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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

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **AUG 11 2010**

IN RE: Petitioner: [Redacted]
Beneficiary: [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:

[Redacted]

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition denied.

The petitioner operates a ranch/farm that seeks to continue to employ the beneficiary as an agricultural equipment operator pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(a), for the period from February 1, 2009 to November 30, 2009. The Department of Labor (DOL) determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification.

The petitioner also requested a nunc pro tunc reinstatement of status in order to reinstate the beneficiary's status retroactively to October 1, 2007.

On March 9, 2009, the director denied the petition pursuant to 8 CFR 214.2(h)(5)(iii)(B), concluding that the record clearly indicates that the petitioner has violated section 274A of the Act within the two-year period prior to filing the petition and is therefore barred from establishing the required intent to employ the beneficiary in accordance with the terms and conditions of the labor certification.

The regulations at 8 C.F.R. § 214.2(h)(5)(iii) states the following:

(iii) *Ability and intent to meet a job offer* —(A) *Eligibility requirements.* An H-2A petitioner must establish that each beneficiary will be employed in accordance with the terms and conditions of the certification, which includes that the principal duties to be performed are those on the certification, with other duties minor and incidental.

(B) *Intent and prior compliance.* Requisite intent cannot be established for two years after an employer or joint employer, or a parent, subsidiary or affiliate thereof, is found to have violated section 274(a) of the Act or to have employed an H-2A worker in a position other than that described in the relating petition.

The regulation at 8 C.F.R. § 274a.1 states the following:

(a) The term *unauthorized alien* means, with respect to employment of an alien at a particular time, that the alien is not at that time either: (1) Lawfully admitted for permanent residence, or (2) authorized to be so employed by this Act or by the Attorney General;

The petitioner filed the current petition on February 18, 2009. Counsel also filed a memorandum in support of the petition and requested a motion for nunc pro tunc retroactive/reinstatement of status due to qualifying circumstances. Specifically, counsel for the petitioner stated that when the beneficiary was still in H-2A status, the petitioner contacted the United States Citizenship and Immigration Services (USCIS) hotline and was told that "if [counsel for the petitioner] filed a PERM labor certification before the H-2A status expired that [the beneficiary] could remain in

the US in lawful status while the PERM application processed.” Thus, the petitioner filed the PERM application on behalf of the beneficiary on January 11, 2008. Counsel claimed that both the petitioner and the beneficiary believed that they submitted the appropriate filing in order to keep the beneficiary in lawful status. Counsel also explained that the petitioner never filed a PERM application before and was confused with the immigration laws, and that the petitioner and beneficiary should not be “penalized for being incorrectly advised on either the H-2A program or properly filing a PERM application [by the USCIS 800 number].” Counsel also cites to 8 C.F.R. § 214.1(c)(4) to request that the Service use its discretion to reinstate the beneficiary’s status to September 20, 1007.

As noted above, pursuant to 8 CFR § 214.2(h)(5)(iii)(B), the director concluded that the record indicates that the petitioner has violated section 274A of the Act within the two-year period prior to filing the petition and is therefore barred from establishing the required intent to employ the beneficiary in accordance with the terms and conditions of the labor certification.

On appeal, counsel contends that the beneficiary qualifies for an extension of stay under 8 C.F.R. § 214.1(c)(4) and thus is not barred from establishing the required intent to employ the beneficiary in accordance with the terms and conditions of the labor certification.

The regulation at 8 C.F.R. § 214.1(c)(4) states:

(4) *Timely filing and maintenance of status.* An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
- (ii) The alien has not otherwise violated his or her nonimmigrant status;
- (iii) The alien remains a bona fide nonimmigrant; and
- (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

The AAO now turns to a consideration of whether the petitioner may qualify under the four criteria listed under 8 C.F.R. § 214.1(c)(4). The first prong requires a demonstration that the delay in filing an extension petition was due to extraordinary circumstances beyond the control

of the applicant or the petitioner, and the Service finds the delay commensurate with the circumstances.

In the memorandum submitted with the petition, and in the appeal brief, counsel for the petitioner stated that the petitioner wanted to sponsor the beneficiary for permanent residence status and called the USCIS 800 number to obtain information on how to do this process. Counsel further states that the petitioner was told by the USCIS 800 number that if she submits a PERM application for the beneficiary prior to the expiration of his status, the beneficiary will remain in status while the PERM application is pending. The PERM application was filed on January 11, 2008.

The petitioner also submitted an affidavit stating that she relied on the officers on the USCIS hotline and was told that the beneficiary will stay in status as long as the PERM application is pending. The petitioner did not provide any documentation to establish that a PERM application was in fact filed for the beneficiary. The petitioner only presented a document from the United States postal service tracking a package that was sent to Chicago, Illinois and received on January 14, 2008. However, the tracking document does not state what was sent to Chicago, Illinois, and thus, does not establish that a PERM application was filed on behalf of the beneficiary. In addition, the petitioner did not submit a receipt for filing a PERM application from the processing center. Furthermore, in the petitioner's affidavit, the petitioner stated that she "subsequently sent an email to the DOL office in Chicago," and the "Chicago office forwarded my email to an office in Atlanta," and she stated that she was "contacted by mail from the Atlanta office." Again, the petitioner did not submit any corroborating documentation. Moreover, the petitioner claims that the PERM application must be lost because she never heard anything about it. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the petitioner claims to have relied on the information provided to her by the USCIS hotline. However, there is no indication that the officer in the hotline actually gave her the incorrect information. Furthermore, the hotline is a resource available for applicants but it is not legal authority.

Upon review of the record, the petitioner did not provide sufficient evidence to establish 8 C.F.R. § 214.2(h)(c)(4)(i).

The AAO turns to the criterion at 8 C.F.R. § 214.2(h)(c)(4)(ii), which requires evidence that the alien has not otherwise violated his or her nonimmigrant status. On appeal, counsel stated that the beneficiary has "not violated the terms of his status in any other manner." Counsel further states that the beneficiary has not "knowingly worked without the authorization granted incident to his H-2A status; he has no criminal convictions, stops, arrests or fines. He has never entered the U.S. without inspection and continues to remain committed to operating within the confines of the laws and regulations." However, since the beneficiary has been working without authorization, he has violated his nonimmigrant status.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(c)(4)(ii), which requires evidence that the alien remains a bona fide non-immigrant under the regulations and is not in removal proceedings.” The alien is not in status and thus does not remain a bona fide nonimmigrant. The beneficiary is not yet in removal proceedings but the petitioner was contacted by an agent from U.S. Immigration and Customs Enforcement (ICE) who told the petitioner that the beneficiary is out of status. On appeal, the petitioner stated that the ICE officer said that “if we did not choose to file this Motion, that [the beneficiary] would need to make arrangements to leave or be placed in removal proceedings.”

The petitioner did not provide evidence or argument on appeal that persuasively overcomes the decision of the California Service Center Director to deny the petition. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.