(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 16 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The petitioner filed the nonimmigrant visa petition on behalf of fourteen beneficiaries. The service center director (the director) approved the petition on behalf of seven workers, and denied it on behalf of the other seven workers.[1] The portion of the matter pertaining to the seven beneficiaries on whose behalf the petition was denied is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. That portion of the petition denied by the director will remain denied.

On the Form I-129 visa petition, the petitioner describes itself as a swimming pool management company[2] established in 1984. In order to employ the beneficiaries in what it designates as swimming pool attendant positions[3] from May 15, 2012 until September 30, 2012, the petitioner seeks to classify them as temporary nonagricultural workers pursuant to 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).

The director denied the petition, concluding that the petitioner failed to establish that the seven beneficiaries who are the subject of this appeal[4] are qualified to perform the duties of the proffered position.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

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, in pertinent part, as follows:

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[1] The director denied that portion of the petition filed on behalf of the following seven beneficiaries:

[2] The petitioner provided a North American Industry Classification System (NAICS) Code of 713990, "All Other Amusement and Recreation Industries." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "713990 All Other Amusement and Recreation Industries," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed May 30, 2013).

[3] The ETA Form 9142, Application for Temporary Employment Certification, submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 37-2011, and the associated Occupational Classification of "Janitors and Cleaners, Except Maids and Housekeeping Cleaners."

[4] From this point forward, the AAO shall use the term "beneficiaries" to refer to the seven beneficiaries on whose behalf the petition was denied.

> [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)(vi) states, in pertinent part, the following:

> *Evidence for H-2B petitions.* An H-2B petition shall be accompanied by:
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> * * *
>
> (C) *Alien's qualifications.* In petitions where the temporary labor certification application requires certain education, training, experience, or special requirements of the beneficiary who is present in the United States, documentation that the alien qualifies for the job offer as specified in the application for such temporary labor certification. This requirement also applies to the named beneficiary who is abroad on the basis of special provisions stated in paragraph (h)(2)(iii) of this section. . . .

At section F, Part b, Item 3 of the temporary labor certification (TLC), the petitioner answered "yes" to the question "Is training for the job opportunity required?" At Item 3a, the petitioner answered "less than one month" when prompted as follows: "If 'Yes' in question 3, specify the number of months of training required." At Item 3b, when asked to "[i]ndicate the field(s)/name(s) of training required," the petitioner answered "30 hour swimming pool training course." Finally, at Item 5, when asked to list any "Special Requirements," the petitioner stated, in part, "complete a 30 hour swimming pool training course."

The U.S. Department of Labor (DOL) certified the temporary labor certification (TLC) on March 23, 2012, and the petitioner filed the instant H-2B petition on May 2, 2012.

In his May 14, 2012 RFE, the director requested evidence establishing that each beneficiary met the requirements listed by the petitioner on the TLC. In particular, the director requested evidence that the beneficiaries had completed the 30-hour training course specified by the petitioner on the TLC.

In its May 15, 2012 affidavit submitted in response to the director's RFE, the petitioner stated the following:

> [The beneficiaries] will be required to take the 30 hour training course upon their arrival . . . If they fail to complete the 30 hour swimming pool training course successfully [the petitioner] will terminate their employment and pay for their return ticket to their home country.

In similar fashion, counsel asserted the following in his May 15, 2012 letter:

> While some of the beneficiaries petitioned for have not yet taken this course they will do so upon arrive [sic] at work. Taking this training is required of all swimming pool attendants but it is not a pre-requisite to employment.

The director did not find the statements of counsel and the petitioner persuasive, and he denied the petition on May 30, 2012.

On appeal, counsel contends that the director erred in denying the petition. Making arguments similar to those rejected by the director, counsel states the following:

> [The petitioner] concurs with [U.S. Citizenship and Immigration Services (USCIS)] that this training is needed to perform the job but what [USCIS] failed to recognize in its denial is that [the petitioner] administers the course to swimming pool attendants either prior to **or** after employment begins and does not deem passage of this course to be a pre-requisite to employment . . . [W]hile passing the swimming pool training course is a job requirement, it is not a pre-requisite to employment.

Counsel also submits the job order the petitioner placed with the Maryland State Workforce Agency. As noted by counsel, when asked to state the minimum experience needed, the petitioner answered "0 months." Counsel notes further that both the job order and the advertisements submitted by the petitioner specifically stated that no previous experience was necessary.

Finally, counsel submitted documentation indicating that six of the beneficiaries completed two training courses: (1) Lifeguarding/First Aid; and (2) CPR/AED for the Professional Rescuer and Health Care Provider. The beneficiaries completed these two training courses on May 20 and 23, 2012.

Upon review, the AAO agrees with the director's determination that the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(6)(vi)(C), and has therefore failed to establish that the beneficiaries are qualified to perform the duties of the proffered position.

The petitioner's claim that the beneficiaries are not required to complete the 30-hour training course until after they begin their period of employment with the petitioner does not satisfy 8 C.F.R. § 214.2(h)(6)(vi)(C). As noted above, that regulation specifically mandates that, in cases where "the temporary labor certification application requires certain education, training, experience, or special requirements," that the H-2B petition "be accompanied by . . . documentation that the alien qualifies for the job offer as specified in the application for such temporary labor certification." In this case, the petitioner specifically stated on the TLC that the "minimum job requirements" of the "job offer" included a "30 hour swimming pool training course." As the petitioner specified that requirement for the job offer on the TLC it was required, pursuant to 8 C.F.R. § 214.2(h)(6)(vi)(C), to submit documentation with the H-2B petition that the beneficiaries qualified for the job offer as specified on the TLC.

The language of 8 C.F.R. § 214.2(h)(6)(vi)(C) stipulates that the petitioner submit documentation *with the H-2B petition* that the beneficiaries meet the requirements of the job offer as specified on

the TLC. Here, the petitioner did not do so. In other words, by listing the 30-hour training course on the TLC as a requirement of its job offer, the petitioner triggered application of 8 C.F.R. § 214.2(h)(6)(vi)(C). While the petitioner's claim that the beneficiaries are not required to complete the 30-hour training course until assuming employment are acknowledged, the language of 8 C.F.R. § 214.2(h)(6)(vi)(C) is clear and, if the beneficiaries did not complete the 30-hour training course prior to the filing of H-2B petition, the petitioner obviously could not have submitted documentation *with the H-2B petition* that the beneficiaries meet the requirements of the job offer as specified on the TLC, as required by the regulation. Counsel identifies no specific grant of discretionary authority to waive the application of that regulation.

Nor do counsel's citation to the job order and advertisements aide the petitioner's case, as the language of 8 C.F.R. § 214.2(h)(6)(vi)(C) requires USCIS to look to the petitioner's statements made on the TLC itself. Again, the petitioner stated on the TLC that that the "minimum job requirements" of the "job offer" included a "30 hour swimming pool training course."

Finally, the AAO turns to the evidence submitted on appeal regarding the training courses completed by at least six of the beneficiaries on May 20 and 23, 2012. This evidence fails to overcome the director's decision for two reasons. First, there is no evidence (and counsel does not assert) that these two courses are in fact the 30-hour training course referenced by the petitioner on the TLC. Second, and of far more importance, it is noted that even if these training courses were established as satisfying the training requirements stated on the TLC, the beneficiaries took them after the H-2B petition was filed. However, the regulation at 8 C.F.R. § 103.2(b)(1) requires the petitioner to establish eligibility at the time of filing the nonimmigrant visa petition.

For all of these reasons, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(6)(vi)(C), and has consequently failed to establish that the beneficiaries are qualified to perform the duties of the proffered position.

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.