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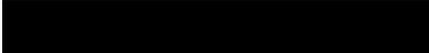
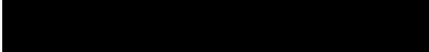
U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 204 53414 Office: CALIFORNIA SERVICE CENTER Date: **MAR 16 2005**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a food service company specializing in door-to-door delivery of home-style Indian foods to corporations and individuals in the bay area. It desires to employ the beneficiary as a specialty chef for one year. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that the position being offered is temporary.

On appeal, counsel states that the information provided is sufficient to justify the position is a one-time occurrence and temporary. Counsel also states that the petitioner needs the beneficiary's services as a trainer. Additional evidence has been submitted with the appeal for consideration.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), 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

.....

The test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is a one-time occurrence.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(I).

The copy of the newspaper advertisement for the proffered position reads:

Food Service

Specialty Chef (one position), Santa Clara, CA. Responsible for implementing new and improved standard of production in the Asian Indian cuisine area, and for training of production staff to ensure superior quality of food production and service. Assist chef supervisor in developing the Annadaata recipe database and train food preparation staff accordingly. Assist in developing new menus with innovative, heart-healthy Indian dishes. Training production staff to ensure superior

quality of food and services. Training of food preparation workers and packaging staff personnel to improve existing service. Assist in development and implementation of new spice range of Annadaata's Edugiri food products, and train staff to prepare and maintain the same. . . Require: 2 years of experience with Indian Masalas, Kerala/Tamlinad and Andhra home style cooking. 2 years of experience with different types of Indian cuisine (Moghlay style, Indo-Chinese, Northern Indian, etc.) 2 years of experience working with commercial cooking equipment (Idli cookers, Dosa griddles, commercial mixer grinders and convection ovens, Tandoor grills, commercial packaging equipment. . . .

The director determined in his decision that the offered position is not temporary. However, it is the petitioner's need for the services which is controlling. Therefore, it must be shown that the petitioner's need for the beneficiary's services is temporary.

Counsel states on appeal that the petitioner needs the beneficiary's services as a trainer for only a short period of time. Counsel states that once the beneficiary trains the current employees to apply these authentic cooking styles, this position will cease to exist. However, a training program has not been outlined in the record of proceeding providing details of the training for the production staff, packaging staff personnel and the food preparation workers. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petition indicates that the petitioner currently employs a total of six employees. Absent a training program and trainees, the petitioner has not established that the beneficiary will not be engaged in productive full-time employment. The petitioner has not demonstrated that its need to employ the beneficiary is a one-time occurrence and temporary.

The petition cannot be approved for another reason. The petitioner has not established that the beneficiary possesses two years of experience working with commercial cooking equipment. The letters submitted to substantiate the beneficiary's cooking experience do not mention whether the beneficiary worked with commercial cooking equipment, specifically those mentioned in the news advertisement. Therefore, the petitioner has not established that the beneficiary meets the job requirement stipulated on the ETA 750.

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.

