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U.S. Citizenship
and Immigration
Services

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FILE: EAC 05 038 52859 Office: VERMONT SERVICE CENTER Date: JUN 15 2005

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

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an inn that filed the H-2B petition in order to employ the beneficiaries as chamber maids for the period March 15, 2005 to December 15, 2005.

Quoting relevant regulations at 8 C.F.R. § 103.2(b) and at 8 C.F.R. §§ 214.2(h)(6)(iii)(C) and (iv), the director denied the petition on the basis that, at the time it filed the petition, the petitioner had not obtained from the Department of Labor (DOL) a temporary labor certification or notice stating that such certification could not be made.

The record of proceeding indicates these salient facts: (1) the petitioner filed its application to DOL for temporary labor certification (ETA 750) on November 15, 2004, and the Form I-129 (Petition for Nonimmigrant Worker) on November 17, 2004; (2) on January 21, 2005, DOL issued the temporary labor certification, which the petitioner subsequently submitted to the service center; and (3) the director denied the petition on February 15, 2005, after the service center received the certification.

The petitioner acknowledges that the petition was filed prior to the date that DOL made its determination on the application for temporary labor certification. It seeks approval of its petition on the basis of its assertion that for the past seven years the service center has approved its H-2B petitions, despite the facts that they were filed prior to DOL's determination on the ETA 750.

The relevant CIS regulations clearly preclude approval of an H-2B petition that was filed prior to the DOL determination on the related ETA 750.

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

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 . . . within the time limits prescribed or accepted by each, *and has obtained* a labor certification determination as required by paragraph (h)(6)(iv). . . . [Italics added.]

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulates that an H-2B petition "shall 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 regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states:

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. [Italics added.]

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). 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). CIS regulations do not provide for amendment of a petition once it has been filed, other than by the filing of a new petition with fee. See 8 C.F.R. § 214.2(h)(2)(i)(E).

In light of the relevant regulations, it was material and gross error for the director to approve any previous H-2B petitions where the Form I-129 was filed prior to DOL's determination on the ETA 750. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court, and the AAO is bound to follow decisions of a service center that are contrary to CIS regulations. *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 Immigration and Nationality Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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