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U.S. Citizenship and Immigration Services

[redacted]

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FILE: LIN 03 276 52618 Office: NEBRASKA SERVICE CENTER Date: NOV 12 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

Mari Johnson

For 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 The director's decision will be withdrawn although the petition is now moot.

The petitioner is a full service conference center, lodging and restaurant and bar operation. It desires to employ the beneficiaries as dining room attendants for six 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 a temporary need for the beneficiaries' services.

On appeal, the representative for the petitioner states that the Citizenship and Immigration Services' officer misinterpreted the forms, figures and documents. Additional evidence has been submitted with the appeal.

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 peakload and the temporary need is unpredictable.

To establish that the nature of the need is "peakload," the petitioner must demonstrate that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

The petition was properly filed on September 25, 2003. The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Facilitate service, set up banquet tables and dining rooms, serve beverages, keep dining room clean.

On appeal, the representative for the petitioner states that there is an increase in banquets and corporate functions from November to April. With this increase, the petitioner explains that there is a need for more food and beverage employees. The evidence submitted with the appeal shows that in the year 2001, the food and beverage sales range from $150,000 to over $250,000 during the months the petitioner requested additional workforce to assist its permanent workforce, whereas food and beverage sales averaged less than $140,000 for the months that the petitioner does not require their services. In fact, food and beverage sales for the months of May through September of 2001 ranged from less than $80,000 to approximately $98,000. The petitioner showed similar trends for the year 2000. Accordingly, the petitioner has demonstrated that its need for the beneficiaries' services is peakload and temporary.

This decision will have no practical effect because the period of requested employment has passed.

ORDER: The decision of the director is withdrawn, although the petition is now moot due to the passage of time.