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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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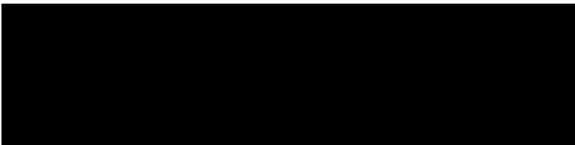
FILE: WAC 09 041 50789 Office: CALIFORNIA SERVICE CENTER Date: **APR 06 2010**

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:



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 Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the AAO on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a contractor that seeks to employ the beneficiaries as housekeepers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b). 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.

On appeal, counsel for the petitioner asserts that the petitioner submitted a final determination for reduced number certification from DOL in response to the director's request for evidence. Counsel further asserts that the petitioner did not "furnish his attorney the original ETA 750 initially and his failure to submit the ETA 750 to the Service was a mere harmless error." Counsel also stated that the petitioner had requested a temporary labor certification from DOL "which was pending at the time of filing the instant petition [and] was expected to be completed within the first couple of weeks of December, 2008 [sic]."

The regulation at 8 C.F.R. § 214.2(h)(6)(iii) (2009) 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 December 1, 2008 without a certified temporary labor certification (ETA 750) or notice from DOL detailing the reasons why such certification cannot be made. Absent such DOL certification or notice detailing the reasons that certification cannot be made, the petition cannot be approved. The petitioner subsequently submitted a temporary labor certification that was certified on January 7, 2009, after the present petition was filed.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) (2009) states that:

After obtaining a determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by

the labor certification determination and supporting documents, with the director having jurisdiction in the area of intended employment.

Neither the statute nor regulations allow for the acceptance of a labor certification obtained subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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).

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.