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FILE: LIN 06 008 50709 Office: NEBRASKA SERVICE CENTER Date: AUG 02 2006

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

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.

Robert P. Wiemann, Chief  
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 appeal will be dismissed. The petition will be denied.

The petitioner is a farm labor contractor that desires to employ the beneficiaries as farm workers 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) for 22 days. The beneficiaries will be performing services for the petitioner's clients, Valley Fruit Orchards in Wapato, WA and Green Acre Farms in Harrah, WA. The director determined that the period of requested employment had already passed at the time the decision was rendered and denied the petition. The director also noted that the State of Washington revoked the petitioner's operating license in December of 2005.

On appeal, counsel states that the timely processing of the I-129 petition would have allowed the beneficiaries to provide essential services through the November 1, 2005 agricultural season. Counsel states that Citizenship and Immigration Services (CIS) can not use the lapsed agricultural season as a legitimate basis to deny the petition. Counsel also states that the petitioner had a valid operating license during the relevant time period. Counsel submits a brief on appeal for consideration.

The I-129, Petition for a Nonimmigrant Worker was filed on October 11, 2005 for 14 named beneficiaries to provide agricultural services and labor. The petitioner explains that it wanted to utilize the approved labor certification for 272 farm workers in its petition, LIN-05-230-53303, by substituting 14 of the 220 visa allocations, with its employees who are currently in the United States holding H-2A visas. The petitioner claims that 220 visa allocations were approved for visa processing at the United States Consulate in Bangkok. However, the petitioner did not have 220 candidates to fill the positions, and desires to utilize 14 of these visa allocations for the individuals named in this petition. The intended period of employment was from October 10, 2005 until November 1, 2005. Counsel states that CIS failed to process the petition during the duration of the certified agricultural season. Counsel claims that after the petitioner filed a mandamus action on April 24, 2006, CIS denied the petition on May 24, 2006 because the agricultural season had expired and the petitioner no longer had an operating license in the State of Washington.

Counsel states on appeal that CIS denied the petition based on factors that would not have existed if the petition had been timely processed. At the time the petition was filed there was an existing certified agricultural labor certification application, a lawful license to operate in the State of Washington<sup>1</sup> and a temporary seasonal need for the beneficiaries' services. If the petitioner had requested expeditious action,<sup>2</sup> the petition would have been timely processed. However, the temporary labor certification expired on November 1, 2005. CIS cannot approve a petition for a temporary agricultural worker without a labor certification valid for the period of employment. 8 C.F.R. § 214.2(h)(5)(i)(D).

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<sup>1</sup> The director's decision indicates that the State of Washington revoked the petitioner's operating license in December 2005.

<sup>2</sup> The AAO notes that the petition was filed 22 days prior to the expiration of the labor certification. The petitioner could have requested premium processing service which guarantees a decision or an adjudicative action in 15 calendar days or the fee is refunded. 8 C.F.R. § 103.2(f)(1).

Beyond the decision of the director, the petitioner failed to fulfill the regulatory requirements for substitution of beneficiaries.

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. A petition for a replacement may not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. . . .

Upon review, the approved temporary labor certification notice dated June 27, 2005 was for 272 farm workers, fruit II, in the State of Washington. The temporary labor certification was valid from July 15, 2005 through November 1, 2005. The proposed beneficiaries are in the United States and seek to extend their status in H-2A classification. The petitioner did not submit a copy of the approval notice for LIN-05-230-53303 covering the workers for which replacements are sought, the names, date and country of birth and number of workers who were admitted into the United States under the approved petition, LIN-05-230-53303, and how many of the positions remain available. The record of proceeding contains a letter dated October 7, 2005 from the petitioner's government relations and visa specialist that states 220 visa allocations were approved for visa processing at the United States Consulate in Bangkok, Thailand. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Absent such evidence, (CIS) cannot utilize the temporary labor certification the petitioner filed with LIN-05-230-532303 for the current petition. For this additional reason, the petition may not be approved.

As discussed above, the temporary labor certification has expired and the petitioner failed to fulfill the regulatory requirements for substitution of beneficiaries. Therefore, the petition is denied.

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. The petition is denied.