

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

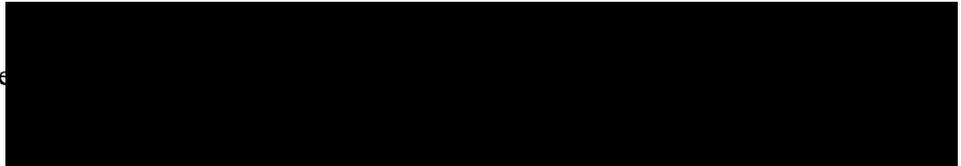
PUBLIC COPY



D4

FILE: EAC 03 171 53102 Office: VERMONT SERVICE CENTER Date: **OCT 19 2005**

IN RE: Petitioner:
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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was found-not to be readily approvable by the Director, Vermont Service Center. Therefore, the director properly served the petitioner with notice of his intent to deny the nonimmigrant visa petition, and his reasons therefore, and ultimately denied the petition. In a subsequent motion to reopen, the acting director affirmed the director's previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in housekeeping services. It desires to employ the beneficiaries as housekeeping cleaners for nine months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. After properly serving the petitioner with a notice of intent to deny, and reviewing the evidence submitted in response to such notice, the director determined that the petitioner had not established a temporary need for the beneficiaries' services and denied the petition. A motion to reopen was subsequently filed, and the director affirmed the previous decision.

On appeal, the petitioner states that it has a seasonal, peakload need, as evident from the past three years' charts. The petitioner also states that its peakload need matches the dates originally requested from April 1 until December 31.

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 the temporary need recurs annually.

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 "peakload," the petitioner must demonstrate 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:

Cleans rooms and halls in commercial establishments. Sorts, counts, folds, marks and carries linens. Makes beds. Replenishes supplies. This is an entry-level position. No experience required. Overtime potential.

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 petitioner states in his letter dated February 12, 2004 that for the three months of January, February and March, the cold winter conditions create the low season for the buildings it services. The petitioner states that its customers' slow season creates its slow season. The petitioner explains that it is experiencing a nine-month (April 1 to December 31) temporary, seasonal, peakload need for housekeeping cleaners.

The record of proceeding also contains three charts. One chart indicates the petitioner's total number of temporary employees for the years 2000-2002. Another chart indicates the total number of employees for the same years and the last chart indicates the sales, month by month, from 2000-2002. The charts have not been substantiated by financial evidence such as payroll records, time and attendance reports, income tax returns, or any other documentary evidence that would show an increase in the petitioner's workload during the nine-month period. The petitioner has not submitted any contracts to show a beginning or completion date and demonstrate that the majority of the petitioner's services are being rendered during a particular season or period of the year. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Consequently, the petitioner has not established a temporary need for the beneficiaries' services.

Moreover, the petitioner states that all the official newspaper advertisements had been paid for and no domestic workers could be found. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

The petition cannot be approved for another reason. The regulation at 8 C.F.R. § 214.2(h)(2) states in pertinent part:

(iii) *Named beneficiaries.* Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Service's Headquarters

The petitioner has not listed the names of four beneficiaries on this petition. The petitioner states that it is not sure that all the persons it originally spoke with will be able to work for the company during the period of need. The petitioner has not presented an emergent situation or clearly described its business reasons as to why the beneficiaries are unnamed. The petitioner has not presented an emergent situation, and the director did not waive the names of the temporary nonagricultural workers at the time of filing. For this additional reason, the petition may not be approved.

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 appeal is dismissed.