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**U.S. Citizenship
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Services**

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FILE: EAC 05 172 54100 Office: VERMONT SERVICE CENER Date: OCT 31 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:



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 operates a premier private country club. It desires to employ the beneficiary as a tennis attendant for six months. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made and denied the petition.

On appeal, counsel states that the fact the petitioner was unable to provide a temporary labor certification or a notice that certification cannot be made at the time of initial visa filing was solely caused by a delay of the New York State Workforce Agency (SWA), which failed to process the temporary alien labor certification in a timely fashion.

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

(C) 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). . . .

The regulations stipulate that an H-2B petition for temporary employment in the United States 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. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on May 27, 2005 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On appeal, the petitioner submitted the final determination notice from the DOL, dated July 14, 2005, and a copy of the original labor certification (Form ETA 750) that had not been certified by the DOL. Although the petitioner applied for a temporary labor certification, prior to the filing of the petition, a determination was not rendered until July 14, 2005, subsequent to the petition's filing date. Counsel states on appeal that the Service, in its discretion, may consider acceptance of the late submission of the DOL notice, nunc pro tunc, given the facts in this case and rule that the petitioner has made every effort to timely file the DOL certification or notice. However, 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).

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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. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.