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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 00 004 52269 Office: Vermont Service Center Date: JUN 4 2001

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: [Redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: This is a motion to reopen the Associate Commissioner for Examination's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The motion to reopen will be granted and the previous decisions affirmed.

The petitioner is engaged in a catering business. It desires to employ the beneficiaries as specialty cooks for a period of six months. The Department of Labor issued a temporary labor certification by the Secretary of Labor. The director determined that the petitioner had not established that the positions are of a temporary nature. The director's decision was affirmed by the Associate Commissioner on appeal.

On motion, the petitioner submitted additional evidence to show the seasonal nature of its catering business.

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....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that 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. See 55 Fed. Reg. 2616 (1990).

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 seasonal. The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be a seasonal need, the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the

period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads in pertinent part "the incumbent will be required to undertake the responsibilities of a chef and will be in charge of preparing the Farsan specialty items of India, such as...and other Indian specialty dishes served at functions and parties. He will select the ingredients, use his knowledge and experience about recipes and prepare them with or without the assistance of other staff, as may be required, and to handle the material, decorate the same and present it, ready to be served at special occasions, parties and functions."

The petitioner states that the certification from its accountant demonstrates a consistent seasonal pattern of cash flow between July and December each year. However, the petitioner is an Indian restaurant that has a regular year round business in addition to a growing catering business that serves the Indian community and the general public. Therefore, an accountant report cannot be used to show that the petitioner's need for the services of the beneficiaries is traditional tied to a season of the year by an event. The petitioner has not demonstrated that the majority of its catered events were for Indian community celebrations during this time period, and therefore, its need for temporary labor should be considered seasonal. The petitioner will always need the availability of specialty chefs in order to cater to large functions and parties all year round. The petitioner has not shown that the nature of its need for specialty chefs is temporary in nature.

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. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed.

ORDER: The order of December 5, 2000 dismissing the appeal is affirmed. The petition is denied.