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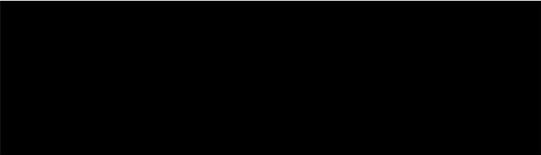


FILE: EAC 07 203 52443 Office: VERMONT SERVICE CENTER Date: DEC 19 2007

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

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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The decision of the director will be withdrawn and the petition will be denied.

The petitioner operates a hotel in Woodcliff Lake, New Jersey. It desires to employ the beneficiaries as housekeeping cleaners pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from June 1, 2007 to March 31, 2008 (see the dates of intended employment specified at item 8 of Part 5 of the Form I-129 (Petition for a Nonimmigrant Worker)). The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiaries' services. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

As discussed below, the AAO agrees with the findings of the DOL that the petitioner has not established a temporary need for the beneficiaries' services. Upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to approve the petition. Accordingly, the director's decision will be withdrawn and the petition will be denied.

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:

(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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

(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.

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 and peakload need.

To establish that the nature of the need is “seasonal,” the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

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

The work includes housekeeping, tidy up rooms, dining room cleaning help, keep hotel neat and clean and follow a designated cleaning routine that includes vacuuming, general cleaning, changing beds, cleaning bathrooms and bathhouse, doing hotel laundry and washing, plus general hotel and grounds cleanup, etc.

In its final determination notice, the DOL stated that the petitioner had not established a temporary need for the beneficiaries’ services. The DOL stated that the petitioner’s prior H-2B Application for Alien Employment Certification the petitioner cited its dates of need to be from October 1, 2006 to May 31, 2007 and that under the current application, the petitioner asserts its dates of need to be from May 1, 2007 to December 31, 2007. The DOL concludes that the overlapping dates of need from one application to the next suggest that the petitioner’s need is more likely permanent than temporary.

DOL framed the basis of its denial as follows:

The employer has a job offer for twenty (20) Housecleaners.¹ In an undated letter, the employer states the following regarding its temporary need:

“In addition to the permanent employees that [the petitioner] currently maintains. We are in need of 20 temporary and short-term workers during the season when the hotel experiences [a]

¹ The AAO notes that the present petition seeks 10 workers, rather than 20 as specified on the Form ETA 750.

high number of guests (from domestic and overseas) enjoying the summer vacation. As a result, our regular staff level is insufficient to meet the needs and services of the increased volume of customers during these months. Due to the short-term and temporary demand nature of these positions, we have had difficulties finding U.S. workers willing to accept these short-term and temporary jobs.”

In its prior H-2B application [for] certification . . . the employer cited dates of need of October 1, 2006 to May 31, 2007. The employer’s 15 H-2B Housecleaners from that ETA 750A will still be on its payroll through the end of May 2007 of the new need it asserts under this application (May 1, 2007 to December 31, 2007). This sets up overlapping dates of need from one application to the next; and suggests that the employer’s need is more likely permanent than temporary. The U.S. Department of Labor has determined that the employer is attempting to use temporary criteria in order to meet its need for a permanent year[-]round job.

According to paragraph 5 of the petitioner’s letter of June 27, 2007, the basis of its need for H-2B temporary workers is an increased demand for temporary workers each year from the summer until Thanksgiving:

Our need for temporary labor is traditionally tied to the summer month [sic] until Thanksgiving, and that our need is a temporary basis due to short term demand as shown by our guests during summer and early fall.

Upon review, the nature of the asserted need appears to be continuous and ongoing, and the countervailing evidence provided with the petition does not overcome the reasons for the DOL denial of the petitioner’s request for temporary labor certification. Contrary to the petitioner’s assertions, the evidence of record does not establish an H-2B peakload and/or seasonal need as defined at 8 C.F.R. §§ 214.2(h)(6)(ii)(B)(2) and (B)(3).

Regarding the overlapping dates noted by DOL, the petitioner stated in its letter dated June 27, 2007 that its intention was to apply for June 1, 2007 to December 31, 2007 instead of May 1, 2007 to December 31, 2007. The petitioner explains that it does not need extra employees for the month of May, and that its need for temporary labor is traditionally tied to the summer months until Thanksgiving. The AAO notes that the petitioner’s explanation of mistake with regard to again seeking workers for May 2007 does not rebut the fact, highlighted by the DOL decision, that the petitioner’s labor certification applications cover an entire year and more, that is, from October 1, 2006 through December 2007. Neither the petitioner’s explanation nor any of its submissions overcome the DOL decision’s information about the labor certification applications’ showing that this employer is seeking a continuous, year-plus period of employment.

The petitioner provided a sheet with a month-by-month breakdown of the number of guests that stayed at the hotel in 2006; its 2006-2007 Occupancy Revenue Report; and a table entitled “HWCL Key Accounts Productivity Reports.” Comparison of the figures in these documents with the record’s staffing and payroll tables does not show that occupancy rates generated either a seasonal or peakload demand for the services provided by housekeeping cleaners.

The Hilton Woodcliff Lake Hotel Labor Report 2005-2007 (which provides a monthly summary of the numbers of the petitioner's housekeeping cleaners, their combined earnings, and their combined working hours) reveals that the housekeeping cleaners were employed by the petitioner from April 2006 through May 2007. These figures, which indicate a year-round use of temporarily employed housekeeping cleaners, are materially inconsistent with either of the types of H-2B temporary need asserted in the petition. That is, the figures show neither a short-term demand for housekeeping cleaners that is traditionally tied to a season of the year or other recurring short-term period (as required for a seasonal H-2B need) nor a seasonal or short-term peak in the demand for housekeeping cleaning that requires hire of temporary housekeeping cleaners to supplement the petitioner's permanent housekeeping-cleaner staff (as required for a peakload H-2B need).

The petitioner submitted its monthly payroll report for the 2006 calendar year for the occupation of room attendants. This report shows a completely different set of figures than the 2006 monthly payroll report for the occupation of housekeeping cleaners. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO notes that the present petition attempts to expand the period of employment beyond that specified in the application for temporary labor certification (Form ETA 750). This is not permissible.

Item 18 of the petitioner's temporary labor certification application specifies May 1, 2007 to December 31, 2007 as the exact dates that the petitioner expects to employ the beneficiaries. The petitioner's job advertisement also specified this as the period of offered employment. However, item 8 at Part 5 of the Form I-129 specifies a longer period of intended employment, namely, June 1, 2007 to March 31, 2008.

The maximum period of employment that Citizenship and Immigration Services may approve in a particular H-2B petition is the period that the related application to DOL for temporary labor certification (Application for Alien Employment Certification (Form ETA 750)) states as the period of intended employment. See 8 C.F.R. §§ 214.2(h)(6)(iii)(A) and (C) (identifying the filing of an application for temporary labor certification and DOL's decision thereupon as conditions precedent to filing an H-2B petition); 8 C.F.R. § 214.2(h)(6)(iii)(E) (requiring that the Form I-129 for an H-2B petition be accompanied by DOL's labor certification determination and related documents); 8 C.F.R. § 214.2(h)(6)(iv)(E) (requiring the H-2B petitioner to submit countervailing evidence that addresses each DOL reason for not granting the temporary labor certification); see also 8 C.F.R. § 214.2(h)(9)(iii)(B) (indicating that the approval period of an H-2B petition is dependent upon the content of the application for labor certification). Further, the regulation at 20 C.F.R. § 655.206(b)(1) states in pertinent parts that temporary labor certifications shall be considered subject to the conditions and assurances made during the application process and "shall be limited to the employer's specific job opportunities." Therefore, if the petition here were approvable - and it is not - it would not be approvable for a longer period of employment than that specified in the related Form ETA 750, which in this case is May 1, 2007 to December 31, 2007. The petitioner erred in specifying June 1, 2007 to March 31, 2008 as the period of intended employment.

In its June 1, 2007 letter, the petitioner states that it has not been able to find willing United States workers to work in these positions. The fact that the petitioner is unable to locate and secure United States workers to perform the job does not justify the petitioner's request for temporary H-2B workers. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

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 director's decision is withdrawn. The petition is denied.