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Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street NW

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536



File: LIN 02 209 50735 Office: Nebraska Service Center

Date: JUN 12 2003

IN RE: Petitioner:  
Beneficiary



Petition: Petition for 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:



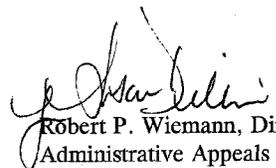
**INSTRUCTIONS:**

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a hog farm. It desires to employ the beneficiary as a swine production worker for an indefinite period. The petition was not accompanied by the required temporary agricultural labor certification, ETA-750. The director determined that absent the certification, the petitioner failed to meet the regulatory requirements necessary for approval of the petition.

On appeal, counsel states that the Minnesota Department of Economic Security (MDES) is experiencing a backlog on Foreign Labor Certifications of approximately 13 to 14 months. Counsel also states that it is through no fault of the employer or the employee that they were unable to send the Alien Employment Certification.

The regulation at 8 C.F.R. § 214.2(h)(5)(i)(A) states in pertinent part that:

An H-2A petition must be filed on Form I-129. The petition must be filed with a single valid temporary agricultural labor certification.

The regulation at 8 C.F.R. § 214.2(h)(5)(i)(D) states in pertinent part that a H-2A petition:

will be automatically denied if filed without the certification evidence required in paragraph (h)(5)(i)(A) of this section....

The petition was filed on July 11, 2002 without a temporary agricultural labor certification. Absent such documentation, the petition cannot be approved.

Counsel requests on appeal that an extension of the beneficiary's IAP-66 be extended retroactively from June 22, 2002, and to continue, pending the MDES's decision on the Application for Foreign Labor Certification. However, neither the statute nor the regulations allows for the extension of stay of a different nonimmigrant classification, such as an exchange visitor under the J-1 category, during this proceeding. An Application to Extend or Change Nonimmigrant Status (Form I-539) must be filed accompanied by a new Form DS-2019, supporting documents and fee.

This petition cannot be approved for an additional reason. The petition indicates that the dates of the intended employment for the beneficiary are from February 2002 to present. The petitioner has not established that the need for the services to be performed is temporary.

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 not met that burden.

**ORDER:** The appeal is dismissed.