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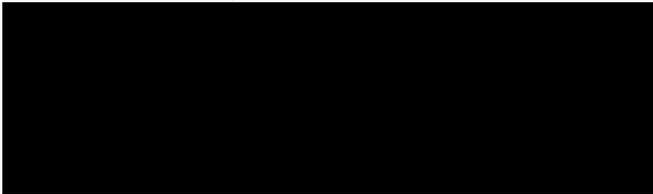
FILE: LIN 03 019 51698 Office: NEBRASKA SERVICE CENTER Date: FEB 18 2004

IN RE: Petitioner:  
Beneficiary:



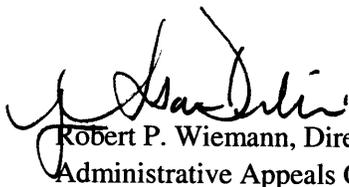
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

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, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a fast food service restaurant. It desires to employ the beneficiaries as food service workers for seven 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.

On appeal, the representative for the petitioner states that there is a constant need during this season each year to find viable employees to meet the employer's demand.

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 seasonal.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

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

Duties include food preparation, cooking, order assembly, taking food orders, cleaning and maintaining dining area, closing and cleaning of kitchen.

In a letter, dated August 7, 2002, the president of the petitioning organization states in pertinent part:

Hardee's of Buffalo is in the fast food service industry and when there isn't enough staff to adequately keep up with demand, it results in delays and dissatisfied customers. Every year we experience this dilemma and have struggled, to no avail, to overcome it. Every year when the high schools reopens we lose several of our daytime and closing staff, while at the same time our lunch rush is increased by these same kids dining here at lunchtime. . . . This being demographically an

older community, there just isn't enough available people to work and many businesses including this one strive to hire from the same labor pool. . . .

In another letter, dated August 7, 2002, the president of the petitioning entity states in pertinent part:

With the ever shrinking labor pool in our area and the addition of several high paying financial businesses taking even more entry level applicants from our workforce, we have concerns regarding the ability to find staff for all positions needed to run our operation in the manner our patrons are accustomed to and required by our Franchisor. Therefore, we are forced to turn to a partial work force outside the United States.

Upon review, the petitioner's need cannot be considered seasonal, since the need for the services is not traditionally tied to a season of the year by an event or pattern. The petitioner explains in both letters that its need for services is based on its inability to find employees to operate its business. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Consequently, the employment cannot be considered seasonal and for a temporary period.

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.