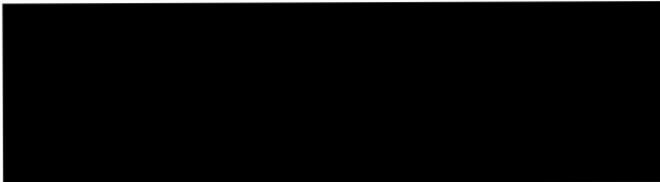


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FILE: WAC 08 023 51212 Office: CALIFORNIA SERVICE CENTER Date: **MAR 24 2008**

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained in part and dismissed in part. The petition will be approved in part for two workers initially named in the petition, that is, for [REDACTED] and [REDACTED] and the petition will be denied for the other six workers named in the petition.

The petitioner is a coffee and tea grower in Kailua-Kona, Hawaii. It desires to employ the beneficiaries as farm workers 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 November 1, 2007 to September 1, 2008. The director determined that the petitioner had not submitted evidence of applying for a temporary agricultural labor certification, Form ETA 750, with the Department of Labor (DOL) as required by regulation. The director found that the beneficiaries had exceeded the maximum period of stay allowed in H-2A visa status. The director also determined that the lawful immigration status of the beneficiaries had already expired at the time of filing the petition, and that their stay could not be extended.

On appeal, the petitioner states that it did apply for and obtain the H-2A temporary agricultural worker permits for the eight workers. A copy of the required temporary labor certification has been submitted with the appeal. The petitioner also states that it was provided with incorrect information about the eight Thai workers' visa status and requests that Citizenship and Immigration Services allow the eight workers to stay until September 2008 as the petitioner needs the workers for the daily production.

As discussed below, the AAO agrees in part with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the petitioner provided a copy of its Form ETA 750 that had been certified by the DOL prior to the filing of the petition. Accordingly, one of the director's objections has now been satisfied. However, the petition cannot be approved for six of the named workers, as the petitioner has not presented evidence to prove that these beneficiaries have spent the required period of time outside the United States and have not reached the maximum period of time in H-2A visa status.

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

An H-2A petition must be filed on Form I-129. The petition must be filed with a single valid temporary agricultural labor certification.

The Form I-129, Petition for a Nonimmigrant Worker, was filed on November 1, 2007 without a temporary agricultural labor certification that had been certified by the DOL or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition could not be approved.

On appeal, the petitioner submits a copy of the temporary agricultural labor certification, Form ETA 750, from the DOL and the notice from the United States Department of Labor, Employment and Training Administration, dated October 4, 2007. The notice states that the certification was granted for 8 unnamed farm workers, field crop II (coffee), from November 1, 2007 until September 1, 2008. Therefore, the certification that has been certified by the DOL was obtained prior to the filing of the Form I-129. However, the petition may not be approved for all of the named workers.

The regulations at 8 C.F.R. § 214.2(h)(5)(viii) states:

- (C) *Limits on an individual's stay.* An alien's stay as an H-2A is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H-2A status for a total of three years may not again be granted H-2A status, or other nonimmigrant status based on agricultural activities, until such time as he or she remains outside the United States for an uninterrupted period of six months. An absence can interrupt the accumulation of time spent as an H-2A. If the accumulated stay is eighteen months or less, an absence is interruptive if it lasts for at least three months. If more than eighteen months stay has been accumulated, an absence is interruptive if it lasts for at least one-sixth the accumulated stay. Eligibility under this subparagraph will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H-2A status than that indicated by the petition due to the application of this subparagraph shall only be admitted for that abbreviated period.

The director found that the beneficiaries had exceeded the three year limit on their stay in the United States in H-2A status and denied the petition.

In the brief to support the appeal, the petitioner states that when the eight workers were hired, it was unknown how long they had been with their previous employer, Global Horizon. The petitioner states that according to the conversations with Global Horizon, it had applied for the eight workers' extension and been approved. The petitioner states it was provided with incorrect information regarding the eight Thai workers' visa status. Therefore, it requests that CIS allow the eight workers to remain in the United States until September 2008, because the petitioner needs the workers for the daily production.

Upon review, the AAO determines that two of the beneficiaries in the current petition are eligible for an extension of stay although it will be a shorter period than that indicated by the petition. *See* 8 C.F.R. § 214.2(h)(5)(viii)(C). [REDACTED] was last admitted into the United States on June 4, 2005 at Honolulu, Hawaii, as an H-2A nonimmigrant worker and is eligible to receive an extension of stay until June 3, 2008. [REDACTED] was last admitted into the United States on August 28, 2005 at Honolulu, Hawaii, as an H-2A nonimmigrant worker and is eligible to receive an extension of stay until August 27, 2008.

The other six beneficiaries named in the current petition were last admitted into the United States on May 29, 2004 or October 6, 2004. The six beneficiaries [REDACTED] and [REDACTED] have held H-2A status for a total of three years. The petitioner has not provided any evidence that demonstrates that the six beneficiaries spent any time outside the United States and that they are eligible to receive an extension of stay beyond the three-year maximum. 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)). Therefore, these beneficiaries have reached their maximum allowable time in H-2A status in the United States and are ineligible for an extension of stay. The petition will be denied with respect to these six beneficiaries.

The petition will be approvable for the beneficiaries, [REDACTED] and [REDACTED] in accordance with 8 C.F.R. § 214.2(h)(9)(i)(A).

The director also found that all of the beneficiaries were out of status when the petition was filed and were not eligible for an extension of status. Upon review, the record reflects that the beneficiaries' H-2A status expired on May 13, 2007. Therefore, the beneficiaries were out of status when the application was properly filed on November 1, 2007. The beneficiaries' eligibility to extend their nonimmigrant status is an issue that may not be appealed. The issue of whether the two beneficiaries for whom the petition is approved are eligible for an extension of status is exclusively before the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the burden has been sustained in part and not sustained in part.

ORDER: The appeal is sustained in part. The nonimmigrant visa petition is approved for [REDACTED] until June 3, 2008 and for [REDACTED] until August 27, 2008.

ORDER: The appeal is dismissed in part. The nonimmigrant visa petition is denied for the following six beneficiaries: [REDACTED] and [REDACTED]