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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



FILE: EAC 03 138 52930 OFFICE: VERMONT SERVICE CENTER DATE:

DEC 05 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:



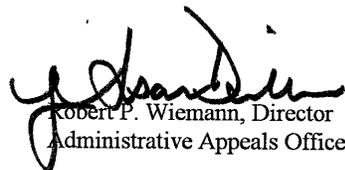
INSTRUCTIONS:

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant petition. The matter is before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Massachusetts restaurant that desires to employ the beneficiaries as cooks specializing in Brazilian food from March 15, 2003 to December 15, 2003. The certifying officer of the Department of Labor (DOL) declined to issue a labor certification because the petitioner had not established a temporary need for the beneficiaries. The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the objections of the Department of Labor.

On appeal, counsel asserts that the supporting documentation to rebut the Department of Labor's non-certification of the position had been sent to the Vermont Service Center and appears to have been lost. Counsel further asserts that the requested evidence will be submitted with the brief.

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).

The petitioner indicates on the Form I-129 that the employment is a seasonal need. With regard to seasonal need, 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) 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.

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

Prepares in large quantities, by various methods of cooking, meat, poultry, fish, vegetables, etc. Seasons and cooks all cuts of various meats, fish and poultry. Boils, steams or fries vegetables. Makes gravies, soups, sauces, roasts, meat pies, fricassees, casseroles, and stews. Excludes food service supervisors and head cooks who exercise general supervision over kitchen activities.

The form also notes that the employee is required to specialize in Brazilian food.

The petitioner submitted the I-129 petition on April 1, 2003. In an accompanying letter, counsel comments on the Department of Labor's statement of non-certification, and refers to the petitioner's cover letter which is not found in the record. Counsel submitted the petitioner's tax return for the year 2001 to the record.

On April 9, 2003, the director requested further evidence and commented on the petitioner's failure to submit countervailing documentary evidence to rebut the Department of Labor's determination. The director also requested evidence to establish that the petitioner's need for the beneficiaries' services was temporary, and that the beneficiaries possessed two years of experience in cooking Brazilian food. In response, the petitioner submitted letters from former employers that provided information on the length of work experience in cooking for all five beneficiaries. On May 6, 2003, the director denied the petition noting the lack of corroborating evidence to establish that the petitioner's need for the beneficiaries' services was temporary. On appeal, counsel states that the requested corroborating documentary evidence was submitted to the Vermont Service Center but appears to have been lost. Counsel asserts that the evidence will be provided again with the brief.

Citizenship and Immigration Services (CIS) notes that, although counsel indicates that a brief and/or additional evidence will be submitted to the AAO within 30 days of filing the appeal, as of this date, the record does not contain any additional evidence. Therefore, the record is considered complete, and the AAO shall render a decision based upon the evidence before it at the present time.

Upon review of the record, the petitioner has not established the seasonal need for the beneficiaries' services, pursuant to 8 C.F.R. § 214.2 (h)(6)(ii)(B)(2). The record is devoid of any information as to whether the petitioner is open for business year round or only for a particular period of time. The I-129 petition indicates that the petitioner wishes to employ the beneficiaries from March to December, a ten-month period of time. Such a period of time includes winter, summer and fall months of service. This extensive period of employment appears representative of a need for permanent employment, rather than temporary services. Without more persuasive evidence, the petitioner has not established that the need for the services to be performed by the beneficiaries is a seasonal need and, therefore, temporary in nature. 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.

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