

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

OK



FILE: WAC 03 101 50112 Office: CALIFORNIA SERVICE CENTER Date: JUN 16 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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

to Robert P. Wiemann, Director
Administrative Appeals Office

3

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 engages in the hand manufacture and sale of pastries, breads and related goods. It desires to employ the beneficiary as a baker for seven months. The Governor of Guam determined that a temporary certification could be made. The director determined that the petitioner had not established that its need for the beneficiary's services is temporary.

On appeal, counsel states that the examiner, for no reason, denies the one-time occurrence caused by Typhoon Pongsona that destroyed competing businesses, increased volume for emergency workers and the general public, and required increased manpower for both production and restoration.

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 a one-time occurrence and 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 (ETA 750) reads:

Mixes and bakes ingredients according to recipes to produce various types of breads, pastries, and other baked goods, including American and European styles of baked goods. Measures ingredients to prepare batters, doughs, fillings, icings, etc. using scales and graduated containers. Place ingredients into mixing machine bowl to mix/cook ingredients according to specifications. Rolls, cuts and shapes dough to form various breads, pastries, crusts, cookies, etc. and related

products preparatory to baking, including puff pastry, croissant and [D]anish doughs. Places dough/batters in pans, molds and on sheets and bakes in oven. Observe color of products being baked and turns thermostat or other controls to adjust oven/stove temperatures. Applies glaze, icing, frosting or other topping to baked goods. Assembles and decorates various European, American and other style [sic] of cakes, pastries, breads and other baked goods. Bakes, assembles and decorates various styles of wedding cakes and related baked goods using batters, buttercreams, rolled fondant and other types of icings/frostings. Creates garnishes for wedding cakes and related baked goods including gum paste, icing flowers and other garnishes. Creates and decorates breads, pastries, cakes and other baked goods using tempered chocolate and related tools and techniques. Develops and tests new recipes. Takes inventory and uses FIFO inventory control. Supervises and trains.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. In this case, the preparation of breads, pastries and other baked goods is the nature of the petitioner's business, and the need to have someone to prepare these baked goods will always exist.

Moreover, in a letter signed by the vice-president of the petitioning entity, she states that the company is in the process of expanding its business and services, and therefore, requires the importation of H-2B workers. She further states that there are no qualified or available local or United States workers on Guam. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

In summation, the petitioner has not established 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 a temporary event of short duration has created the need for bakers. Consequently, the employment cannot be considered a one-time occurrence 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.