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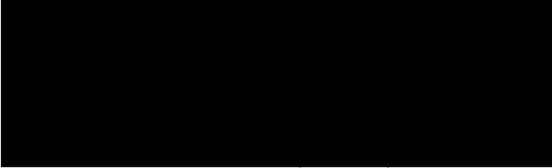
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U.S. Department of Homeland Security

Citizenship and Immigration Services

Handwritten initials: DH

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



FILE: EAC 03 124 54280

OFFICE: VERMONT SERVICE CENTER

DATE: **DEC 04 2003**

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Citizenship and Immigration Services (CIS) 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.

Handwritten signature of Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is presently at the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is either an agent for a Haitian restaurant and bar or a Haitian restaurant and bar in Brooklyn, New York. The petitioner desires to employ the beneficiary as a musician and singer from April 1, 2003 to January 25, 2004 on an intermittent and unpredictable basis. The director determined that the petitioner had not established that the position was intermittent in nature, and therefore temporary.

On appeal, the petitioner submits a calendar with the restaurant's name that lists a series of weekend events during 2003. The petitioner also states that there was no mention of showing proof of the beneficiary's assets when filing the original petition.

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 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. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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). To establish 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

The issue in this proceeding is whether the need for the beneficiary's services is temporary. On the original petition, the

petitioner did not indicate the nature of the beneficiary's employment; however, it did note that the temporary need was unpredictable.

The non-technical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads: "Individual that sings and can perform with a flute R&B in different languages. (German, English, Chinese)[.] This individual should have a professional demo CD and have at least 2 years of experience[.] The wage is \$11 an hour an[d] times are from 5 PM to 12 AM Thursday-Sunday."

On March 24, 2003, the director requested further evidence as to how the nature of the position fit into the criteria outlined in 8 C.F.R. § 214.2(h)(6)(ii)(B). The director also stated the following: "It appear [sic] that you have file [sic] for the beneficiary under the wrong visa classification. The P-1 or possibly P-3 would be more appropriate. You may wish to withdraw this petition."

On March 27, 2003, the petitioner submitted a copy of the beneficiary's passport, referrals from previous employers, as well as a copy of an ad that the petitioner claimed he put into *Variety* magazine. The petitioner stated that he wanted to hire the beneficiary on an intermittent need, since no one had responded to his ad in *Variety*. The petitioner also submitted two letters from former employers of the beneficiary in Vienna who stated that she has performed music for them or their companies. Another letter stated that the beneficiary had worked as a translator for a Vienna travel agency for two summers.

On April 1, 2003, the director denied the petition. He stated that the need for the beneficiary did not appear intermittent, as the restaurant was open year round, and the beneficiary would have the opportunity to play anytime. In addition, the director stated there did not appear to be a reason why the petitioner selected the date of January 25, 2004 as the ending date for the beneficiary's services.

On appeal, the petitioner submits a calendar for the year 2003. The calendar is titled "Le Bistroit [sic] Bar and Resturant [sic] Events". On the bottom of the calendar, days of events are listed as mother's day weekend, father's day weekend, independence day, Thanksgiving weekend and the days December 19 to 21 for a Christmas party. The petitioner also submits a housing contract for the beneficiary's apartment in Vienna, Austria. The translator of the document also affirms that the beneficiary has lived in her apartment since May of 2000.

Upon review of the record, the petitioner has not provided enough persuasive evidence to establish that the beneficiary will be employed by the petitioner on an intermittent basis. For example,

the calendar submitted by the petitioner does not establish the employment of the beneficiary for specific events. It simply notes that some events will take place during the year. A contract between the beneficiary and the petitioner for specific performances on specific dates would be much more probative of any intermittent employment. It is not clear why the petitioner has submitted a copy of the beneficiary's rental agreement in Vienna. This document in itself would not establish any employment of the beneficiary on an intermittent basis in the United States. Furthermore the petitioner has submitted no evidence on its present hiring practices of musicians or singers that would support the regulatory criteria that it has not employed permanent or full-time workers to perform the same services or labor. Based upon such documentary evidence, the petitioner has not established that its need for the beneficiary's services is temporary. For these reasons, the director's decision will not be disturbed.

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 met that burden. The appeal is dismissed.

ORDER: The appeal is dismissed. The petition is denied.