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U.S. Citizenship
and Immigration
Services

D2



JUN 08 2007

FILE: EAC 06 248 51072 Office: VERMONT SERVICE CENTER Date: JUN 08 2007

IN RE: Petitioner:
Beneficiaries



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:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

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

The petitioner runs a store and is engaged in the sale of furniture, appliances, clothing, bedding, and industrial and commercial distributions, located in Myers, Florida. It desires to employ the beneficiaries as assemblers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for the period of October 15, 2006 to July 10, 2007. The Department of Labor (DOL) determined that a temporary labor certification (Form ETA-750) by the Secretary of Labor could not be made because the petitioner had not established that its need for the beneficiaries' services is temporary, and the petitioner did not provide evidence that the job had been advertised for three consecutive days in a newspaper of general circulation in the area of intended employment.

On appeal, the petitioner states that it requests ten additional workers for a temporary one-time occurrence. The petitioner states that it needs to supplement the permanent workforce as a "result of a peak load/seasonal increase in bedding/furniture proposals for our fall/2006 summer 2007 season." The petitioner states that it only needs the supplemental workers for ten months in order to complete the contracts.

In addition, the petitioner submitted a letter to CIS indicating that the DOL did not certify the temporary labor certification because the petitioner did not respond to the rebuttal in a timely manner. On appeal, the petitioner asserts that it mailed all supporting documentation in a timely manner but there was a "delay with the postal services." The petitioner submits copies of the job advertisement posted in The Miami Herald for three consecutive days, April 2, 2006, through April 4, 2006.

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 regulation at 8 C.F.R. § 214.2(h) provides, in part:

(6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B):*

(i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

(ii) *Temporary services or labor:*

(A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* 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:

(1) *One-time occurrence.* The petitioner must establish 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.

(2) *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.

(3) *Peakload need.* The petitioner must establish 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.

(4) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states 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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner seeks approval of the proffered position as a peakload need. On appeal, the petitioner asserts that the petition is for a one-time occurrence.

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).

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

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

Sorting and assembler items for sales processing, maintaining the neatness of the store, tagging [sic] and pricing garments as well as furniture, loading and unloading packages, ect... [sic]

As stated on the petition (Form I-129), the petitioner explains that its temporary need for the beneficiaries' services arose because there has been a "high increase in sales for items such as; clothing, Shoes, Mattress, household items and furniture, ect." In addition, the petitioner stated that due to the recent devastation of Hurricanes Wilma and Katrina, the demand for assemblers, cashiers, and truck drivers is very high. In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload as a retail store. The petitioner has not carefully documented the peakload situation through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or has different specialty skills than the 6 workers currently employed by the company. Consequently, the petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation.

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 petition indicates that the employer currently has 6 employees. Consequently, the petitioner has not demonstrated that it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future. Further, 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 petitioner's need for assemblers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

As stated on the petition (Form I-129), the petitioner explains that its temporary need for the beneficiaries' services arose because there has been a "high increase in sales for items such as; clothing, Shoes, Mattress, household items and furniture, ect." In addition, the petitioner stated that due to the recent devastation of Hurricanes Wilma and Katrina, the need for assemblers, cashiers, and truck drivers is dire. The petitioner has not demonstrated through copies of invoices, sales, financial statements or contracts or other documentary evidence that the requested employment is for a one-time occurrence. It is the nature of the need, not the nature of the duties, that determined whether a position is temporary. *Matter of Artee Corp.*, 18 I & N Dec. 366 (Comm. 1982). The petitioner has not demonstrated 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 workers. That petitioner has not established that its need for the beneficiaries' services is a one-time occurrence and temporary. 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)).

In addition, the DOL stated in its decision that a certification could not be issued because the employer did not submit proof of the job advertisement in the local newspaper for three consecutive days. However, the record of proceeding contains a copy of the petitioner's job advertisement for three consecutive days in The Miami Herald. Therefore, this concern expressed in the DOL's decision has been overcome.

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.