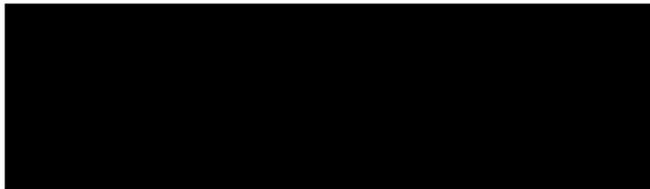




U.S. Citizenship  
and Immigration  
Services

B4



FILE: WAC 08 202 51199 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)(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.

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).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center. A subsequent appeal was incorrectly rejected as untimely filed by the California Service Center. The petitioner filed a Motion to Reopen or Reconsider which was granted by the California Service Center. The matter is now before the AAO on appeal. The director's decision, dated August 25, 2008, will not be disturbed. The petition is denied, although the matter is moot due to passage of time.

The petitioner is a farm service provider that seeks to employ the beneficiary as a farm machine operator pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(a) for the period from August 1, 2008 to May 31, 2009.<sup>1</sup> The Department of Labor (DOL) determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification.

The director determined that the petitioner had not submitted a temporary labor certification from DOL for the beneficiary, [REDACTED] and denied the petition. On September 2, 2008, the petitioner filed an appeal. The director rejected the appeal as untimely filed. The petitioner filed a motion to reopen/reconsider since the appeal was indeed filed timely, and the Service granted the motion. On motion, the petitioner states that although it received a request from the director to submit the original labor certification for the beneficiaries, only the labor certification on behalf of one beneficiary was forwarded to the director. On appeal, the petitioner submits the original labor certification for [REDACTED].

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 July 15, 2008 without a temporary labor certification (ETA 750) or notice from DOL detailing the reasons why such certification cannot be made. On July 18, 2008, the director sent a request for evidence requesting the petitioner to submit an original copy of the labor certification. In response to that request, the petitioner submitted the original labor certification for only one of the two beneficiaries. Absent

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<sup>1</sup> The petitioner requested H-2A classification for two individuals. The director approved the H-2A classification on behalf of [REDACTED], thus, the appeal pertains only to [REDACTED].

such DOL certification or notice detailing the reasons that certification cannot be made, the petition cannot be approved. On appeal, the petitioner submits the original labor certification for the second beneficiary.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

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).

It is noted that the petitioner requested the beneficiary's services from August 1, 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 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, although the matter is moot due to passage of time.