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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



DEC 05 2003

FILE: EAC 03 139 54952      OFFICE: VERMONT SERVICE CENTER      DATE:

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

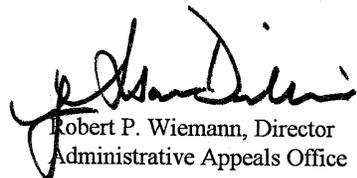
INSTRUCTIONS:

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is an automobile sales company that desires to employ the beneficiaries in positions described as "Cleaner II" from February 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, the petitioner resubmits materials sent in response to the director's request for further evidence, including graphs that indicate monthly levels of staffing and business activity. The petitioner also refers to a H-2B petition that involved car washers that was approved by Citizenship and Immigration Services (CIS).

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 that recurs annually. To establish that the nature of the petitioner's need is a seasonal need, 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. 8 C.F.R. § 214.2 (h)(6) (ii)(B) (2).

The non-technical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads: "Cleans interiors and exteriors of automobiles. Cleans interior of vehicle, using broom, cloth, vacuum cleaner, and whiskbroom. Cleans windows with water, cleansing compounds, and cloth or chamois. Removes dust by spraying or washing vehicles, using spraying equipment, brush or sponge. Automobile washer."

The petitioner submitted what it described as a seasonal substantiation letter with its initial petition. This letter stated that the petitioner's seasonal/peakload sales season is traditionally tied to the warm weather season of the year and also tied to the auto sales high season of the year. The reoccurring pattern criteria outlined in the H-2B regulations is identified by the petitioner as the "reoccurring pattern of nature (weather)." The petitioner then described its seasonal time period as running from February to December. The graphs submitted by the petitioner with regard to staffing needs show that both January and December are the months with the lowest staffing, and that the months of June, July and August have the highest staffing levels with some twelve employees on staff. The remaining months on the graph show a gradual increase in employees from February to June, as well as gradual decrease in the months of August to November. No month indicates a cessation of all employment.

Based upon such documentary evidence, it appears the petitioner's need for car washers covers ten months of the year, which does not cover the warm weather seasonal/peakload period of time identified by the petitioner. As such, the petitioner appears to need car washers throughout the year, and at no time, does the petitioner not need such employees. The petitioner's need appears to be a long-term, chronic problem rather than a short-term need. The petitioner has not established that the need for the services to be performed is a seasonal need and, therefore, temporary in nature. For these reasons, the director's decision will not be disturbed.

Beyond the decision of the director, the petitioner has not provided sufficient evidence to establish an emergent situation with regard to petitioning for unnamed multiple beneficiaries. Although 8 C.F.R. 214.2 (h)(2)(ii) provides that non-agricultural petitions must include the names of beneficiaries at the time of filing, under the H-2B classification, exceptions to this requirement may be granted in emergent situations at the discretion of the director.<sup>1</sup> However the petitioner is required to provide

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<sup>1</sup> Memorandum from Thomas Cook, Acting Assistant Commissioner, INS

evidence describing the business reason why the beneficiaries are unnamed. In the instant petition, the petitioner merely states: "I can not yet provide names due to an emergent situation, where I am not 100% sure that all of the aliens I originally spoke with will be able to work for our company during the period of the need." This statement is not sufficient to establish the business reasons why the beneficiaries are unnamed.

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.