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Immigration and Naturalization Service

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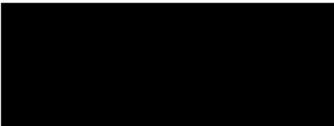
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File:  Office: Texas Service Center Date: 03 DEC 2002

IN RE: Petitioner: 
Beneficiaries: 

Petition: Petition for a Nonimmigrant Worker Pursuant to § 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:

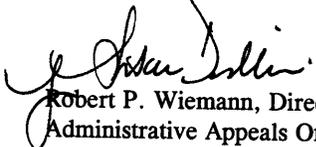
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 that 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiaries as laborers for five months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not submitted sufficient countervailing evidence to establish that qualified persons in the United States are not available and that the positions offered are temporary.

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), 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 seasonal and that the temporary need recurs annually.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, 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.

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

Restaurant and food service entry-level labor performing the following duties: discard trash, wash dishes, clean and set tables, clean and assist in food service preparation, and related tasks.

The petition indicates that the dates of intended employment are from July 15, 2002 until December 2, 2002. The Form ETA 750 indicates that the dates of intended employment are from February 20, 2002 until December 20, 2002. The two applications filed by the petitioner have tied two seasonal needs into ten months. Counsel states that the seasonal need corresponded to Indian festivals which occur during early Spring (March, May), August, September and October. However, the assertions that counsel made on appeal do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

In addition, this cannot be considered a seasonal need, since restaurant and food service labor is not traditionally tied to a season of the year by an event or pattern. The petitioner operates a restaurant business, and therefore has a permanent need for laborers to discard trash, wash dishes, assist in food preparations, etc. Consequently, the employment cannot be considered a seasonal need and for only a temporary period. Further, the petitioner has not submitted sufficient countervailing evidence to show that qualified workers in the United States are not available for the positions offered. For these reasons, the petition may not be approved.

This petition may not be approved for another reason. The regulation at 8 C.F.R. 214.2(h)(2)(iii) states in pertinent part that:

Named beneficiaries. Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Service's Headquarters.

The decision to allow unnamed beneficiaries on an H-2B petition should be based on evidence from the petitioner clearly describing the "emergent situation." In general, the decision to allow unnamed beneficiaries on an H-2B petition should be based on valid business reasons.

Counsel states that the employer's business reason for submitting an I-129 H-2B application with unnamed laborers is based on the fact that it is necessary, in order to be able to recruit workers under the limited time constraints. However, the petitioner has not submitted any evidence establishing when it started its recruitment efforts to fill the temporary positions and the results of its efforts. Moreover, the petitioner has not given any reasons as to why it was under limited time constraints regarding its recruitment of workers. Absent such evidence, the Service is unable to determine whether the petitioner advertised, and allowed itself sufficient time to recruit qualified workers. Consequently, the petitioner has not justified why the beneficiaries are unnamed on the petition. The petitioner has not presented an emergent situation that would allow the director to waive the names of the temporary nonagricultural workers at the time of filing. For this additional reason, the petition may not be approved.

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.