identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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 09 080 50688 Office: CALIFORNIA SERVICE CENTER Date: JAN 13 2010

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.

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 will be sustained and the petition will be approved, although the matter is moot due to the passage of time.

The petitioner is engaged in landscape services, and seeks to amend the previously approved petition to employ the beneficiaries as landscape laborers 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 April 1, 2009 to November 14, 2009. On December 17, 2008, the petitioner initially filed the Form I-129 for H-2B classification which was approved on December 22, 2008, granting H-2B classification for 29 workers (EAC 09 058 50076). In the initial filing, the petitioner requested that the beneficiaries perform services in various counties in Texas. On January 26, 2009, the petitioner filed an amendment to the previously approved petition (WAC 09 080 50688) in order to expand the location of employment to areas in Colorado. The petitioner submitted a new certified labor certification from the Department of Labor (DOL) to include the new employment areas in Colorado [redacted]

The director denied the petition on the ground that U.S. Citizenship and Immigration Services (USCIS) received sufficient numbers of H-2B petitions to reach the statutory numerical limitation (the H-2B cap) for the second half of fiscal year 2009 (FY09) and the petitioner did not qualify for an exemption from the H-2B cap.

The issue before the AAO is whether the petitioner qualifies for exemption from the FY09 H-2B cap.

On appeal, the petitioner asserts that since the current petition is an amendment to an already approved petition for H-2B classification, the petitioner is not subject to the FY09 H-2B cap. The petitioner states that the beneficiaries listed on the amended Form I-129 are 19 of the same 29 individuals that were counted as beneficiaries in the previously approved petition (EAC 09 058 50076).

According to the Federal Register announcement regarding reaching the congressionally mandated H-2B cap for the second half of Fiscal Year 2009 (FY2009), certain petitions are exempt from the H-2B cap. The announcement stated the following:

> Petitions for workers who are currently in H-2B status do not count towards the congressionally mandated bi-annual H-2B cap. USCIS will continue to process petitions filed to:
>
> Extend the stay of a current H-2B worker in the United States;
>
> Change the terms of employment for current H-2B workers and extend their stay; or
>
> Allow current H-2B workers to change or add employers and extend their stay.

In addition, regulations at 8 C.F.R. § 214.2(h)(A)(ii), state the following:

> *Procedures.* (A) Each alien issued a visa or otherwise provided non-immigrant status under section 101(a)(15)(H)(i)(b), 101(a)(15)(H)(i)(c), or 101(a)(15)(H)(ii) of the Act shall be counted for purposes of the numerical limit.

As discussed above, the petitioner filed an amendment to a previously approved petition. Therefore, the petitioner seeks to "change the terms of employment for current H-2B workers" and is exempt from the H-2B classification because the petitioner was already granted an approval notice and the beneficiaries were already counted towards the numerical limit with the previous petition (EAC 09 058 50076).

The regulations at 214.2(h)(2)(E) state the following:

> *Amended or new petition.* 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 specific 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 the instant case, the petitioner filed an amended petition with a new filing fee and a new certified labor certification from DOL for the extended area of employment in Colorado. Thus, the petitioner provided sufficient evidence to approve the amended petition.

It is noted that the petitioner requested the beneficiary's services from April 1, 2009 until November 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 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 the passage of time.