [redacted] with the same address as the petitioner. In reviewing the Service records, the petitioner filed two H-2B petitions simultaneously. The approved Labor Certification from DOL is only valid for one petition for H-2B status, thus the original copy is necessary so that it cannot be used several times for multiple petitions. As the original certification was not filed, this petition cannot be approved.

Beyond the decision of the director, the petitioner did not submit evidence to establish a temporary need. On the Form I-129, the petitioner stated that its temporary need was a seasonal need to "at least help manage the work during a critical part of the season." The petitioner further stated that "failure to get any labor support during the season will have a tremendous adverse effect on the property and our company." However, the petitioner did not submit a statement explaining its temporary and seasonal need for housekeepers.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R.§ 214.2(h)(6)(ii)(B)(*2*).

In this instance, the petitioner has not carefully documented the seasonal need through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the seasonal positions will be engaged in different duties or had different skills than the workers currently employed by the company. Consequently, the petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. In addition, the petitioner has not presented documentary evidence that demonstrates

that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. 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)). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

It is noted that the petitioner requested the beneficiary's services from May 19, 2008 to October 31, 2008. 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.