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Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536



FILE: LIN 02 133 54397

Office: Nebraska Service Center

Date:

JUN 25 2003

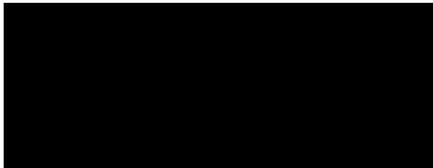
IN RE: Petitioner:

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:



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 engages in the business of building and landscape stone quarrying fabrication and packaging. It desires to employ the beneficiaries as laborers for a period of nine months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could be made. The director determined that the petitioner had not established that the beneficiaries had the requisite education specified in the application for labor certification.

On appeal, counsel states that the Bureau of Citizenship and Immigration Services (Bureau) abused its discretion by failing to give an adequate explanation in its decision regarding its inconsistent treatment of two similar H-2B petitions and by failing to consider relevant factors critical to the petition. Counsel also states that, even if the Bureau did not abuse its discretion, the erroneous statement of the education requirements is a harmless error when the advertisement neither indicated such requirement nor did it decrease the pool of United States job applicants.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

The regulation at 8 C.F.R. § 214.2(h)(6)(vi)(C) states:

Alien's qualifications. Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary;

The Application for Alien Employment Certification (Form ETA 750) at Part A indicates that the minimum amount of education required to perform satisfactorily the job duties is four years of high school education.

On May 13, 2002, the Bureau requested that the petitioner submit evidence that the beneficiaries obtained the required four years of high school as indicated on Form ETA 750. In its response dated

May 24, 2002, counsel states that the petitioner admits that the requirement of a four-year high school education as indicated on Form ETA 750 was a sheer supervisory oversight. Counsel goes on to state that the petitioner had never demanded such requirement during any of its past or present recruitment efforts for the same or similar positions. Unfortunately, after a certification has been issued any amendments to be made to the job requirements on the ETA 750, must be addressed to the Department of Labor.

In this case, the petitioner, through its counsel, has not provided documentation that the beneficiaries qualify for the job offer as specified on the ETA 750. Absent documentation to establish that the beneficiaries have four years of high school education, as specified on the labor certification, the petition may not be approved.

On appeal, counsel claims eligibility in view of the Bureau's inconsistent treatment of two identical H-2B petitions filed by the petitioner. Counsel states that the certified temporary labor certifications contained the same minimum job requirements as the present petition. Counsel asserts that all of the beneficiaries under both petitions had virtually the same background or experience where none of them possessed a high school diploma and the Bureau approved one petition and denied the other. However, this Bureau is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Bureau or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied*, 485 U.S. 1008 (1988).

Further, counsel cites two Department of Labor Board of Alien Labor Certification Appeals (BALCA) decisions in support of the appeal and argues that it is a harmless error when the failure to state the exact job requirements in the advertisements does not decrease the pool of job applicants or defer any United States workers from applying for the job. However, the BALCA decisions have no bearing on this case. In this proceeding, the petitioner has not established that the beneficiaries qualify for the job offer as specified on the labor certification.

Counsel also cites an AAO decision in support of her argument. The regulation at 8 C.F.R. § 103.3(c) provides that Bureau precedent decisions are binding on all Bureau employees in the administration of the Act. However, unpublished decisions are not similarly binding.

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.