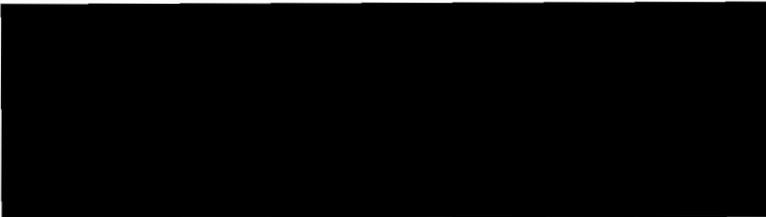




U.S. Citizenship  
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FILE: LIN 06 016 52637 Office: NEBRASKA SERVICE CENTER

Date: SEP 13 2006

IN RE: Petitioner:  
Beneficiaries:



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, Chief  
Administrative Appeals Office

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

The petitioner is a company that supplies seasonal workers to hotels, resorts, and restaurants. It desires to extend its authorization to employ the beneficiaries as resort attendants pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for a period of eight months. The beneficiaries will be performing services for the [REDACTED] and [REDACTED] in Kissimmee, Florida. The acting 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 prior to the filing date of the petition and denied the petition.

On appeal, the petitioner requests that the appeal be considered only for the extension of one beneficiary, namely [REDACTED]

As discussed below, the AAO agrees with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record supports the director's decision to deny the petition. The AAO will dismiss the appeal.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country

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 provide 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 October 21, 2005 without the temporary labor certification, or notice detailing the reasons why such certification could not be made. Absent such evidence, the petition could not be approved.

In his decision, the acting director states that the petition was initially accompanied by a copy of a temporary labor certification that stated that the beneficiaries would be working in Colorado. The temporary labor certification was certified for 500 resort cleaners from October 1, 2005 to May 31, 2006.

Upon the director's request for additional evidence, the petitioner submitted a temporary labor certification that was certified for 300 resort attendants to work in Park City, Utah, for the period October 1, 2005 until May 31, 2006. The petitioner stated that Citizenship and Immigration Services (CIS) was confusing its Utah certification with another. The petitioner also submitted copies of contracts between [REDACTED]

[REDACTED] and the [REDACTED] and [REDACTED]

The contracts reveal the contractor as [REDACTED] and the customers as the [REDACTED] the [REDACTED] and the [REDACTED] in Kissimmee, Florida. The contracts do not mention or make reference to the petitioner, [REDACTED] Services, LLC, but instead state, in pertinent part, the following:

**12.2 Employment Documentation.** It is the understanding and agreement of the Parties that all labor and personnel provided by Contractor to Customer hereunder shall be deemed to be employees or independent contractors of Contractor and not employees of the Customer. . . .

Therefore, the evidence indicates that the beneficiaries will be employed by [REDACTED] VR High Quality Service while they are working for the aforementioned hotels and resorts in Kissimmee, Florida.

The petitioner's operations manager states in its response to the director's request for evidence that 12 of the beneficiaries who work for the petitioner in Utah were assigned to perform temporary services at one location in Kissimmee, Florida. The petitioner's operations manager goes on to state that [REDACTED] remains the Utah employer. The temporary labor certification submitted with the petitioner's response to the director's request for evidence was certified for the beneficiaries to perform their services in Park City, Utah., and not in another location, specifically, Kissimmee, Florida, with another employer. 20 C.F.R. § 655.206(b)(1). The petitioner would need a new temporary labor certification if the beneficiaries are performing services outside the area indicated on the temporary labor certification while under its employment. Since the petitioner did not submit a temporary labor certification for the beneficiaries to work in Kissimmee, Florida, prior to the filing date of the petition, or notice detailing the reasons why such certification could not be made, the petition cannot be approved.

Beyond the decision of the director, the petitioner, [REDACTED] LLC, has not established itself as the employer or the agent of the named beneficiaries.

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

(B) An H-2B petitioner shall be a United States employer, a United States agent, or a foreign employer filing through a United States agent. . . .

The contracts contained in the record of proceeding are not signed by the petitioner and the aforementioned hotels or resorts to show that the petitioner will be the employer of the named beneficiaries. The petitioner has not established that it will retain control over the beneficiaries wherever they are to be employed. The petitioner has not established that it will be responsible for firing, setting hours and working conditions, insurance, leave, and other employment-related factors. Further, the record does not establish that the petitioner will be the agent of the beneficiaries or for the employers. For this additional reason, the petition may not be approved.

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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.