



U.S. Citizenship
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Services

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FILE: EAC 07 148 55454 Office: VERMONT SERVICE CENTER Date: DEC 14 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont 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 is a hotel in Colorado. It filed the H-2B petition in order to employ the beneficiaries as food and beverage servers from May 25, 2007 to October 5, 2007.

Quoting relevant regulations at 8 C.F.R. § 103.2(b) and at 8 C.F.R. §§ 214.2(h)(6)(iii)(C), 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 certification or notice stating that such certification could not be made.

As discussed below, the AAO finds that director's decision is supported by the evidence of record and that its basis has not been overcome by the matters submitted on appeal. Accordingly, the appeal will be dismissed, and the petition will be denied.

The record of proceedings establishes, and the petitioner acknowledges on appeal, that the petitioner filed its application to DOL for temporary labor certification (Form ETA 750) prior to filing the petition, but that the petition was filed before DOL issued the notice of its determination on the application.¹ The petitioner filed the present petition on April 27, 2007, with a memorandum (submitted as an Addendum) that summarized the processing history of the Form ETA 750 and noted that that the form was at DOL's Chicago National Processing Center (CNPC) for a final decision. The memorandum requested that the Vermont Service Center "contact the Chicago Processing Center for a copy of the certification." On May 9, 2007, DOL certified the labor certification application and issued its notice of the certification. This was 12 days after the petition was filed.

On appeal, the petitioner acknowledges that the petition was filed prior to the date that DOL made its determination on the application for temporary labor certification. Following a chronology of processing events regarding this and another petition ["#6203"] with DOL certification after the petition was filed, the brief on appeal requests that the AAO reverse the director's decision for the following reasons:

[The petitioner] informed VSC [the Vermont Service Center] of the delay in receiving the labor certification for both petitions with [the petitioner's] I-129 submission. [The petitioner] was making every effort to provide timely and complete information to VSC in pursuit of obtaining petition approval so that the beneficiaries could obtain consulate interviews (if applicable) and be at work at the time of [the petitioner's] demonstrated seasonal employment need.

Petition [#6203] was approved upon VSC's receipt of CNPC's labor certification, which was received by VSC subsequent to their acceptance of the petition. It seems that CNPC staff are overwhelmed by application requests and cannot respond to requests in a timely manner[,] and

¹ According to the petitioner, it filed the Form ETA 750 with the Colorado Department of Labor on January 30, 2007. The director cites February 16, 2007 as the date that the Form ETA 750 was filed with DOL. This is the date stamped on the Form ETA 750 for receipt at the local office. The difference in the dates is not material, as both dates establish that the Form ETA 750 was filed with DOL weeks before the petition was filed with CIS.

whomever [sic] approved petition #6203 implicitly or explicitly knew the process was taking longer than petitioners anticipated and acted in accordance with the spirit of the regulations.

Even though [the petitioner's] petitions did not include the CNPC certification due to a delay at CNPC, they were ultimately certified and we ask that you recommend approval of petition # 5454.

The AAO recognizes that the petitioner submitted its application for temporary labor certification to DOL before it filed the Form I-129, and that DOL subsequently approved the application. However, the relevant CIS regulations clearly preclude approval of an H-2B petition that was filed prior to the DOL determination on the related ETA 750.

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.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) requires that the DOL certification determination accompany the Form I-129 when it is filed:

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.]

The relevant regulations are unambiguous. They clearly support the director's denial of the petition. He correctly applied the regulations regarding the relative timing of DOL temporary labor certification determinations and H-2B petition filings.

The director's decision on the other petition cited by the petitioner has no bearing on the outcome of this appeal. If that other petition was approved despite DOL's not making its determination on the related labor certification until after the petition was filed, the director's approval would constitute material error. The relevant regulations allow no discretion in their application. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest

that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The fact that the petitioner filed the approved labor certification prior to the director's decision does not remedy the failure to comply with the regulatory requirements cited above. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). 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). CIS regulations do not provide for amendment of a petition once it has been filed, other than by the filing of a new petition with fee. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

The director's decision was correct, and the evidence and arguments presented on appeal do not merit relief. It is noted that the petitioner requested the beneficiaries' services for from May 25, 2007 to October 5, 2007. Therefore, the period of employment has passed.

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. 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.