



U.S. Department of Justice

Immigration and Naturalization Service

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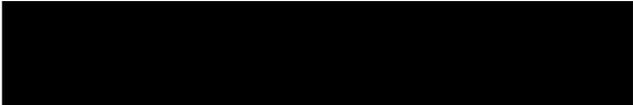
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 99 231 51676 Office: Vermont Service Center

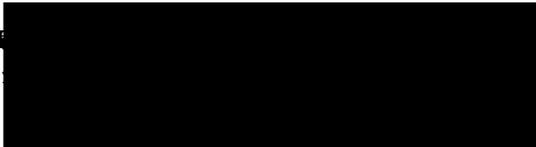
Date: JUL 20 2001

IN RE:



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)

IN BEHALF OF PETITIONER



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

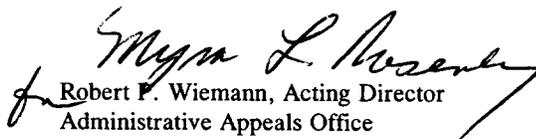
If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert F. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: This is a motion to reconsider the Associate Commissioner for Examination's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decision affirmed.

The petitioner is responsible for providing entertainers to perform at various clubs, bars and restaurants. It desires to employ the beneficiaries as singers for a period of 10 months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined a temporary need for the beneficiaries' services had not been established. The director's decision was affirmed by the Associate Commissioner on appeal.

On motion, counsel states that the beneficiaries are coming to the United States on a temporary basis to perform as singers at various nightclubs for eleven and one-half months. Counsel states that the petitioner's need is an intermittent need because the singers and entertainers, who perform folk and popular songs of Greek, Albania, the Middle East, and Europe, are in scant supply.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), 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, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that 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. See 55 Fed. Reg. 2616 (1990).

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 must 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 an intermittent need and the need is unpredictable. The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(4) states that for the nature of the petitioner's need to be an 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 nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads "sings folk and popular songs of Greece, Albania, Israel, Arabic, European and international languages....Will appear in one hour shows....Tuesday through Thursday and Sunday nights and two shows each of about one hour duration Saturday and Sunday nights."

The petitioner's need for the beneficiaries to perform services or labor for eleven and one-half months cannot be considered occasional or for a short period. Counsel states that the petitioner regularly books entertainment for its facilities and depends on different performers on a frequent basis in order to stay in business. Therefore, the petitioner has not shown that its need for the services or labor is an intermittent need and that the need for the services to be performed by the beneficiaries is 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 not met that burden.

ORDER: The order of June 9, 2000 dismissing the appeal is affirmed. The petition is denied.