



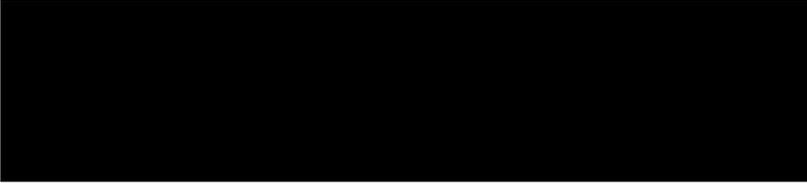
DH

U.S. Department of Justice

Immigration and Naturalization Service

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

**PUBLIC COPY**



File: EAC 02 033 53414 Office: Vermont Service Center Date: 15 OCT 2002

IN RE: Petitioner: [Redacted]  
Beneficiary [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)

IN BEHALF OF PETITIONER:



*Identifying data deleted to prevent clearly unwarranted invasion of personal privacy*

**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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the matter remanded to him for further consideration and action.

The petitioner is an ethnic restaurant and entertainment center. It desires to employ the beneficiary as a chef and instructor of Russian and Georgian cuisine for one year. The petition was not accompanied by the required Labor Certification, ETA-750. The director denied the petition because the petitioner had not submitted the required certification or the Department of Labor's notice that such certification cannot be made.

On appeal, counsel states that he previously submitted the Department of Labor Final Determination to the Service and has again submitted another copy with the appeal. Therefore, the objections of the director have now been satisfied. However, the petition may not be approved for other reasons beyond the decision of the director.

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 a one-time occurrence.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish 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.

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

Develop ethnic menus for a new restaurant. Adopt ethnic recipes for use with local products and teach cooks and kitchen personnel in methods of preparation of Russian and Georgian traditional and modern dishes, such as Vareniki, Pelmeni, Herring with Onion and Mayonnaise, Pilaf, Sturgeon Kabob, Lamb with Tkemali Sauce, Kulebyaka, Roasted Suckling Pig Stuffed with Kasha, Chakhokhbili, Chanakh, Chalachach, Cutlets, Schnitzel. Train cooks and other kitchen personnel in proper procedures and presentation. Develop seasonal menus.

Upon review, the duties are shown to be ongoing. The services to be rendered cannot be classified as duties that will not need to be performed in the future. Consequently, the petitioner has not established that the nature of its need for a chef and instructor is temporary in nature.

Further, the beneficiary's job description states "...teach cooks and kitchen personnel in methods of preparation of Russian and Georgian traditional and modern dishes...Train cooks and other kitchen personnel in proper procedures and presentation...."

Petitions pursuant to section 101(a)(15)(H)(ii) of the Act for a class or type of employee for which the petitioner has a permanent need where the petitioner makes attempts to establish the temporariness of its need for the beneficiary's services by stipulating that the beneficiary will function as a trainer or instructor rather than in a productive capacity must be accompanied by evidence of the existence of a training program, by evidence that the petitioner has recruited or hired trainees, and by evidence that the petitioner can viably employ a full-time instructor and can viably simultaneously operate a training program and a commercial or other enterprise. Matter of Golden Dragon Chinese Restaurant, 19 I&N Dec. 238 (Comm. 1984). The record does not contain such evidence. 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).

Since the aforementioned issues were not discussed in the director's decision, it will be remanded so that the director may address this matter. The petitioner should be given an opportunity to submit any additional evidence that the director deems necessary. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

**ORDER:** The director's decision of March 26, 2002 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.