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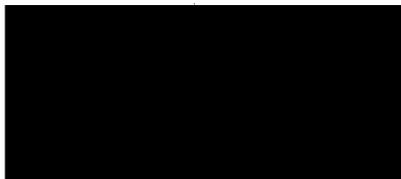
U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



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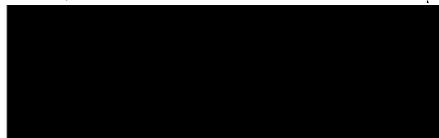
FILE: EAC 07 067 51336 Office: VERMONT SERVICE CENTER Date: DEC 18 2007

IN RE: Petitioner:
Beneficiaries:



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:



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.

Michael T. Kelly
for 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 and the petition will be denied.

The petitioner is engaged in the farming business. It desires to extend its authorization to employ the beneficiaries as farm laborers pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(a) from January 15, 2007 until September 15, 2007. The director denied the petition, based upon his finding that the petitioner had not submitted a temporary agricultural labor certification, Form ETA 750, from the Department of Labor (DOL), or notice from DOL stating that such certification could not be made.

On appeal, counsel states that the original purpose of the petition was to obtain an extension of visas that were already granted. Counsel states, however, that, upon receipt of the director's request for evidence (RFE), the petitioner decided to change the petition to consular notification instead of an extension of stay or change of status.

Upon careful review of the entire record of proceeding, the director's decision to deny the petition is correct. Therefore, the AAO will dismiss the appeal.

The director's decision fully quotes the following sections of the regulation at 8 C.F.R. § 214.2(h)(5)(i):

(A) *General.* An H-2A petition must be filed on Form I-129. The petition must be filed with a single valid temporary agricultural labor certification. However, if a certification is denied, domestic labor subsequently fails to appear at the worksite, and the Department of Labor denies an appeal under section 216(e)(2) of the Act, the written denial of appeal shall be considered a certification for this purpose if filed with evidence which establishes that qualified domestic labor is unavailable. An H-2A petition may be filed by either the employer listed on the certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the certification.

...

(D) *Evidence.* An H-2A petitioner must show that the proposed employment qualifies as a basis for H-2A status, and that any named beneficiary qualifies for that employment. A petition will be automatically denied if filed without the certification evidence required in paragraph (h)(5)(i)(A) of this section and, for each named beneficiary, the initial evidence required in paragraph (h)(5)(v) of this section.

The petition was filed on January 8, 2007 without a temporary agricultural labor certification by DOL or any documentation regarding a DOL denial of an application for temporary certification related to the present petition. On February 7, 2007, the director issued a request for evidence (RFE) requesting the petitioner to submit a certified temporary labor certification issued by the DOL (Form ETA 750A and B) or DOL's letter of declination to issue the certification. The petitioner was also asked to identify which individuals it would like considered under this petition filing - that is, those who can receive a change of status or those who are eligible for an extension of stay, since not all of the beneficiaries are in the United States in H-2A status. The RFE also stated that the petitioner may wish to have the petition changed to consular notification instead of extension of stay or change of status so that all of the beneficiaries can be approved.

The petitioner's response to the RFE consists of one letter, dated April 26, 2007, without any enclosures. The letter states, in full:

With reference to your Notice of Action [i.e., the RFE] dated 02/07/2007 please be advised as follows:

In the matter of ETA-750 we are not applying for a new application, but for an extension up to September 15, 2007. That was our original intention. However, we are willing to accept counselor notification, so that all applicants can be approved.

If you should need any additional information, please feel free to contact our office.

The petitioner's response to the RFE was to change the petition to consular notification instead of an extension of stay or change of status. However, the petitioner failed to provide a temporary labor certification or a DOL notice of denial of an application for such certification. Absent such temporary labor certification from the DOL, or notice detailing the reasons why such certification cannot be made, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the 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. The petition is denied.