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U.S. Citizenship
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FILE: LIN 06 038 50929 Office: NEBRASKA SERVICE CENTER Date: APR 05 2006

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 Acting Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a private citizen that desires to employ the beneficiary as a household manager for one year. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the employer was not offering the same terms and conditions to United States workers as he was offering to the foreign worker. Further, the DOL determined that there were qualified United States workers who were available for the job. The acting director determined that the petitioner presented a valid reason for not hiring the only United States worker who applied for the position; however, the acting director found that the job description was not accurately reflected in the newspaper print ads and on Form ETA 750. Therefore, the petitioner had not overcome one of the objections addressed in the DOL's decision and the acting director denied the petition.

On appeal, counsel states that the newspaper print ads did accurately reflect the job description.

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 shall 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 and that the temporary need is periodic.

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)(1).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Live-in household manager. Will perform or supervise all duties relating to household management. Will communicate in French when receiving and providing hospitality to West African francophone business guests; will shop for family food supplies and preparation of formal and informal meals including the preparation of a variety of traditional West African dishes; responsible for light family cleaning duties in the private household. Responsible for obtaining long-term service for household through recruitment and training of independent contractors to complete specific household tasks. Temporary employment 11/01/05-10/30/06. Work 8-hour rotational shifts 4:30am to 2:00am.

The DOL states in its decision that the requirement to prepare West African dishes was not stated in the newspaper print ads that appeared in the Oregonian on October 14-16, 2005, nor was it stated on the Form ETA 750, Item 15, under the heading "Other Special Requirements". Therefore, the DOL determined that the petitioner was not offering the same terms and conditions to United States workers as he was offering to the foreign worker. The acting director concurred with the decision made by the DOL.

On appeal, counsel states that a comparison of the job description against what appeared in the newspaper print ads clearly show that the job description was fully and accurately reflected in the print ads. Counsel also asserts that the key duty of preparation of a variety of West African dishes was also clearly laid out in the job description as well as in all three of the print ads. The record of proceeding as it is presently constituted does not contain the newspaper print ads. Counsel has not submitted copies of the newspaper print ads with the appeal to substantiate his assertions. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Absent copies of the newspaper print ads, the AAO cannot determine if the job description was fully and accurately reflected in the newspaper print ads. Accordingly, the petition must be denied.

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. The petition is denied.

