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



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: FEB 01 2013

OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

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:

[Redacted]

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,

for Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition, and the matter 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.

On the Form I-129 visa petition, the petitioner describes itself as a “wildlife refuge with hotel/hospitality services” established in 1985. In order to employ the beneficiary in what it designates as a housekeeper position, the petitioner seeks to classify her as a temporary nonagricultural worker 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 because the employment start date listed on the Form I-129 was not the same as the date of need stated on the approved temporary labor certification, as required by 8 C.F.R. § 214.2(h)(6)(iv)(D).

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.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(D) states, in pertinent part, the following:¹

Employment start date. Beginning with petitions filed for workers for fiscal year 2010, an H-2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification.

The temporary labor certification was approved for a period of certification lasting from January 25, 2012 until September 15, 2012. However, on the Form I-129 the petitioner provided a start date of April 1, 2012. Accordingly, the start date on the H-2B petition was not the same as the date of need stated on the temporary labor certification, as specifically required by 8 C.F.R. § 214.2(h)(6)(iv)(D). The director denied the petition on the basis of the petitioner’s noncompliance with that regulatory requirement, which the AAO finds, is clearly and unambiguously stated.

On appeal, counsel claims that this discrepancy was the result of clerical error on his part, and argues that denying the petition on this basis “is an unjust application of the law.” However, counsel cites no statute, regulation, or case precedents in support of his assertion. Likewise, counsel identifies no specific grant of discretionary authority allowing the AAO to waive the application of 8 C.F.R. § 214.2(h)(6)(iv)(D). 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec.

¹ It should be noted that the full H-2B regulatory context in which this provision appears indicates that it does not apply to petitions for H-2B temporary labor to be performed in Guam.

190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the regulation's use of the word "must" conveys that compliance – and, likewise, enforcement - is mandatory. Accordingly, the AAO finds that the petitioner's failure to comply with the aforementioned regulatory provision precludes approval of this petition. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.²

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.

² For substantive discussions by U.S. Citizenship and Immigration Services (USCIS) addressing the reasons for the regulation at 8 C.F.R. § 214.2(h)(6)(iv)(D) and indicating that compliance with that provision is a material precondition for approval of an H-2B petition filed for workers in the fiscal year 2010 and beyond, see the pertinent sections of the Supplementary Information in the Federal Register, commencing at 73 Fed. Reg. 49109-01 (Aug. 20, 2008) (for the USCIS proposal to adopt the provision as a final rule or regulation) and commencing at 73 Fed. Reg. 78104-01 (Dec. 19, 2008) (for the USCIS promulgation of the provision as a final rule).