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U.S. Citizenship  
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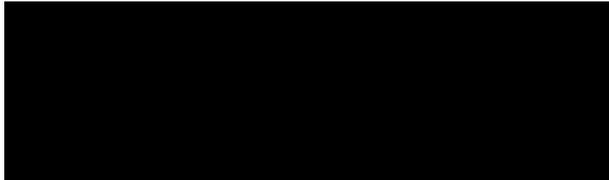
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FILE: EAC 04 248 51502 Office: VERMONT SERVICE CENTER Date: AUG 19 2005

IN RE: Petitioner: [Redacted]  
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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a parent that filed an H-2B petition to continue to employ the beneficiary as a live-in child care attendant.

The director denied the petition on the basis that, at the time it filed the petition, the petitioner had not obtained from the Department of Labor (DOL) a temporary labor employment certification or notice stating that such certification could not be made.

The record reveals the following undisputed facts. In August 2004, the petitioner filed both the Form I-129 (Petition for Nonimmigrant Worker) with Citizenship and Immigration Services (CIS) and his application to DOL for temporary employment labor certification (ETA Form 750).<sup>1</sup> The petitioner was unable to provide DOL's determination on the labor certification application in his December 2004 response to the service center's request for this evidence because DOL had not yet adjudicated the matter. On December 29, 2004, DOL issued its determination denying the labor certification application. The director issued his decision on January 25, 2005.

As evident in this statement from his decision, the director denied the petition on the single ground that the petitioner had not complied with the CIS regulatory requirement to obtain DOL's labor certification determination before filing an H-2B petition:

Your petition was submitted with evidence that you have applied for, but not yet received, the required certification from [DOL]. It does not appear that [DOL] issued the required certification before you filed this petition (before August 30, 2004.)

On appeal, counsel submits a timely Form I-290B (Notice of Appeal) with an addendum, and a brief accompanied by allied documents. The brief states that the issue on appeal is:

Whether the decision denying the H-2B nonimmigrant visa petition extension in the referenced case was in error, as contrary to established precedent decision[s] of both the Board of Immigration Appeals and controlling federal court decisions.

Counsel states that, because the matter was still pending at DOL at the time, he had been unable to respond to the portion of the service center's request for additional evidence that sought a copy of DOL's determination. Counsel's particular arguments include: assertions that "DOL's delay in adjudication is unfair and prejudicial" and that the service center "gave an inordinate amount of weight to the DOL's certification of the temporary labor certification"; a suggestion that the service center failed to exercise "an independent evaluation of the merits of the visa petition requested"; and an observation about proposed changes to the H-2B regulations.

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<sup>1</sup> The Form I-129 bears a CIS receipt date of August 30, 2004. While counsel states that the ETA Form 750 was filed on August 27, 2004, DOL's determination letter states that this document was received for processing on August 30, 2004.

The appeal is without merit. The director correctly applied the relevant regulations, which unambiguously preclude approval of an H-2B petition that has been filed prior to the DOL determination on the related application for temporary labor certification.

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

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). . . . [Italics added.]

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulates that an H-2B petition “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.

Whether the petitioner filed the labor condition application prior to filing the Form I-129 is irrelevant. 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.* [Italics added.]

Counsel provides no legal authority for his argument that DOL’s processing was unfair and prejudicial. Counsel does not provide a factual foundation or legal precedents to support his contention that the service center gave “an inordinate amount of weight to the DOL’s certification of the temporary labor certification.” Because the petition was not preceded by a DOL labor certification determination, as required by the regulations, the petition was denied. Counsel’s discussion of proposed H-2B regulations is irrelevant. It is not probative of any erroneous application of the regulations in force, which the director was bound to apply.

None of the matters submitted on appeal reveal any legal or factual errors in the director’s application of the regulations upon which he relied, and which plainly mandate that an H-2B petition not be filed prior to DOL’s determination to either grant or deny a temporary employment labor certification.

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. The petition is denied.