

DA

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: SRC 03 239 54792 Office: TEXAS SERVICE CENTER

Date:

AUG 04 2004

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

for *Mari Johnson*
Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and certified to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn although the petition is now moot.

The petitioner is a general contracting firm specializing in Andalusian architecture. It seeks to employ the beneficiaries as mosaic tile installers for six months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established a temporary need for the beneficiaries' services. The director also determined that there appears to be a lack of good faith on the part of the employer to seek out qualified available United States workers.

On certification, counsel submitted additional evidence for consideration.

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:

Fabricate, install hand-cut glazed ceramic mosaics to spec, modifying same in conjunction with wood carver and plasterer. Using Andalusian technique[s], assemble, mount and seal decorative "mother tiles".

With respect to the allegation of a lack of good faith by the employer regarding the one United States worker responding to the job offer, it was found during his interview that he was unfamiliar with Andalusian architecture, including its design, effect and method of application. Further, the applicant acknowledged that he had no qualifying experience and because he lacked this experience, he was rejected.

The temporary nature was established by the one-time occurrence nature of the two projects. The petitioner was retained to complete authentic Moroccan style rooms using handcrafted Andalusian architectural details in the residences of two homeowners in the Miami area. A claim that a permanent need exists for a particular skill on two projects of limited duration cannot be justified.

After review of the evidence contained in the record, it has been determined that sufficient countervailing evidence had been submitted to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed, and that the need for the services to be performed is a one-time occurrence and temporary. However, the regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) states that, if a petition is approved after the date the petitioner indicates that the service will begin, the approved petition and approval notice should show a validity period commencing with the date of approval and ending with the date requested by the petitioner.

The petition should have been approved for the requested time period. This decision will have no practical effect because the period of requested employment has passed. Therefore, the petition must be denied.

ORDER: The petition is denied because the matter is moot due to the passage of time.