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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: SRC 03 137 53201 OFFICE: TEXAS SERVICE CENTER

DATE: DEC 09 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

PUBLIC COPY

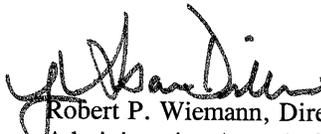
INSTRUCTIONS:

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 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, Texas Service Center, denied by the nonimmigrant petition and certified the decision to the Administrative Appeals Office for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a convenience store in Orlando, Florida, that desires to employ the beneficiary as a shift manager from July 7, 2003 to February 7, 2004. 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 beneficiary. The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the objections of the Department of Labor.

The petitioner did not any further materials for consideration by the AAO on notice of certification.

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 did not submit the Supplemental Form to the I-129 petition that identifies the nature of the petitioner's need for the beneficiary's services. In a cover letter, the petitioner stated that it had established a temporary need by the fact that the position is only available for a short period of time. The petitioner further stated that the owner of the company was in the process of expanding his operation and each time he opened a new store, he needed temporary staff to transition from a new developing business operation to a permanent full-time business operation. The petitioner stated that it needed the beneficiary's

services for up to eight months, since the position required the beneficiary to perform in a management and trainer position until a new manager and peripheral staff were trained. The petitioner then stated that the position would be a one-time occurrence for each new store that the petitioner would open.

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

Manages store engaged in selling specific line of merchandise, such as groceries, meat, liquor, apparel, jewelry, or furniture; or general line of merchandise, performing following duties personally or supervising employees performing duties[.] Plans and prepares work schedules and assigns employees to specific duties. Supervises employees engaged in sales work, taking of inventories, reconciling cash with sales receipts, keeping operating records.

Upon review of the record, the petitioner appears to need a general supervisor and manager of a convenience store. The job description contains no mention of any transitional management training responsibilities for the beneficiary. The duties listed in the job description do not appear to support a one-time occurrence employment but rather a permanent supervisory position. In addition, the petitioner submitted no further corroborating documentation with regard to its assertion that the petitioner uses such temporary help every time it opens a store. The petitioner has not established that the need for the services to be performed is a one-time occurrence 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 director's decision of June 4, 2003 is affirmed. The petition is denied.