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U.S. Citizenship  
and Immigration  
Services

D4

FILE: EAC 05 048 52604 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.

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 two 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.

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 December 4, 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 January 20, 2005.

In response to the director's RFE, the petitioner submitted the temporary labor certification. The final determination notice from the DOL is dated January 7, 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 December 4, 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 does not assert that the director erred in denying the petition. Rather, she simply asks that the AAO sustain the appeal and approve the petition because otherwise, her business will suffer. However, the late filed and certified temporary labor certification precludes the petition's approval, and there is no provision in the regulations for discretionary relief from the temporary labor certification requirements.

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.