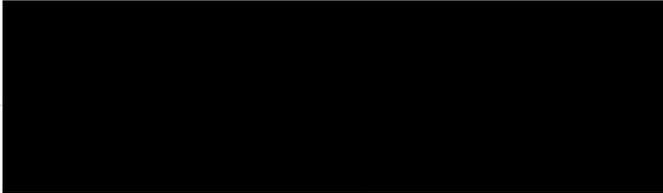




U.S. Citizenship
and Immigration
Services

DH



FILE: WAC 03 182 51788 Office: CALIFORNIA SERVICE CENTER Date:

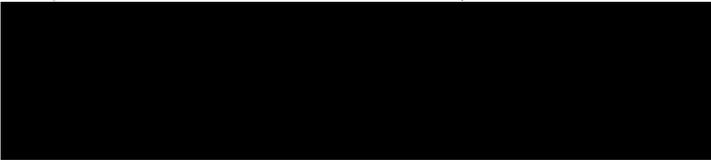
IN RE: Petitioner:
Beneficiaries



AUG 04 2004

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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a construction business. It desires to employ the beneficiaries as carpenters for one year. The Government of Guam, Department of Labor, determined that a temporary labor certification by the Governor of Guam could be made. The director determined that the petitioner had not established that the position meets Citizenship and Immigration Services requirements to qualify as a temporary nonagricultural worker.

On appeal, the petitioner states that the decision indicates its information was inadequate. The petitioner submits additional evidence for consideration with the appeal.

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 shall 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 intermittent. The petitioner also states in a letter submitted with the appeal that its need for the beneficiaries' services is a peakload need.

To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

To establish that the nature of the need is "intermittent," the petitioner must demonstrate that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

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

Constructs, erects, installs, and repairs structures and fixtures of wood, plywood, and wallboard, using carpenter's handtools and power tools, and conforming to local [b]uilding [c]odes. Studies blueprints, sketches, or building plans for information pertaining to type of materials required, such as lumber or fiberboard, and dimensions of structure or fixture to be fabricated. Selects specific type of lumber or materials. Prepares layout, using rule, framing square, and calipers. Marks cutting or assembly line on materials, using pencil, chalk, and marking gage. Shapes materials to prescribed measurements, using saws, chisels, and planes.

Upon review, the evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as intermittent. Instead, the petitioner has a permanent need for workers to fulfill its construction contracts, which is the specific nature of the petitioner's business. The petitioner has not shown that it occasionally or intermittently needs carpenters to perform services, especially when the petitioner's need for workers is for one year.

To establish that the nature of the need is "intermittent," the petitioner must demonstrate that it has not employed permanent or full-time workers to perform the services or labor but occasionally needs workers to perform services for short periods. The petition indicates that the petitioner currently employs eight individuals. The petitioner explains that its need for the beneficiaries' services is to perform temporary work as carpenters on ongoing construction projects with the company. Therefore, the petitioner has not established that a temporary event of short duration has created the need for carpenters. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

To establish that the nature of the need is peakload, the petitioner must establish that it regularly employs permanent workers and it just needs to supplement its staff temporarily due to a seasonal or short-term demand. The petitioner must carefully document the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contract. In this case, the petitioner states that its company is engaged in the construction of new buildings and houses, renovation and repair of existing structures, maintenance of corporate buildings and offices and construction of sewer lines and perimeter fencing. The petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for carpenters to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist. The petitioner has not established that the carpenters are only needed for a limited period of time or contract having a clear termination date. Therefore, the petitioner has not shown that the growth in home building, renovation, and the repair of existing structures is seasonal and for a short-term demand. The petitioner has not established that its need for the beneficiaries' services is peakload, or intermittent and temporary.

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 appeal is dismissed.