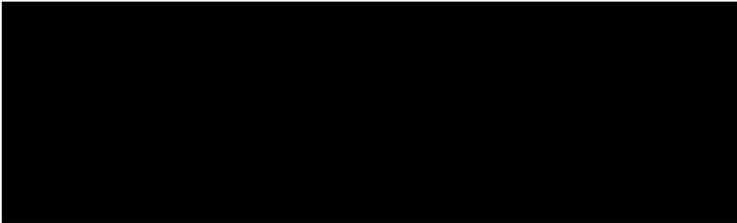


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prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

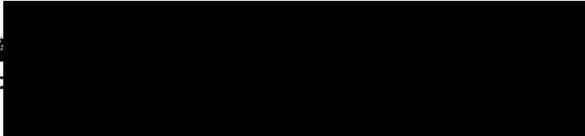
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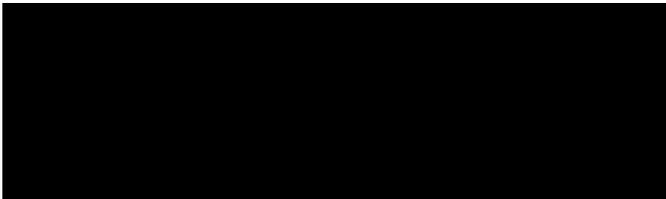
FILE: LIN 05 252 51082 Office: NEBRASKA SERVICE CENTER Date: NOV 18 2015

IN RE: Petitioner:
Beneficiaries:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a premier traveling carnival and amusement company. It desires to extend its authorization to employ the beneficiaries as carnival laborers for three months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could be made. The acting director determined that the petitioner had not established a temporary need for the beneficiaries' services and denied the petition.

On appeal, counsel for the petitioner states that the petitioner employs 40 permanent workers year round and that it is only during the peak season that it requests temporary workers for assistance.

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 and that the temporary need recurs annually. On appeal, counsel states that the petitioner's need for workers may be categorized as intermittent, peakload or 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).

To establish that the nature of the need is "intermittent," the petitioner must establish 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).

To establish that the nature of the need is "peakload," the petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-

term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

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

Working with carnival rides and seats, unloading and loading rides, seats and tents, moving heavy equipment as directed, setting up and taking down rides, seats, and tents.

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.

The acting director's decision states that Citizenship and Immigration Service's (CIS) records reflect that the petitioner had a prior petition (LIN-05-019-52449) that was approved for 35 temporary workers, which includes several intended beneficiaries of the instant petition, from November 15, 2004 until September 1, 2005. The AAO notes that the petitioner has another petition (SRC-05-024-53305) that was approved and valid until September 1, 2005. The beneficiaries from these two petitions are named in the current petition and the petitioner desires an extension of their temporary stay in the United States.

In his brief, counsel states that the petitioner will have to renegotiate all its contracts for the following season, as the past client relationship has concluded and there is no guarantee that two season's schedules will ever be identical. Counsel also states that it is almost certain that there will be a different beginning and ending date for the following season. Counsel states further that if any duplication of the previous year's tour schedule does occur, it is purely coincidental and not a consistent pattern. Counsel explains that the petitioner's contracts are entered into on a yearly basis, and the petitioner has no clear way of determining its labor need for the following season.

The above cited regulation defining "seasonal" states that "the employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change. . . ." In this particular case, since the petitioner's work schedules are never identical, the period of time each year that temporary workers are not needed is subject to change. The petitioner has not indicated in the record the period of time each year that temporary workers are not needed. Therefore, the petitioner has not established that the need for the beneficiaries' services is seasonal and temporary.

To support a finding that the need is temporary and peakload, the petitioner must establish that it regularly employs permanent workers and it just needs to supplement its staff temporarily due to a seasonal or short-term demand. The duties do not demonstrate a seasonal need. Moreover, in the current petition, the petitioner desires to extend its authorization to employ 69 workers in the United States from September 2, 2005 until November 30, 2005. The petitioner's extension request makes the total period of the petitioner's need for services over one year. The petitioner has not established that its need for the beneficiary's services is due to a short-term demand.

The petitioner has not shown that the services to be performed are intermittent. The duties to be performed are a principal function of the petitioner's business. The petitioner's need for carnival laborers to perform the duties described on Form ETA 750 will always exist and the petition indicates that the petitioner currently employs 100 workers to perform such services or labor. Further, the petitioner has not submitted any financial evidence to demonstrate that its business activity has formed a pattern where its needs for carnival laborers are occasional or intermittent or for short periods.

In these proceedings, the burden of proof 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.