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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 155 52372 Office: VERMONT SERVICE CENTER Date: MAR 03 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 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: This is a motion to reopen the Administrative Appeals Office's decision to withdraw the approval of the nonimmigrant visa petition. The motion to reopen will be granted and the previous decision withdrawn, although the petition is now moot.

The petitioner engages in diamond jewelry manufacturing and sales. It desires to employ the beneficiary as a gemologist for one year to train its account executives, designers, buyers, graders and sorters in yellow diamonds. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made because the employer had not established a temporary need. The director concluded that the need for the beneficiary's services is temporary and certified the decision to the Administrative Appeals Office (AAO).

On certification, the AAO withdrew the director's decision. The AAO concluded that the petitioner had provided insufficient countervailing evidence to establish that the petitioner's need was temporary. The AAO also concluded that the petitioner had not provided any evidence of a training program or of its ability to viably operate both a training program and a commercial enterprise.

On motion, counsel states that the position has been made available to United States workers and no one applied. Counsel also states that a request was never made for the training program.

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.

The record indicates that the employment is a one-time occurrence. 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 petitioner has now explained and provided on motion the structure of the training program. The petitioner has shown that the training program is designed so employees can be trained and can continue to devote substantial periods of the workweek to oversee their accounts and other functions. The petitioner has also shown that the services to be provided by the beneficiary are a one-time occurrence and temporary.

The regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) states that, if a petition is approved after the date the petitioner indicates that the service will begin, the approved petition and approval notice should show a validity period commencing with the date of approval and ending with the date requested by the petitioner.

This decision will have no practical effect because the period of requested employment has passed.

ORDER: The decision of the AAO dated April 24, 2002 is withdrawn, although the petition is now moot due to the passage of time.