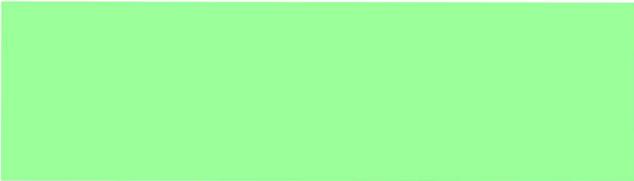


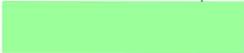


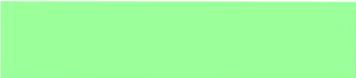
**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: **MAR 11 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a five-employee agent association established in 1988. In order to extend its employment of the beneficiaries in what it designates as goatherder positions¹ from September 1, 2012 until August 31, 2013, the petitioner seeks to extend their classification as temporary agricultural workers pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

The director denied the petition because the petitioner did not submit a valid temporary agricultural labor certification issued by the U.S. Department of Labor when it filed the petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Applicable Law

Section 101(a)(15)(H)(ii)(a) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), defines an H-2A temporary worker, in pertinent part, as follows:

[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 agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of the Internal Revenue Code of 1986, agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. [§] 203(f)), and the pressing of apples for cider on a farm, of a temporary or seasonal nature. . . .

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

Petition for alien to perform temporary agricultural labor or services of a temporary or seasonal nature (H-2A)—

(i) *Filing a petition—*

¹ The ETA Form 9142, Application for Temporary Employment Certification ultimately submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 45-2093.00 and the associated Occupational Classification of "Farmworkers: Farm & Ranch Animals."

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

* * *

- (D) *Evidence . . .* A petition will be automatically denied if filed without the certification evidence required in paragraph (h)(5)(i)(A) of this section. . . .

Discussion

The petitioner, through its agent, filed the instant H-2A petition on August 31, 2012. Although the filing contained an ETA Form 9142, Application for Temporary Employment Certification (hereinafter "temporary labor certification"), it did not relate to the petitioner.² Accordingly, the director issued an RFE on September 5, 2012, and requested the original temporary labor certification issued to the petitioner.

The petitioner's agent responded to the RFE on September 17, 2012, and submitted a temporary labor certification that had been issued to the petitioner on September 4, 2012. The director denied the petition on October 4, 2012 and, citing to 8 C.F.R. § 214.2(h)(5)(i)(A) and (D), found that the petitioner's failure to submit the temporary labor certification when the petition was filed precluded its approval.

The petitioner's agent filed the instant, timely appeal on October 31, 2012. In her October 30, 2012 letter submitted on appeal, the agent describes the difficulties the petitioner experienced with the U.S. Department of Labor (DOL) during the pendency of the temporary labor certification with that agency, and explains that the agent prematurely filed the instant Form I-129 with U.S. Citizenship and Immigration Services (USCIS), in error.³

² In her October 30, 2012 letter submitted on appeal, the petitioner's agent explains that it filed the Form I-129 on August 31, 2012 prematurely:

On 8/30/12 this employer's I-129 petition was mistakenly included with other petitions sent on that day by [the petitioner's agent]. At the time the petition did not include an original Labor Certification document. A request for evidence was received by [the petitioner's agent] indicating [that] the petition [had] been submitted with a certification for a different H-2A employer.

³ The petitioner's agent also notes that the director mistakenly referred to the petition as one filed for an H-1B nonimmigrant worker, rather than for an H-2A nonimmigrant worker, at one portion of her October 4, 2012 decision. While this statement was technically incorrect, the AAO finds it to have been a harmless, typographical error on the part of the director.

First and foremost, it is noted that the petitioner's agent identifies no harm arising from this typographical error.

That the petition was filed without the temporary labor certification as required by 8 C.F.R. § 214.2(h)(5)(i)(A) is not in dispute. The issue is whether the AAO possesses the discretionary authority to waive the provisions of 8 C.F.R. § 214.2(h)(5)(i)(A) and its companion regulation at 8 C.F.R. § 214.2(h)(5)(i)(D), which mandates “automatic deni[al]” of a petition which does not comply with 8 C.F.R. § 214.2(h)(5)(i)(A).

Upon review, the AAO finds that because the petitioner did not submit a valid temporary agricultural labor certification when it filed the petition, the director properly denied it pursuant to 8 C.F.R. § 214.2(h)(5)(i)(A) and (D). While the AAO acknowledges the statements of the petitioner’s agent made on appeal with regard to the difficulties faced during DOL’s adjudication of the matter and the clerical errors made by the agent, neither the petitioner nor its agent has identified any specific grant of discretionary authority that would allow the AAO to waive application of 8 C.F.R. § 214.2(h)(5)(i)(A) and (D), and the language of those regulations is clear: “[a] petition will be automatically denied if filed without the [temporary labor] certification evidence required in paragraph (h)(5)(i)(A). 8 C.F.R. § 214.2(h)(5)(i)(A), (D). Consequently, the petitioner’s failure to file a valid temporary agricultural labor certification with the petition mandates its denial.⁴

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.

Second, the AAO notes that the director stated in her introduction that the petition had been filed to classify the beneficiaries as nonimmigrant workers under section 101(a)(15)(H)(ii)(a) of the Act; cited, and excerpted from, the relevant statutory and regulatory framework governing the H-2A program; and specifically referred to the matter as an “H-2A” petition at least seven separate times. Thus, even if the petitioner’s agent had alleged specific harm from the director’s single typographical error, that allegation would not be credible, as the director made abundantly clear that she was adjudicating an H-2A petition.

For both of these reasons, the AAO will assign no weight to the petitioner’s statement regarding this typographical error, and the matter will not be discussed further.

⁴ Furthermore, the AAO notes the impossibility of curing this defect, given the timing of the petition’s filing and the date on which DOL certified the temporary labor certification. Again, although the Form I-129 was filed with USCIS on August 31, 2012, DOL did not certify the temporary labor certification until September 4, 2012. It would therefore have been impossible for the petitioner to comply with 8 C.F.R. § 214.2(h)(5)(i)(A) given the fact that it filed the Form I-129 before the temporary labor certification was certified.