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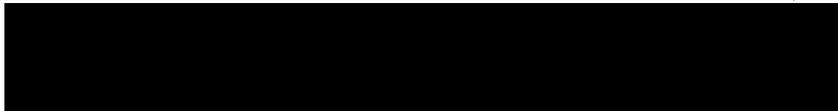
U.S. Citizenship  
and Immigration  
Services

D4



FILE: EAC 05 035 52347 Office: VERMONT SERVICE CENTER Date: JUN 13 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:

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, 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 ten unnamed beneficiaries as kitchen workers for a period of nine months, the petitioner, a restaurant, endeavors to classify them as temporary nonagricultural workers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 101(a)(15)(H)(ii)(b).

The director denied the petition on the basis that the petitioner had failed to 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.

On appeal, the petitioner concedes that the temporary labor certification was certified after the petition was filed and asks that the AAO approve the petition.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states the following:

The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv) of this section.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states the following:

After obtaining a determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by the labor certification determination and supporting documents, with the director having jurisdiction in the area of intended employment.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulates that an H-2B petition for temporary employment in the United States be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made.

The instant H-2B petition was received at the service center on November 15, 2004 without a temporary labor certification or notice detailing the reasons such a certification could not be made. Absent such evidence, the petition cannot be approved, as noted above. As such, the director issued a request for evidence (RFE) on December 22, 2004.

In response to the director's RFE, the petitioner submitted the temporary labor certification. The final determination notice from the DOL is dated January 5, 2005, and the temporary labor certification is valid March 15, 2005 through December 15, 2005. Therefore, the final determination was issued subsequent to the filing of the H-2B petition on November 15, 2004. Thus, the director denied the petition.

Neither the statute nor the regulations cited above allow for the acceptance of a temporary labor certification obtained subsequent to the filing of an H-2B petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A nonimmigrant visa petition may not be approved at a future date

after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner notes that he hired a company to handle the H-2B process for him, and that he struggles with the fact that the company made an "egregious error." The petitioner asks that the AAO approve the petition.

However, there is no provision in the regulations for discretionary relief from the temporary labor certification requirements.

The petitioner also asserts that CIS has approved similar H-2B petitions in the past (when the temporary labor certification was certified subsequent to filing the H-2B petition).

However, each nonimmigrant proceeding is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the instant petition or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based upon evidence substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988). Moreover, the AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.