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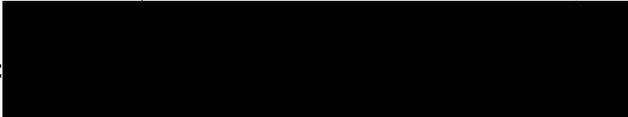
U.S. Citizenship
and Immigration
Services

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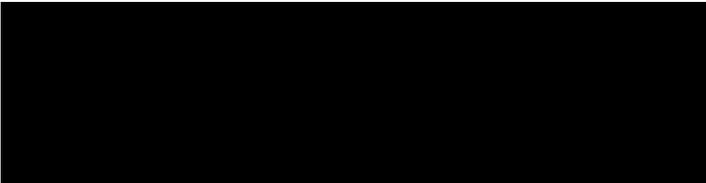
FILE: LIN 04 051 53181 Office: NEBRASKA SERVICE CENTER Date: JUN 14 2005

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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn although the petition is now moot.

The petitioner is the owner of a livestock farm. It desires to employ the beneficiaries as farm workers for seven and one-half months. The director determined that the petitioner had filed the instant petition using a labor certification that had already been utilized for three out of the four job opportunities allowable leaving one position available. The current petition is requesting two farm workers, and therefore, the petition was denied.

On appeal, counsel states that the petitioner requested a reduction in the number of workers on the previously approved petition, LIN-04-048-52675, from three workers to two workers. Counsel states that the request was made prior to the final adjudication of the petition.

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

(ix) *Substitution of beneficiaries after admission.* An H-2A petition may be filed to replace H-2A workers whose employment was terminated early. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving each terminated worker's name, date and country of birth, termination date, and evidence the worker has departed the United States. . . .

The amended Petition for a Nonimmigrant Worker (Form I-129) was filed on December 15, 2003 for two H-2A farm workers to work in Leola, South Dakota. The petitioner filed the amended petition, LIN-04-051-53181, hoping to utilize the approved labor certification filed with its initial petition, LIN-04-048-52675, on December 10, 2003. The petitioner desires to substitute two of the four positions listed on the labor certification with the two workers named in this amended petition. However, the record shows that the petition, LIN-04-048-52675, was approved for three of the four unnamed beneficiaries on December 19, 2003 and notification was sent to the American Consulate in Capetown, South Africa. The approved petition, LIN-04-048-52675, was valid from December 18, 2003 until July 30, 2004.

The beneficiaries named on the amended petition had been working for another employer in the United States under H-2A classification that expired 12-15-03. Counsel states, in her letter dated July 21, 2004, that the two workers have now left the United States and will remain in South Africa until a determination has been made on their appeal.

Upon review, the AAO finds that the petitioner attempted to amend the approved petition, LIN-04-048-52675, by writing a letter. The letter is dated December 13, 2003. The letter requests that the number of positions be reduced by two prior to the adjudication of the petition. The petitioner also filed an amended petition.

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

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. . . .

The petitioner followed the proper procedure and filed Form I-129 to request H-2A classification and extension of the beneficiary's stay in the United States. Since the regulations do allow for a change of employers if the beneficiary is maintaining his previously authorized nonimmigrant status in the United States, the director should have considered the petitioner's request. To remand this case to the director for further action and consideration would have no practical effect because the period of requested employment (December 15, 2003 until July 30, 2004) has passed.

On appeal, counsel for the petitioner states that CIS should accept the new labor certification granted on February 4, 2004. However, this labor certification determination cannot be considered in this proceeding because a final determination was not rendered until February 4, 2004, subsequent to the petition's filing date, December 15, 2003.

Neither the statute nor regulations allow for the acceptance of a labor certification obtained subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A 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). Therefore, the petition is denied.

ORDER: The petition is denied because the matter is moot due to the passage of time.