

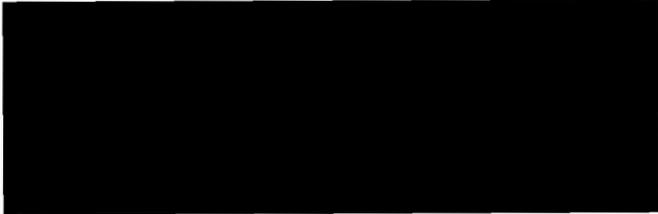


U.S. Citizenship
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FILE: EAC 07 089 51203 Office: VERMONT SERVICE CENTER Date: JAN 09 2008

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, 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 although the matter is moot due to the passage of time.

The petitioner is a non-profit cooperative. It desires to employ the beneficiaries as landscape laborers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for the period from November 1, 2006 to March 30, 2007. On October 31, 2006, the petitioner initially filed the Form I-129 for H-2B classification which was approved on November 16, 2006, granting H-2B classification for 100 unnamed workers (EAC-07-021-53083). In the initial filing, the petitioner requested consular processing. The approval listed the three different consulates to be notified as Bridgetown, Barbados, Kingston, Jamaica and Monterrey, Mexico. On January 31, 2007, the petitioner filed an amendment to the previously approved petition (EAC-07-021-53083) in order to request a change of status for the beneficiaries currently residing in the United States rather than a consular processing of the H-2B nonimmigrant visa at the consulate in Kingston, Jamaica.

On March 16, 2007, the director denied the petition and stated that the regulations do not permit substituting workers when all approved allocations were not utilized at the Consulate. The director also noted that the petitioner's request for an extension of stay for the beneficiaries is denied because the nonimmigrant visa petition was filed after the beneficiary's status had expired on December 15, 2006.

On appeal, the petitioner asserts that since the current petition is an amendment to an already approved petition for H-2B classification, the petitioner is not seeking to substitute employees. The petitioner states that the beneficiaries listed on the amended Form I-129 are 29 of the same 100 individuals that were to be counted as unnamed beneficiaries in the previously approved petition (EAC-07-021-53083).

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country

The regulation at 8 C.F.R. § 214.2(h)(2) states in pertinent part:

(iii) *Named beneficiaries.* . . . If all of the beneficiaries covered by an . . . H-2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with a copy of the same labor certification. Each petition must reference all previously filed petitions for that labor certification.

(iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H-2B petitions that are approved for a group, or H-2B petitions that are approved for unnamed beneficiaries, or approved H-2B petitions where the job offered to the alien(s) does not require any education,

training, and/or experience. . . .

The petitioner followed the proper procedure and filed the Form I-129, Petition for a Nonimmigrant Worker, on January 31, 2007, to request H-2B classification and extension of the beneficiary's stay in the United States. In a letter submitted in support of the appeal, the petitioner explained that it wanted to utilize the labor certification in its previously approved petition, EAC-07-021-53083. The petitioner stated in its letter dated January 2, 2007 that "given the change of circumstances/correction, we would like to retract 29 of those visas from the consulate in Kingston, Jamaica, and grant them to 29 H2B workers currently in the United States for an extension of stay."

The record of proceeding contains the labor certification (Form ETA 750) and the final determination notice that stated the petition was approved for 100 landscape laborers for the period from November 1, 2006 through March 30, 2007. The record of proceeding also contains a copy of the approval notice (Form I-797B) for the petitioner's previously approved nonimmigrant petition, EAC-07-021-53083. The approval notice granted H-2B classification to 100 unnamed beneficiaries. Nevertheless, the petitioner has not provided employment records or other documentary evidence to establish that the 29 nonimmigrant visas sought in the amended petition were not already issued at the consulate in Kingston, Jamaica. Further, the petitioner did not submit a list of the individuals that have utilized the previously approved petition to enter the United States in order to determine how many visas were not utilized. Consequently, the petitioner has not established that the previous approval petition for H-2B classification has a remaining number of visas that are available for the 29 beneficiaries in the instant petition. 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, CIS cannot approve the amended petition or utilize the labor certification the petitioner filed with the previously approved petition, EAC-07-089-51203.

It is noted that the petitioner requested the beneficiary's services from November 9, 2006 until March 30, 2007. Therefore, the period of requested employment has passed.

The director also noted that any extension of status on behalf of the 29 named beneficiaries could not be approved, as the beneficiaries had fallen out of status prior to the filing of the amended petition. The issue may not be appealed to the AAO and will not be addressed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 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 although the matter is moot due to the passage of time.