



U.S. Citizenship
and Immigration
Services

D4

[Redacted]

FILE: WAC 09 014 50775 Office: CALIFORNIA SERVICE CENTER Date: DEC 01 2009

IN RE: Petitioner: [Redacted]
Beneficiaries [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:

[Redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhea
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 petition will be denied but the matter is moot due to the passage of time.

The petitioner is a hotel/motel, and it seeks to employ the beneficiary as a dining room attendant 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 the period from October 20, 2008 to May 31, 2009.¹ The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL), and denied the petition.

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 October 21, 2008, with the Final Determination cover letter from DOL stating that the Form ETA 750A was certified for 12 dining room attendants from October 1, 2008 until May 31, 2009.² Although the cover letter from DOL stated that the Form ETA 750A was attached, the petitioner indicated that it never received the certified Form ETA 750A. The petitioner submitted copies of email correspondence between the

¹ The Form I-129 indicates that the petitioner seeks to employ five individuals; however, on appeal, counsel for the petitioner requested to withdraw [REDACTED] and [REDACTED] from the petition.

² The Department of Homeland Security (DHS) published the H-2B Nonagricultural Temporary Worker Final Rule in the Federal Register on December 19, 2008. The final rule became effective on January 18, 2009. See 73 FR 49109. This final rule amends DHS regulations regarding temporary nonagricultural workers, and their U.S. employers, within the H-2B nonimmigrant classification. The current Petition was filed with United States Citizenship and Immigration Services on October 21, 2008, prior to the date the new H-2B regulation came into effect. Under general rules of legal construction, a substantive, non-curative, adverse change in administrative rules is not to be applied retroactively unless the language of both the administrative rule and the statute authorizing the rule requires such a result. *Uzuegbu v. Caplinger*, 745 F.Supp. 1200, 1215 (E.D. La. 1990).

petitioner and the Chicago National Processing Center. The Chicago National Processing Center indicated in its email that the labor certification was certified and it cannot re-issue another ETA 750. The email also stated that "duplicate requests for ETA 750s are only provided to USCIS or the Consulate Office upon their request for the ETA 750s."

The director requested a duplicate copy of the Form ETA 750 from the Chicago National Processing Center and received it. However, the duplicate copy does not have the stamp signed by the certifying officer stating that qualified workers cannot be found in the U.S., and that the division of foreign labor certification policies have been observed.

As noted above, the regulations at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a labor 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.

Absent such DOL certification or notice with the stamp and signature from the certifying officer, the petition cannot be approved. 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).

In addition, without the original certified copy of the Form ETA 750A, there is no proof that the labor certification has not already been utilized.

It is noted that the petitioner requested the beneficiary's services from October 20, 2008 until May 31, 2009. Therefore, the period of requested employment has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 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, although the matter is moot due to the passage of time.