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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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JUN 01 2005

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date:

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:

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

Robert P. Wiemann, Director
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 petitioner engages in the business of landscape maintenance. It desires to employ the beneficiaries as landscape laborers for ten months. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made at the time of filing the petition, and denied the petition.

On appeal, the petitioner states that the regulation only requires that a petitioner apply for a temporary labor certification prior to filing a petition. The petitioner further states that under the regulation a petitioner is not required to obtain a labor certification determination prior to filing Form I-129 with the director.

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

(C) 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). . . .

The regulations stipulate that an H-2B petition for temporary employment in the United States 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. 8 C.F.R. § 214.2(h)(6)(iv)(A).

On November 16, 2004, the petitioner submitted to DOL its application for a temporary labor certification (ETA 750). On December 9, 2004, the petitioner filed the Petition for a Nonimmigrant Worker (Form I-129). However, because DOL had not yet made a determination, the Form I-129 was not accompanied by either a temporary labor certification or notice from DOL detailing the reasons why such certification cannot be made. On February 5, 2005, the petitioner submitted its labor certification into the record: it bears an approval date (January 26, 2005) that is subsequent to the date upon which the petition was filed. On February 15, 2005, the director denied the petition, in accordance with the regulatory requirement that the filing of an H-2B petition follow the DOL determination on the application for temporary labor certification.

On appeal, the petitioner states that a petitioner is not required to obtain a labor certification determination prior to filing Form I-129 with the director. However, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states that:

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.

Neither the statute nor regulations allow for the acceptance of a labor certification 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 petitioner argues further that it was not the intent of Congress nor the purpose or objective of the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) to deny a petition merely because it was not accompanied by a labor certification determination when it was filed. However, the petitioner has not explained the Congressional legislative history of the applicable law or related floor statements to substantiate its statement. 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)). Further, where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

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.