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U.S. Citizenship
and Immigration
Services



FILE: WAC 03 090 55367 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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 is engaged in artistic and dance promotions and acts as the agent for the beneficiaries listed. It desires to employ the beneficiaries as musicians and entertainers for eleven 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 that its need for the beneficiaries' services is temporary.

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 and the temporary need is unpredictable. The work contract, dated December 13, 2002, states that the petitioner will hire the beneficiaries for a United States tour from January 31, 2003 to December 31, 2003.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(4) states that for the nature of the petitioner's need to be an intermittent need, the petitioner must establish 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.

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

They will sing in Spanish their latest recording hits and play their musical instruments. They will perform at each dance/show between the hours of 10PM and 2AM. Two sets of 45 minutes each per engagement according to itinerary....They play norteno music.

Upon review, the evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as an intermittent need. It is the petitioner's business to promote various types of entertainers throughout various venues in the United States. The petitioner has not shown that it occasionally or intermittently needs artists to perform services, especially when the work contract is for an entire year. Therefore, the petitioner's need to have musicians and entertainers to perform for various events is clearly a principal function of the petitioner's business. The petitioner's need to have employees perform at various venues will always exist. The petitioner has not shown that its need for the beneficiaries' services is temporary.

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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.