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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: SRC 02 169 50020 Office: Texas Service Center Date: MAY - 8 2003

IN RE: Petitioner: [redacted]
Beneficiaries

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 the Bureau of Citizenship and Immigration Services (Bureau) 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, Texas Service Center, who certified her decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The petitioner is a restaurant operating out of the petitioner's private home until sufficient workers can be obtained to begin its full operation. It desires to employ the beneficiaries as entry level short order cooks for seven months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the evidence submitted did not establish that the positions are temporary.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii), 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, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. § 214.2(h)(6)(ii), specified that 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. *See* 55 Fed. Reg. 2616 (1990).

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 and the temporary need is periodic.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish 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.

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

> Entry level labor to be trained as short order cooks for authentic Southern Indian food and to prepare food for cooks.

The director determined in her decision that the evidence submitted did not establish that the positions are temporary. However, it is the petitioner's need for the services which is controlling. Therefore, it must be shown that the petitioner's need for the beneficiaries' services is temporary.

Upon review, it is clear that the petitioner has a permanent need for workers in the positions since the business plan is to operate a full restaurant. The services to be rendered cannot be classified as duties that will not need to be performed in the future. The petitioner even states on the petition that "we need temporary workers to work as cooks of authentic Southern Indian cuisine until we can train sufficient United States workers...." The petitioner's need for cooks to prepare authentic Southern Indian cuisine, whether United States or foreign workers, will always exist. The petitioner has not shown that a temporary event of short duration exists, and therefore, creates the need for temporary workers. Consequently, the petitioner has not established that the nature of its need for entry level short order cooks is a one-time occurrence and temporary in nature.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The decision of the director is affirmed. The petition is denied.