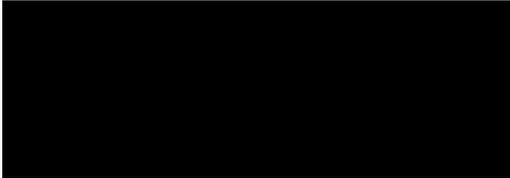




U.S. Citizenship  
and Immigration  
Services

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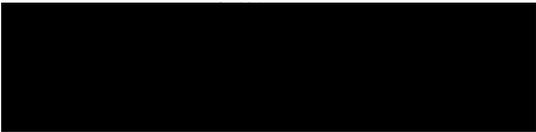
D4

FILE: EAC 05 013 51627 Office: VERMONT SERVICE CENTER Date: OCT 19 2005

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:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the business of event design and the production of trade shows. It seeks to employ the beneficiary as a merchandise displayer and window trimmer for 11 months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the employer had not established a temporary need for the beneficiary's services. The director determined that the petitioner had not established a temporary need for the beneficiary's services. The director also determined that the petitioner had not placed advertisements for the job in the local newspapers.

On appeal, counsel states that it is clearly stipulated on the Application for Alien Employment Certification (Form ETA 750) that the job is temporary. Counsel also submitted on appeal a set of the original ads placed in the New York Post on June 26, 27 and 28 of the year 2004. Therefore, the petitioner has now shown that it properly advertised the position in the local newspaper. The remaining issue is whether the petitioner's need for the beneficiary's services is temporary.

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 does not indicate whether the employment is seasonal, peakload, intermittent or a one-time occurrence. The petition does indicate that the temporary need recurs annually.

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).

To establish that the nature of the need is a “one-time occurrence,” the petitioner must establish 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).

To establish that the nature of the need is “seasonal,” the petitioner must establish 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).

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

Prepare and install decorations and displays from blueprints or drawings for trade shows, weddings, expositions, festivals and other events. Erect tents, with windows and panels to be covered with flowers and shrubs. Install carpets, drapes, floral arrangements and cut out designs on cardboard, hard board and plywood, according to specifications, using woodworking power tools.

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.

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 petition indicates that there are no employees, the duties do not demonstrate a seasonal need and the petitioner desires the beneficiary’s services for a period of 11 months. The petitioner has not established that its need for the beneficiary’s services is peakload.

The petitioner has not shown that the services to be performed are intermittent. The duties to be performed are clearly a principal function of the petitioner’s business. The petitioner’s need for a merchandise displayer or window trimmer to perform the duties described on Form ETA 750 will always exist. The petitioner has not

submitted any financial evidence to demonstrate that its business activity has formed a pattern where its needs for a merchandise displayer and window trimmer are occasional or intermittent or for short periods.

Further, the petitioner has not established that its need is a one-time occurrence. The petitioner has not demonstrated that it will not continually need to have someone perform these services in order to keep its business operational. Therefore, the petitioner has not established that a temporary event of short duration has created the need for a merchandise displayer and window trimmer and that its need for the beneficiary's services is a one-time occurrence and temporary.

The petitioner has not demonstrated that its business is seasonal. The petitioner has not shown that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Absent evidence of the petitioner's employment being seasonal, peakload, intermittent or a one-time occurrence to justify its need for the beneficiary's services, this petition cannot be approved.

This petition cannot be approved for another reason. The petitioner has not established that the beneficiary has the requisite high school education and two years of experience in the job being offered as stipulated on Form ETA 750. Absent such documentary evidence, the petition cannot be approved.

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.