



U.S. Citizenship
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FILE: LIN 04 160 52669 Office: NEBRASKA SERVICE CENTER Date: **AUG 02 2005**

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

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a deli restaurant and catering business. It desires to continue its authorization to employ the beneficiary as a continental chef for nine months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could be made. The director determined that the petitioner had not established that its need for the beneficiary's services is temporary.

On appeal, the petitioner requests that the beneficiary be allowed to remain through January 31, 2005 because the petitioner is committed to continental style events through that date.

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 that the temporary need recurs annually.

To establish that the nature of the need is "intermittent," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

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

The person who performs this job must have a thorough knowledge of foods, food preparation, cooking, presentation and serving. This job requires independent conduct of these activities and must be performed professionally.

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. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

In order for the petitioner's need to be intermittent, the petitioner must demonstrate that it has not employed permanent or full-time workers to perform the services or labor. The petition indicates that the employer currently has seven employees. Moreover, the director states in his decision that the beneficiary has been previously employed by the petitioner from August 5, 2003 to March 30, 2004. The petitioner's need to extend the beneficiary's services has not been shown to be intermittent and temporary. The services to be performed by the beneficiary are ongoing. The petitioner has not submitted any financial evidence to demonstrate that its business activity has formed a pattern where its needs for the beneficiary's services are occasional or intermittent or for short periods. The intended employment is for an additional nine months. 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).

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.