



U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 239 50146 Office: VERMONT SERVICE CENTER Date: FEB 20 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:

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, 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 a farm labor contractor. It desires to employ the beneficiaries as farm workers for a period of four months. The beneficiaries will be performing services for [REDACTED] located in Kula, Hawaii. The director determined that the petitioner had filed the current petition using a labor certification that had already been utilized for nine job opportunities in a previously filed petition, (WAC-06-096-50061) leaving no other positions available. The current petition is requesting nine farm workers based on the labor certification previously utilized, and therefore, the petition was denied.

On appeal, the petitioner states that it has not used the nine visa openings granted under WAC-06-096-50061, and therefore, the nine openings remain available for the current petition.

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

(ix) *Substitution of beneficiaries after admission.* An H-2A petition may be filed to replace H-2A workers whose employment was terminated early. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving each terminated worker's name, date and country of birth, termination date, and evidence the worker has departed the United States. . . .

The Petition for a Nonimmigrant Worker (Form I-129) was filed on August 21, 2006 for nine, named H-2A farm workers to work in Kula, Hawaii. The petitioner filed the new petition, EAC-06-239-50146, hoping to utilize the approved labor certification filed with its petition, WAC-06-096-50061. The petitioner desires to substitute the nine positions listed on the labor certification with the nine workers named in the instant petition.

The record shows that the petition, WAC-06-096-50061, was approved for nine unnamed beneficiaries on May 23, 2006 and notification was sent to the American Consulate in Bangkok, Thailand. The approved petition, WAC-06-096-50061, was valid from May 15, 2006 until December 22, 2006.

The petitioner states, in its letter dated August 17, 2006, that it seeks to cancel the consular processing of the nine, unnamed H-2A workers in petition WAC-06-096-50061 and instead seeks to substitute and extend the stay of the nine, named H-2A workers in the current petition. The petitioner states that the beneficiaries named on the instant petition had been working for the employer in the United States under H-2A classification that expired September 6, 2006. The petitioner states that since the nine, unnamed workers approved in petition, WAC-06-096-50061, never obtained their H-2A visas from the American Consulate, in Bangkok, Thailand, the visa allocations remain available for usage by the nine, named workers in the current petition.

The petitioner has not provided evidence from the American Consulate, Bangkok, Thailand, to establish that none of the nine visa allocations were utilized and that nine remain available to be used by the petitioner. 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)). Absent such evidence, Citizenship and Immigration Services (CIS) cannot utilize the labor certification the petitioner filed with WAC-06-096-50061 for the current petition.

The director indicated in his decision that CIS had already approved the maximum number of positions allowed by the supporting Form ETA 750 and that the petition could not be approved based on the same labor certification. This statement by the director does not take into account the regulation which allows the petitioner to use the same labor certification for any unused visa that may have been approved based on that labor certification. The petitioner has the burden of proving through documentary evidence that any such visas remain unused.

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.