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20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FEB 22 2005

FILE: WAC 03 040 52932 Office: CALIFORNIA 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter to the director for further action and consideration. Upon review, the director again denied the petition and certified his decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The petitioner is a licensed health club and massage parlor established in 1994. It desires to employ the beneficiaries as Chinese foot massage technicians for ten months. Initially, the director denied the petition because it was not accompanied by the required labor certification, Form ETA 750. However, on appeal, counsel submitted the notice from the Department of Labor (DOL) detailing the reasons why the certification could not be made. Although the petitioner had overcome the objections set forth in the director's decision, the AAO determined that the petition could not be approved for another reason. The AAO found that the petitioner had not submitted sufficient evidence to establish that its need for the beneficiaries' services could be classified as a one-time occurrence. Further, a training program had not been outlined in the record of proceeding providing details of the training. Since these issues were not discussed in the director's decision, the case was remanded to the director for further action and consideration. Upon review, the director denied the petition because the evidence submitted did not establish the petitioner's need for the beneficiaries' services as a one-time occurrence. The director's decision has now been certified to the AAO for review.

On notice of certification, counsel for the petitioner submitted additional evidence for consideration.

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.

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

Based on Jinluo doctrine (doctrine of meridian), apply Chinese food [sic] massage to customers. Use fist, fingers, palm or with instrument to apply the massage to Jinluo areas and channels and points of the feet to stimulate body energy flow and achieve the aim of disease prevention and treatment.

Upon review, the petitioner has submitted insufficient evidence to overcome the objections made by the director in his decision. The petitioner attempts to establish the temporary nature of the beneficiaries' services by saying they will be training the petitioner's permanent employees in the Chinese art of foot massage. The training timetable lists the 18 permanent employees that will be trained in seven areas. Counsel states in his letter dated May 11, 2004, that the petitioner will employ six workers to teach and train the present United States workers at a one instructor to three student ratio. Counsel states that each trainee will receive 1.5 hours of direct training per day and three hours of indirect training. The training program is said to be ongoing, with written exams where the employees are graded on a quarterly basis. The petitioner has not submitted any of the training manuals and testing materials used for the training. The Foot Massage Training Program Time Table does not indicate the instructor's name, give a full description of the classes A through G, or explain how the beneficiaries' indirect training will be evaluated. The petitioner states in his letter dated September 7, 2004. "...A training manual and the testing materials for the ongoing training will be developed during the same 10 month period. . . ." From this statement, it appears that the petitioner is still formulating its training program. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not shown that a training program has been developed to train its employees. The petitioner has not established that a temporary event of short duration has created the need for temporary workers. This petition cannot be approved for another reason.

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 at Part A indicates that the minimum amount of education and training required to perform satisfactorily the job duties is the completion of high school and six months of experience in the job being offered. The record, as it is presently constituted, does not show that each of the beneficiaries has completed their high school education. Absent such documentation, the petitioner has not shown that the beneficiaries possess the qualifications specified by the petitioner on the labor certification.

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 decision of the director is affirmed. The petition is denied.