



U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 06 241 51586 Office: VERMONT SERVICE CENTER Date: FEB 26 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 engages in the planting and harvesting of rice and soybeans. It desires to employ the beneficiaries as farm workers for three months. The director determined that the petitioner had filed the current petition using a labor certification that had already been utilized for two job opportunities leaving no other positions available. The current petition is requesting two farm workers, and therefore, the petition was denied.

On appeal, the petitioner states that it was unable to obtain any workers from South Africa. The petitioner states that it is requesting to transfer two workers as the original labor certification has not been utilized.

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 instant Petition for a Nonimmigrant Worker (Form I-129) was filed on August 24, 2006 for two, named H-2A farm workers. The petitioner filed the petition, EAC-06-241-51586, hoping to utilize the approved labor certification filed with its previous petition, LIN-06-130-51722. The petitioner desires to substitute the two positions listed on the labor certification with the two workers named in this petition.

The record shows that the petition, LIN-06-130-51722, was approved for two, unnamed beneficiaries on April 13, 2006 and notification was sent to the American Consulate in Johannesburg, South Africa. The approved petition, LIN-06-130-51722, was valid from April 13, 2006 until November 30, 2006.

The petitioner states, in its letter dated August 20, 2006, that it has been unable to obtain any workers from South Africa and therefore, desires to extend the stay of the two, named H-2A workers in the current petition. The petitioner indicates that the beneficiaries named on the instant petition had been working for another employer in the United States under H-2A classification that expired September 1, 2006. The petitioner states that since the two, unnamed workers approved in the previous petition, LIN-06-130-51722, never obtained their H-2A visas from the American Consulate, in Johannesburg, South Africa, the visa allocations remains available for usage by the two, named workers in the current petition.

Upon review, the petitioner has not provided a copy of the approval notice covering the workers for which replacements are sought. Further, the petitioner has not provided evidence from the American Consulate in Johannesburg, South Africa, to establish that the two visa allocations were not utilized and 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 LIN-06-130-51722 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 unless the petitioner provided evidence that the visa allocations were not used. In the instant case, the petitioner did not provide documentary evidence that the visas are unused.

Beyond the director's decision, the petitioner has not provided documentation to establish that the beneficiaries qualify for the job offer as specified on Form ETA 750. The beneficiaries have not been shown to possess the requisite other special requirements, specifically, a current driver's abstract showing an acceptable driving record and basic literacy and arithmetic, stipulated on the copy of Form ETA 750. 8 C.F.R. § 214.2(h)(5)(v). Absent such evidence, the petition may not be approved.

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.