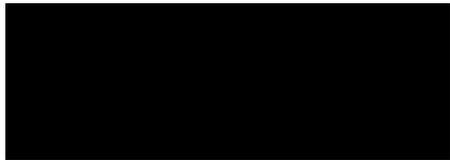


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FILE: WAC 05 045 51797 Office: CALIFORNIA SERVICE CENTER Date: **AUG 02 2005**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(a) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a)

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, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the growing of grapes and operation of a winery. It desires to employ the beneficiary as a general farm laborer for ten months. The director determined that the petitioner had not submitted a temporary agricultural labor certification, Form ETA 750, from the Department of Labor (DOL), or notice stating that such certification could not be made. The director also determined that the petitioner had not established that the need for the beneficiary's services is temporary and denied the petition.

The regulation at 8 C.F.R. §214.2(h)(1)(ii) states:

(C) An H-2A classification applies to an alien who is coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature.

The regulations at 8 C.F.R. 214.2(h)(5) states:

(iv) *Temporary and seasonal employment –(A) Eligibility requirements.* An H-2A petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

On appeal, the petitioner states that the beneficiary is not seeking permanent residency but is instead seeking certification to work in the United States on a seasonal basis from March 1, 2005 until December 1, 2005 as a general farm laborer. The job duties, as described on the copy of Form ETA 750, have been shown to be seasonal and for a temporary period. The petitioner has also shown that its need to fill the position with a temporary worker is less than one year. Therefore, the petitioner has established that its need for the beneficiary's services is temporary.

The petitioner also states on appeal that it was unaware of the Form ETA 750 requirement and is in the process of completing and submitting this request.

The regulation at 8 C.F.R. § 214.2(h)(5)(i)(A) states in pertinent part:

An H-2A petition must be filed on Form I-129. The petition must be filed with a single valid temporary agricultural labor certification.

The petition was filed on December 3, 2004 without a temporary agricultural labor certification that had been certified by the DOL or notice detailing the reasons why such certification cannot be made. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On appeal, the petitioner attached an uncertified copy of Form ETA 750 that has been submitted to the DOL. Neither the statute nor regulations allow for the acceptance of a labor certification whether it has been certified or uncertified, or denial notification obtained subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

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.

This decision is without prejudice to the filing of a new petition accompanied by the proper documentation and fee.

**ORDER:** The appeal is dismissed.