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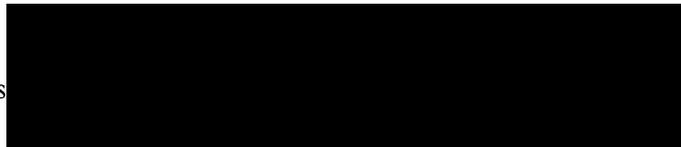
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FILE: LIN 05 122 50933 Office: NEBRASKA SERVICE CENTER Date: AUG 31-2005

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:

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.

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 The decision of the director will be withdrawn and the matter will be remanded to the director for further action and consideration.

The petitioner is a seasonal job placement company. It desires to change the previously approved employment of the beneficiaries and extend their stay since they are now holding this status. The petitioner desires to employ the beneficiaries as resort attendants for six and one-half months at various locations in mountain resort facilities in Colorado. The director determined that the petitioner had filed the instant petition using a labor certification that had already been utilized for the maximum allowable number of alien workers and denied the petition.

On appeal, the petitioner states that at the time of filing this petition, it had not filled all of the positions approved in the labor certification.

The regulation at 8 C.F.R. § 214.2(h)(2) provides in pertinent part:

(iii) *Named beneficiaries.* . . . If all of the beneficiaries covered by an H-2A or H-2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with a copy of the same labor certification. Each petition must reference all previously filed petitions for that labor certification.

The regulation at 8 C.F.R. § 214.2(h)(2) states in pertinent part:

(iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H-2B petitions that are approved for a group, or H-2B petitions that are approved for unnamed beneficiaries, or approved H-2B petitions where the job offered to the alien(s) does not require any education, training, and/or experience. . . .

In a letter dated March 12, 2005, the petitioner explained that it wanted to utilize the labor certification in its previously approved petition, [REDACTED]. The labor certification is valid from December 1, 2004 through September 30, 2005. The petitioner states that it only utilized 31 of the 300 approved visa allocations; therefore, 269 visa allocations remained available for usage by the petitioner.

The approval notice contained in the record of proceeding indicates that the petition, [REDACTED] was approved for 300 workers from December 9, 2004 until September 30, 2005 and that notification had been sent to the various American consulates in Hermosillo, Auckland, Buenos Aires, Kingston, Monterrey, and Sydney. The petitioner did not submit evidence from the various American consulates abroad to establish that only 31 visa allocations were utilized and that 269 remain available to be used, a list of the names, date and country of birth of the workers who were admitted into the United States under the approved petition, [REDACTED] employment records or other documentary evidence to establish that only 31 of the 300 approved visas have been issued. The petitioner only states that 31 of the 300 approved positions have been filled. Simply 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)). Absent such evidence, CIS cannot utilize the labor certification the petitioner filed with [REDACTED] for the current petition.

The director indicated in his decision that CIS had already approved the maximum number of positions allowed by the supporting Form ETA 750 and that the petition could not be approved based on the same labor certification. This statement by the director does not take into account the regulation which allows the petitioner to use the same labor certification for any unused visa that may have been approved based on that labor certification. The petitioner has the burden of proving through documentary evidence that the visas are unused.

Since this deficiency was not mentioned in the director's decision, this case will be remanded in order to give the petitioner an opportunity to submit any additional information or evidence that the director deems necessary to adjudicate the matter at hand. The director may also request additional evidence that is pertinent to the adjudication of this case. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.