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U.S. Department of Homeland Security
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U.S. Citizenship
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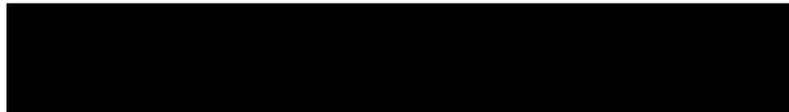
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FILE: WAC 08 075 50381 Office: CALIFORNIA SERVICE CENTER Date: JUL 29 2008

IN RE: Petitioner:
Beneficiaries:



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:

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California 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. It desires to amend its previously approved petition, WAC-07-267-51202, by substituting the 16 workers named in the current petition, WAC-08-075-50381. The beneficiaries will be performing services for the petitioner as farm workers at Tulare County, California from October 11, 2007 to July 30, 2009. The director determined that the petition was not accompanied by a copy of the required temporary agricultural labor certification, Form ETA 750, and denied the petition. The director also determined that the petitioner did not provide the information required for the terminated employees in its previously approved petition, WAC-07-267-51202, to be replaced by the beneficiaries named in the current petition.

On appeal, the petitioner submitted a copy of the letter from the Department of Labor granting temporary labor certification for 33 workers from September 27, 2007 to June 30, 2008, a copy of Form ETA 750, a copy of Form I-797B, Notice of Action, valid from October 11, 2007 to July 30, 2009 for its previously approved petition, WAC-07-267-51202 and a list of 16 workers named in the previously approved petition, WAC-07-267-51202, who did not enter the United States under the previous petition approval.

Upon careful review of the entire record of proceeding, the AAO agrees with the director's finding. Therefore, the AAO will dismiss the appeal.

The petitioner is seeking an amendment of its previously approved petition, WAC-07-267-51202, by replacing 16 of the H-2A farm workers named in the previously approved petition, with the 16 workers named in the current petition, WAC-08-075-50381. The letter from the Department of Labor dated August 28, 2007, that accompanied the current petition, WAC-08-075-50381, shows that the temporary agricultural labor certification was approved for 33 workers and valid from September 27, 2007 through June 30, 2008. The petitioner cannot utilize this labor certification with the current petition as it has already expired and does not cover the period of requested employment. Thus, the director's decision will be affirmed. The petition may not be approved.

The petitioner also provided a copy of Form I-797B, Notice of Action, dated September 17, 2007, for the petition, WAC-07-267-51202 that indicates the petition was approved on October 16, 2007 and valid from October 11, 2007 to July 30, 2009. An approved H-2A petition is valid through the expiration of the relating certification for the purpose of allowing a beneficiary to seek issuance of an H-2A nonimmigrant visa, admission or an extension of stay for the purpose of engaging in the specific certified employment. 8 C.F.R. 214.2 (h)(5)(vii). As the record does not contain an approved temporary agricultural labor certification (Form ETA 750) valid through July 30, 2009, the petition may not be approved.¹

The director also denied the current petition because the petitioner had not provided the evidence required by the regulation at 8 C.F.R. § 214.2(h)(5)(ix) for H-2B workers whose employment had been terminated early. On

¹ It is not clear from the record whether the director erred in approving the previous petition until July 30, 2009, or whether the petitioner submitted the wrong labor certification with the current petition.

appeal, the petitioner has demonstrated that the regulation is not relevant to this petition, as the petitioner is not attempting to substitute for terminated workers, but is seeking to amend its previously approved petition. The AAO withdraws that portion of the director's decision disallowing the substitution.

The petition cannot be approved for another reason. The petition indicates that the dates of intended employment are from October 11, 2007 to July 30, 2009. An H-2A petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year. 8 C.F.R. 214.2(h)(5)(iv)(A). In the current petition, the petitioner intends to employ the beneficiaries for one year and nine months. Absent extraordinary circumstances, the petitioner has not established that its need for the beneficiaries' services is temporary. For this additional reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.