

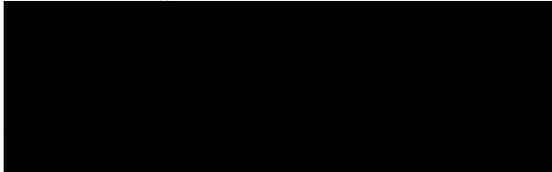
DH

U.S. Department of Homeland Security

Citizenship and Immigration Services

Identification of individuals related to  
immigration proceedings is limited  
invasion of personal privacy

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



DEC 22 2003

FILE: WAC 03 040 52932 Office: California Service Center Date:

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)

ON BEHALF OF PETITIONER: [Redacted]

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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded to the director for further action and consideration.

The petitioner is a health club and massage parlor. It desires to employ the beneficiaries as Chinese foot massage technicians for ten months. The petition was not accompanied by the required labor certification, Form ETA-750. The director denied the petition because the petitioner had not submitted the required certification or the Department of Labor's (DOL) notice that such certification cannot be made.

On appeal, counsel states that Citizenship and Immigration Services incorrectly denied the H-2B petition on the basis that a temporary labor certification was not included. Counsel states that such certification is not mandatory or required.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made.

The petition was filed on November 19, 2002, without a temporary labor certification. However, counsel submitted the DOL's notice detailing the reasons why such certification could not be made. Therefore, the petitioner has overcome the objection set forth in the director's decision. However, this petition cannot be approved for another reason beyond the decision of the director.

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 petition indicates that the employment is a one-time occurrence.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate that it has not employed workers to perform the services or labor in the past and 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

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

Based on Jinluo doctrine (doctrine of meridian), apply Chinese foot massage to customers. Use fist, fingers, and palm or with instrument to apply the massage to Jinluo areas and channels and points of the feet to stimulate body energy flow and achieve the aim of disease prevention and treatment.

The record of proceeding contains the DOL's final determination notification, dated September 6, 2002. The DOL determined that a certification could not be made because the evidence submitted by the petitioner does not indicate that a one-time occurrence exists. The DOL also determined that there was no evidence submitted to justify the need for six massage technicians.

In a letter, dated December 19, 2002, counsel states that the petitioner's need for Chinese foot massage technicians is temporary at the initial promotion and introduction period. Counsel goes on to state that, although the petitioner intends to continue providing Chinese foot massage after the promotion, the petitioner's intent is to use the foreign workers to train its present massage technicians in Chinese foot massage therapy.

Upon review, the evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as a one-time occurrence. The petitioner has not shown that it will not need workers to perform the services or labor in the future. The petitioner has not demonstrated that a temporary event of short duration has created the need for six temporary

workers. 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).

Further, a training program has not been outlined in the record of proceeding providing details of the training. Absent a training program, the petitioner has not established that the beneficiaries will not be engaged in productive full-time employment. Therefore, the petitioner has not shown that the nature of its need for Chinese foot massage technicians is temporary. *Matter of Golden Dragon Chinese Restaurant*, 19 I&N Dec. 238 (Comm. 1984)

Pursuant to *Matter of Golden Dragon Chinese Restaurant, Id.*, counsel contends that Citizenship and Immigration Services (CIS) is not bound by a decision from the DOL.

Although the role of the Department of Labor in temporary worker proceedings is an advisory one and temporary labor certification determinations by the DOL are not binding on CIS, this does not preclude concurrence with such an advisory opinion. Further, a temporary labor certification determination is to be overridden only upon presentation by a petitioner of countervailing evidence that serves to demonstrate the error in inapplicability of such determination. 8 C.F.R. 214.2(h)(6)(iv)(D).

Since the aforementioned issue was not discussed in the director's decision, the case 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 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 AAO for review.