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FILE: EAC 07 003 50915 Office: VERMONT SERVICE CENTER Date: MAR 14 2007

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

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied although the matter is moot due to the passage of time.

The petitioner engages in custom floor design and installation. The petitioner desires to extend its authorization to employ the beneficiaries as custom flooring installers and finishers for three months. 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. The director determined that the petitioner had not established that its needs meet the regulatory definition of temporary services or labor and denied the petition.

On appeal, counsel states that despite the fact that Form ETA-750 filed with the instant petition reflected the petitioner's request for three workers for an additional period of October 1, 2006 to March 31, 2007, the visa petition (Form I-129) only sought workers for the balance of the year (October 1 to December 31, 2006). Counsel states that the petitioner only needs the workers until the end of the year to complete the contracts.

As discussed below, the AAO agrees with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record supports the director's decision to deny the petition. The AAO will dismiss 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 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 are traditionally tied to a season of the year by an event or pattern and are 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

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 seasonal need.

To establish that the nature of the need is “seasonal,” the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

In the final determination notice, the DOL stated that the petitioner’s letter, dated July 19, 2006, indicated a one-time temporary need based on several recently awarded contracts.

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 petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Prepare/install/finish custom hardwood floors by doing the following: Selects specified type of lumber/other materials. Prepare layout. Marks cutting/assembly line of materials. Hand cut/shape materials. Assemble cut/shaped materials. Lay subflooring and hardwood/parquet/wood-strip-block floors. Sand floors/stairs using heavy duty floor belt sander (6HP or greater)/trio orbital sander/edge sander. Hand finish floors using various water and oil based stains and finishes, including epoxy finish, Tung oil treatment with wax finish, white brush textured finish and aged wood finish.

In its final determination notice, the DOL stated that the petitioner had not established that the work to be performed is temporary in nature.

On appeal, the petitioner has not provided sufficient countervailing evidence to overcome the concerns addressed in the DOL’s decision. The record, as it presently constituted, does not contain evidence that the petitioner’s need for the beneficiaries’ service 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.

The petitioner clearly indicates that it currently employs six individuals. Also, the petitioner has not established that it has an employment situation that is otherwise permanent, but a temporary need of short duration has created the need for a temporary worker. The petitioner stated in its letter addressed to the Vermont Service Center (VSC) that it has been unable to locate sufficient custom flooring installers and finishers to adequately operate the business during peak season. The petitioner states that it first obtained approval for H-2B

visas this past April¹ and because of several large contracts that it signed this fall, it desperately needs to keep the three workers until the end of the year. The petitioner has not demonstrated through copies of contracts or other documentary evidence that the requested employment is during a peak season. It is the nature of the need, not the nature of the duties, that determines 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 worker. The petitioner has not established that its need for the beneficiary's service is a one-time occurrence and temporary.

Upon filing the instant petition, the petitioner indicated that its need is seasonal. The petitioner submitted a statement naming eight of its pending projects. However, the statement has not been substantiated by financial or any other documentary evidence, such as business contracts, to confirm the accuracy of the information given in the statement and establish that the petitioner's business activity has formed a pattern where its need for temporary workers is for a certain time period and will recur next year at the same time. The petitioner's letter addressed to the VSC states that its business is seasonal, following the seasonal trends for Summit County resorts. However, absent documentation, the petitioner has not shown that its need for the beneficiaries' services is tied to a seasonal trend or a particular event that recurs every year. 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)).

The petitioner states that it has been unable to locate sufficient laborers to adequately operate the business during peak seasons. The petitioner has not established that it has a peak season. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

Beyond the decision of the director, the AAO finds that the beneficiaries, as the record is presently constituted, have not been shown to be qualified to perform the services of the occupation.

The regulation at 8 C.F.R. 214.2(h)(6)(vi) states:

(C) *Alien's qualifications.* Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary.

The Form ETA 750 states at section 14 that the minimum amount of experience needed to satisfactorily perform the job duties is one year of experience in a related occupation, specifically, hardwood floor installer and finisher. The other special requirements listed on Form ETA 750 are:

1. Use of heavy duty floor belt sander (6HP or greater), trio orbital sander, buffer, edge sander.

¹ Citizenship and Immigration Service (CIS) records show that the petitioner filed a previous petition (LIN-06-098-51585) that was approved on April 6, 2006 for three beneficiaries and valid until October 1, 2006.

2. Application by hand of stains and finishes, including epoxy finish, tung oil treatment with wax finish, white brush textured finish and aged wood finish.
3. Hand cutting/shaping of hardwood and other flooring materials.

The petitioner has not established that the beneficiaries possess one year of experience in a related occupation, namely, hardwood floor installer and finisher. Further, the record of proceeding does not contain documentary evidence of the beneficiaries possessing the other special requirements listed on Form ETA 750. For this additional reason, the petition may not be approved.

It is noted that the petitioner requested the beneficiaries' services from October 1, 2006 until December 31, 2006. Therefore, the period of requested employment has passed.

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 although the matter is moot due to the passage of time.