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

**identifying data deleted to
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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street NW
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



FILE: EAC 02 146 52598 Office: Vermont Service Center Date: **SEP 23 2003**

IN RE: Petitioner:
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)

PUBLIC COPY

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 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: This is a motion to reopen the Administrative Appeals Office's (AAO) decision affirming the Director, Vermont Service Center's denial of the nonimmigrant visa petition. The motion to reopen will be granted and the previous decision of the AAO will be affirmed.

The petitioner operates a fast food restaurant, specifically, [REDACTED]. It desires to employ the beneficiaries as fast food workers for eight months. The Department of Labor determined that a temporary certification by the Secretary of Labor could be made. The director determined that the petitioner had not established a temporary need for the beneficiaries' services. The director's decision was affirmed by the AAO on certification.

On motion, the petitioner states that it has a seasonal, peakload need that recurs every year. Additional evidence has been submitted with the motion for consideration.

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), 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 petitioner indicates in his letter dated April 4, 2002 that the employment is seasonal and a peakload need.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) states that for the nature of the petitioner's need to be a peakload need, the

petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, 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 nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Would be doing cashier, broiler, steamer, specialty area, dining room, whopper station, and hamburger station, drive through and any other assigned tasks.
Will be opening or closing 5-6 days a week. Full time.

In determining whether the beneficiary is coming temporarily to the United States to perform temporary services or labor, the test is whether the need of the petitioner for the duties to be performed is temporary. The petitioner explains on motion that it can not meet its seasonal, peakload needs that start in late April through November. The petitioner has submitted a graph of its monthly sales, guest count, and payroll hours used from January 1999 until April 2002.

Upon review, the petitioner has not submitted financial evidence such as its income tax returns, W-2 wage and tax statements, W-3 Transmittal of Wage and Tax Statements, or other financial evidence to substantiate the information shown in the graphs. 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, the petitioner has not established that its need for fast food workers is due to a short-term demand since the preparation of food is the nature of the petitioner's business, and the need to have someone to prepare the food will always exist. The petitioner has not provided sufficient evidence to show 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. Furthermore, the petitioner has not demonstrated that the beneficiaries would be only a

temporary addition to its staff and not become a part of its regular operation.

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 AAO's order of April 24, 2002 is affirmed.
The petition is denied.