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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, DC 20536

[redacted]

FILE: SRC 02 164 51428 Office: Texas Service Center Date: JAN 08 2004

IN RE: Petitioner: [redacted]
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: [redacted]

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 Citizenship and Immigration Services (CIS) 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: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and certified to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The petitioner operates an Indian restaurant. It desires to employ the beneficiary as an executive chef for one year. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need. The director concurred with the findings of the Department of Labor.

On notice of certification, neither counsel nor the petitioner submitted additional evidence. Therefore, the record is considered complete.

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 and that the temporary need is unpredictable.

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:

> Coordinate activities of and direct indoctrination and training of chefs, cooks, and other kitchen workers engaged in preparing and cooking Indian specialty foods, to ensure an efficient and profitable food service; Plan menus, taking into account probable number of guests, marketing conditions, and popularity of various dishes; Estimate food consumption and purchase foodstuffs and kitchen supplies; Review menus, analyze recipes, determine food labor and overhead costs, and assign prices to menu items; Direct food apportionment policy to control cost; Observe methods of food preparation and cooking, sizes of portions, and garnishing of foods to ensure food is prepared in prescribed manner; Test cooked foods; Devise special dishes and develop recipes; Familiarize newly hired chefs and cooks with practices of restaurant kitchen; Establish and enforce nutrition and sanitation standards; Hire and discharge employees

The record of proceeding contains the DOL's final determination notification, dated March 30, 2002. The DOL determined that a certification could not be made because the employer had not established a temporary need for the beneficiary. The employer's stated period of need is from March 1, 2002 through February 28, 2003. The DOL determined that the job is for permanent employment and not appropriate for H-2B temporary labor certification. The DOL also determined that a bona fide job opportunity does not exist because the business has not been established. Further, the DOL stated that the petitioner is requiring the beneficiary to work a shift from 10:00 to 2:00PM and 5:30PM to 9:30PM. The DOL stated that this requirement precludes effective recruitment and may have deterred otherwise qualified United States workers from applying.

In a letter, dated April 18, 2002, the petitioner explained that a split shift is normal in the restaurant industry because the executive chef has to be present when the restaurant is open in order to supervise the kitchen workers. Since the restaurant is open only for lunch and dinner, the split shift does not appear to be over restrictive. Therefore, the petitioner has justified his reason for maintaining a split shift.

In the same letter, the petitioner stated that its need would be a one-time occurrence because the executive chef will train specialty chefs to take over his position. The petitioner goes on to state that it should take no more than a year to direct the indoctrination of these chefs and bring them up to speed.

Upon review, the evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as a one-time occurrence. The petitioner has not shown that it will not need a worker to perform the services or labor in the future. The petitioner has not demonstrated that a temporary event of short duration has created the need for an executive chef.

Further, the petitioner has not established that the restaurant is operational. The petitioner stated that it has already acquired the location, obtained the kitchen equipment, and ordered the furniture and furnishings. However, 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).

Moreover, a training program has not been outlined in the record of proceeding providing details of the training. Absent a training program, the petitioner has not established that the beneficiary will not be engaged in productive full-time employment. *Matter of Golden Dragon Chinese Restaurant*, 19 I&N Dec. 238 (Comm. 1984). The petitioner has not shown that the nature of its need for an executive chef is a one-time occurrence and temporary.

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 decision of the director is affirmed. The petition is denied.