

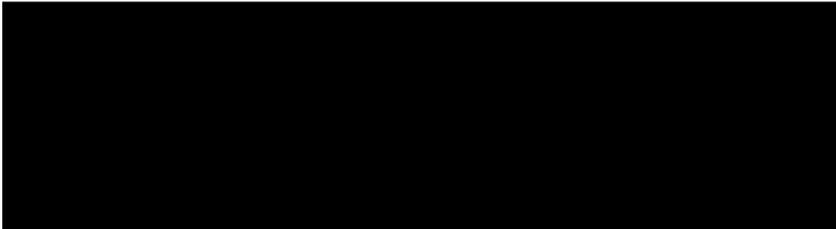
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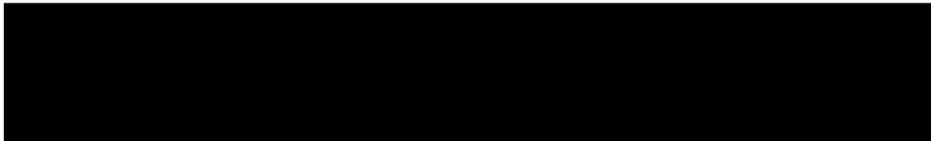


SEP 18 2007

FILE: EAC 07 108 51172 Office: VERMONT SERVICE CENTER Date:

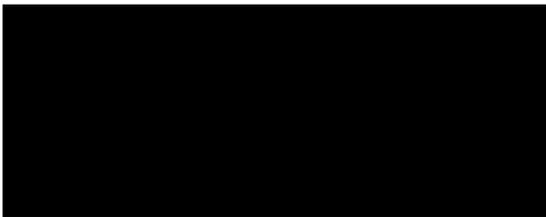
IN RE: Petitioner:

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:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a restaurant, motel and catering service company. It desires to employ the beneficiary as a restaurant cook 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 from April 1, 2007 to November 10, 2007. The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor. The director determined that the petitioner had not overcome the objections addressed in the Department of Labor's (DOL) decision and denied the petition. The director found in his decision that the DOL did not certify the temporary labor certification requesting an extension of stay for the named beneficiary because the employer provided a payroll and staffing chart that indicated a peakload from June to November rather than from April to November.

On appeal, the petitioner states that it has complied with all of the procedural filing requirements mandated by the United States DOL and the United States Citizenship and Immigration Services (CIS). The petitioner contends that the peakload season for the petitioner always runs from April to the first weeks of November. The petitioner further asserted that the payroll charts for 2006 do not contain temporary workers for April due to a delay in processing the H-2B petition and obtaining the visas from the consulate in Jamaica in 2006.

On appeal, the petitioner submitted evidence that it has a peakload demand for temporary workers from April until November. In addition, the petitioner demonstrated the delay in obtaining an approval of the H-2B classification and the H-2B visas for the 2006 peakload season and thus, the temporary workers were unable to commence employment until mid-May 2006 rather than April 2006. The petitioner asserts that the peakload season has always been from April until November, which is reflected in the payroll summary of 2005 and the approval of prior H-2B petitions. The petitioner has overcome the concerns addressed in the director's and the DOL's decisions. Moreover, sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed and that the petitioner's need for the beneficiary's services is seasonal and temporary.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.