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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: EAC 07 189 51155 Office: VERMONT SERVICE CENTER Date: SEP 08 2009

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved, but the matter is moot due to the passage of time.

The petitioner is a commercial shrimping company and it desires to employ the beneficiaries as shrimp boat deckhand/headers 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 May 1, 2007 to March 1, 2008. The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor.

The petitioner filed the Form I-129 on June 14, 2007. The petitioner filed the petition with the final determination of the DOL stating that the labor certification could not be certified. The petitioner also submitted supporting documentation as countervailing evidence.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The director reviewed the petition and the countervailing evidence and certified the petition for approval on July 13, 2007. Since the petition was filed without a certified labor condition, the regulations require that the director send the decision to the AAO for review. The nonimmigrant visa petition was approved by the Director, Vermont Service Center, and certified to the AAO for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). On July 23, 2007, the decision of the director was affirmed and the petition was approved.

On appeal, the petitioner states that it received the AAO's decision, however, the approval notice, Form I-797, was never sent to the petitioner.

On June 13, 2008, the director sent a second request for evidence. The request indicated that the employment dates listed on the I-129 had passed and if the petitioner wishes to continue with the petition, the petitioner must present a new labor certification with the new employment dates. On July 18, 2008, the petitioner submitted a response to the request for evidence that stated it wishes to continue with the petition and it submitted a new labor certification certified on March 4, 2008, for the new employment dates, as requested by the director. On July 2, 2008, the director denied the petition on the ground that the labor certification was filed after the instant petition was filed. On July 18, 2008, the petitioner filed Form I-1290B with supporting documentation.

Upon review of the record, the petition was approved by the Service Center on July 13, 2008 and on certification, the AAO affirmed the director's decision. Since the director's second request for evidence, dated June 13, 2008, and the director's denial decision, dated July 18, 2008, all occurred after the petition was approved, the AAO will withdraw the denial dated July 18, 2009. Thus, the AAO's decision, dated July 23, 2007, will be undisturbed and the petition is approved.

Upon review of the record, sufficient evidence was submitted by the petitioner to qualify for H-2B classification on behalf of the beneficiaries. It is noted that the petitioner requested the beneficiary's services from May 1, 2007 until March 1, 2008. Therefore, the period of requested employment has passed.

On appeal, the petitioner has overcome the concerns addressed in the director's decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved, although the matter is moot due to passage of time.