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U.S. Citizenship
and Immigration
Services

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FILE: EAC 05 068 52436 Office: VERMONT SERVICE CENTER

Date: JUN 15 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [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.

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

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 child monitor/live-in for a period of one year, the petitioner, a private individual, 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).

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 contends that the director erred in denying the petition. The petitioner asserts that the director erred in not issuing a request for evidence (RFE) prior to denying the petition, and that the director should have made an independent evaluation of the merits of 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 January 10, 2005 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.

The petition did contain a letter from the petitioner indicating that the temporary labor certification was still pending at the DOL. Therefore, the petitioner's argument that the director was required to issue an RFE fails. When there is evidence of ineligibility in the record, 8 C.F.R. § 103.2(b)(8) requires the director to deny the petition, and there is no requirement to issue an RFE. The petitioner's cover letter, dated January 7, 2005, stated that an application for temporary labor certification was pending at the DOL. As such, it could not have been certified prior to the petition's receipt at the service center (the

petitioner concedes on appeal that it has still not been certified).¹ This constituted clear evidence of ineligibility in the record (i.e., no temporary labor certification or notice detailing the reasons such a certification could not be made), and there was no need for the director to issue an RFE. The director was therefore correct to deny the petition without issuing first issuing an RFE.

The record still lacks either a temporary labor certification or a notice detailing the reasons such a certification could not be made. However, even if the petitioner were to now obtain either of these documents, its failure to procure one of them prior to filing the H-2B petition now precludes the petition's approval. 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).

As the lack of a temporary labor certification or notice detailing the reasons such a certification could not be made precludes the approval of this petition, the petitioner's further contentions are not material to the outcome of this appeal and need not be addressed.

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.

¹ The AAO notes that in one of the documents submitted on appeal, the petitioner states that the temporary certification was filed on January 11, 2005, the day after the H-2B petition was received at the service center. This would make it impossible for the petitioner to obtain a temporary labor certification or a notice detailing the reasons such a certification could not be made prior to filing the H-2B petition, as required by the regulations.