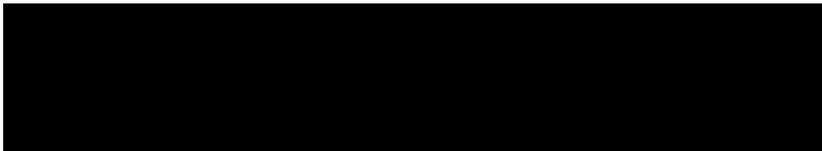




U.S. Citizenship
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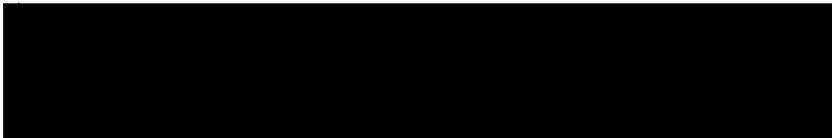
FILE: LIN 05 064 52233 Office: NEBRASKA SERVICE CENTER Date: **AUG 11 2005**

IN RE: Petitioner:
Beneficiary:



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:



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 director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In order to employ the beneficiary as a kitchen helper for a period of ten months, the petitioner, a resort hotel, endeavors to classify the beneficiary as a temporary nonagricultural 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).

In order to satisfy the requirement that a petitioner obtain a temporary labor certification from the Department of Labor (DOL), or a notice stating that such certification could not be made prior to filing the H-2B petition, the petitioner submitted a copy of a temporary labor certification that the DOL had previously issued to the petitioner for 18 aliens to serve as kitchen workers. At the time it filed the instant petition, the petitioner had already submitted that temporary labor certification to Citizenship and Immigration Services (CIS) as the basis for an approved H-2B petition for 18 beneficiaries (receipt number LIN-05-024-52386).

The director denied the petition, concluding that CIS regulations do not allow a petitioner to use a temporary labor certification that was submitted in support of a previously approved petition. The director determined that in such a case, the petitioner must file a new H-2B petition and temporary labor certification, or obtain approval from the appropriate consular official to effectuate the substitution.

On appeal, counsel contends that the director erred in denying the petition. Counsel asserts that since not all the beneficiaries of the previously approved H-2B petition obtained visas, a new temporary labor certification is not necessary.

The DOL granted a temporary labor certification for the petitioner to employ 18 aliens as H-2B kitchen workers from December 15, 2004 through October 15, 2005. As noted above, the petitioner submitted that temporary labor certification in support of an H-2B petition that was subsequently approved for 18 beneficiaries on December 9, 2004 (receipt number LIN-05-024-52386). The petitioner submitted that same temporary labor certification in support of the instant H-2B petition on December 30, 2004.

The instant petition requests that the beneficiary be permitted to take the place of one of the kitchen workers approved in the earlier petition. The record reflects that the beneficiary was in the United States in valid B-1 status on the date the petition was filed. The petitioner filed the H-2B petition on her behalf in order to change her status and extend her stay in the United States.

Counsel is correct in asserting that the petitioner is permitted to use the temporary labor certification that it submitted for the previous petition. The governing regulation at 8 C.F.R. § 214.2(h)(15)(iii) states the following:

- [I]f all the beneficiaries covered by an H-2A or 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.

While counsel's assertion is correct, the record does not establish that the beneficiary will fill one of the approved kitchen worker positions not yet filled, and that the period of employment specified in the present petition coincides with the time that remains on the temporary labor certification. No evidence, such as a list of current employees, a list of the number of openings still available, forms W-2, or the like have been

submitted to support the assertion that there are still positions available. 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)).

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

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