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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS

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425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



14 JUN 2002

File: SRC 02 131 52004 Office: Texas Service Center

Date: ~~MAY 28 2002~~

IN RE: Petitioner:  
Beneficiary:



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:



Public Copy

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 approved by the Director, Texas Service Center, who certified her decision to the Associate Commissioner for Examinations for review. The director's decision will be withdrawn and the petition will be denied.

The petitioner is a hospitality management firm that seeks to employ the beneficiaries as seasonal housecleaners for a period of 11 months. The director approved the petition, although it was not accompanied by a temporary labor certification certified by the Department of Labor. The certifying officer declined to issue a labor certification because he determined that the petitioner has not established a temporary need for the beneficiaries' services.

Counsel argued that the petitioner does have a temporary need. The director found that the petitioner's need for the beneficiaries' services is seasonal and peakload.

Service regulations at 8 C.F.R. 214.2(h)(6)(iv)(A) require that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made. A petition not accompanied by temporary labor certification must be accompanied by countervailing evidence from the petitioner that addresses the reasons why the Secretary of Labor could not grant a labor certification.

The petitioner's countervailing evidence is a letter from counsel dated March 20, 2002. Counsel states in this letter: "Although the petitioner has a permanent need for workers, its need for seasonal housecleaners is seasonal and temporary." Counsel footnotes this statement with a citation to a precedent decision relating to another nonimmigrant visa classification. Counsel discusses a nonprecedent decision in which an H-2B petition was approved for a period of ten months, and states that the one-month difference is "immaterial because the tourist season for renting out vacation homes in North Carolina is approximately 11 months." Counsel states that the petitioner "designates the tourist season as February through December," and that "[s]o long as the season does not extend beyond one year, then the requirements pursuant to the federal regulations have been satisfied."

Counsel does not take the word "season" to mean one of the four divisions of the year marked by the passage of the sun through an equinox or solstice, but rather to mean the period requested by a petitioner on an H-2B petition. Counsel's letter does not adequately address the finding of the certifying officer of the Department of Labor. The Administrative Appeals Office concurs with the certifying officer that employment for an annually recurring period of 11 months is permanent employment. The director's finding that the petitioner's need for housecleaners is seasonal and peakload is withdrawn.

Matter of Artee Corporation, 18 I&N Dec. 366 (Comm. 1982), 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 for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties that is controlling.

A seasonal need is described in regulations at 8 C.F.R. 214.2(h)(6)(ii)(B)(2), which states that:

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.

A peakload need is described at 8 C.F.R. 214.2(h)(6)(ii)(B)(3), which states that:

The petitioner must establish that it regularly employs permanent workers to perform 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 part of the petitioner's regular operation.

Even if counsel had not conceded that the petitioner's need is permanent, employment lasting 11 months with one month off, that recurs every year, is indistinguishable from permanent employment. A period of 11 months is not a season or a time of short-term demand. Accordingly, it is concluded that the petitioner has not established that its need for housecleaners is temporary. This decision is without prejudice to the filing of employment-based immigrant visa petitions by the petitioner to fill its housecleaner positions, or to fill any other permanent jobs for which qualified United States workers are unavailable.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will be withdrawn and the petition will be denied.

**ORDER:** The director's decision of March 26, 2002 is withdrawn and the petition is denied.