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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**

D4

FILE: WAC 08 256 50982 Office: CALIFORNIA SERVICE CENTER Date: **APR 05 2010**

IN RE: Petitioner:
Beneficiary:

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 "Perry Rhew", with a horizontal line extending to the right. Below the signature, the initials "tol" are written.

Perry Rhew
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 is sustained but moot due to the passage of time.

The petitioner states it operates a hotel. The petitioner seeks to employ 48 named beneficiaries as servers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from October 1, 2008 until June 30, 2009. The director determined that the petitioner had not submitted a certified temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made at the time of filing the petition, and denied the petition.

The petitioner initially filed Form I-129, Petition for a Nonimmigrant Worker, on June 24, 2008, to request H-2B classification for 50 unnamed beneficiaries living abroad (WAC 08 188 52005), which was approved by United States Citizenship and Immigration Services (USCIS) granting H-2B classification for 50 unnamed workers, valid from October 1, 2008 until June 30, 2009. The approval listed the two different consulates to be notified as Istanbul, Turkey and Kyiv, Ukraine. On September 30, 2008, the petitioner filed an amendment to the previously approved petition (WAC 08 256 50982) in order to request an extension of stay and a change of employer for beneficiaries currently residing in the United States, rather than a consular processing of the H-2B nonimmigrant visa at the consulates abroad. In the petition, the petitioner submitted a copy of the DOL certified temporary labor certification utilized in the first petition, which was valid from October 1, 2008 until June 30, 2009, and the USCIS approval notice.

The director sent a request for evidence which required the petitioner to submit the original DOL certified temporary labor certification. On appeal, the petitioner asserts that it never received the director's request for evidence. On appeal, the petitioner provided an email exchange with the Chicago National Processing Center requesting a duplicate copy of the certified temporary labor certification and the response stating that the petitioner cannot receive a duplicate copy. The petitioner also explained that the petition is to amend a previously approved petition and it provided a copy of the approval notice and a copy of the certified temporary labor certification which was still current at the time the current petition was filed. On appeal, the petitioner explains that it wanted to utilize the labor certification in its previously approved petition, WAC 08 188 52005. The petitioner states on appeal that it did not utilize any of the 50 approved visa allocations; therefore, these visa allocations are available for usage by the petitioner.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) states in pertinent part:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

In addition, the regulation at 8 C.F.R. § 214.2(h)(2)(2009) states in pertinent part:

(iii) *Named beneficiaries.* . . . If all of the beneficiaries covered by an . . . H-2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with a copy of the same labor certification. Each petition must reference all previously filed petitions for that labor certification.

(iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H-2B petitions that are approved for a group, or H-2B petitions that are approved for unnamed beneficiaries, or approved H-2B petitions where the job offered to the alien(s) does not require any education, training, and/or experience. . . .

As stated above, an amended petition “must be accompanied by a current or new Department of Labor determination.” The petitioner submitted a photocopy of the DOL certified temporary labor certification, certified on June 6, 2008, valid from October 1, 2008 until June 30, 2009. Since the current petition was filed on December 30, 2008, the temporary labor certification was current. In addition, the regulations permit a petitioner to file multiple petitions naming the beneficiaries, with a copy of the same labor certification used to obtain the initial approval of H-2B classification. In this case, the petitioner initially filed for H-2B classification on behalf of unnamed workers and then subsequently filed an amended petition to name the workers. Thus, it was appropriate to submit a photocopy of the initial labor certification. For this reason, the AAO will withdraw the director’s decision on this issue.

It is noted that the petitioner requested the beneficiaries’ services from October 1, 2008 until June 30, 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 met that burden.

ORDER: The appeal is sustained but moot due to the passage of time.