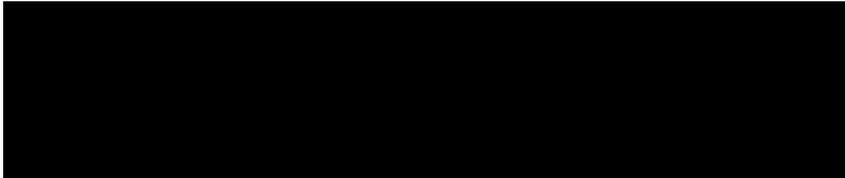




U.S. Citizenship
and Immigration
Services

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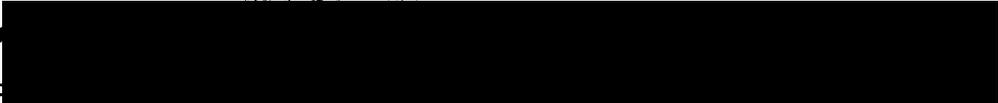


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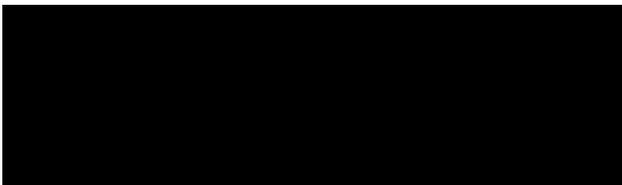
Date: OCT 19 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and in a subsequent motion to reopen, the director dismissed the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the business of painting and carpentry. It desires to employ the beneficiaries as interior house painters for ten months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. 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 dismissed the motion.

On appeal, the petitioner states that it has a seasonal need for 12 house painters for the spring and summer season. The petitioner also states that an approval is warranted.

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 peakload.

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:

Paint interiors and exterior walls of residences using brushes, rollers, and paint spray guns. May remove old paint to prepare surface prior to painting. May mix colors or oils to obtain desired color or consistency. Uses brushes, paint scrapers, sandpaper, rollers, ladders, brush cleaners, paint guards, roller extensions, screwdrivers, wire brushes, box cutters, and drop cloths.

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 December 17, 2004 that its spring season begins February 15, 2005 and ends December 15, 2005. The petitioner states that its clients begin placing their orders starting the middle to late February, continuing through the summer, and maintenance and clean up continues until December. The petitioner explains in his letter dated March 22, 2005 that it has contracted over \$96,000 of house exterior painting work. In another letter dated June 14, 2005, the petitioner states that it hires more house painters during the spring and summer months and has experienced substantial growth in its demand for exterior house painting in 2005 as compared to 2004. However, the petitioner has not substantiated these statements with evidence. The contracts submitted do not indicate a beginning or completion date or demonstrate that the majority of the petitioner's services are being rendered during a particular season. 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)).

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload in the painting business. Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload position will be engaged in different duties or has different specialty skills than the workers currently employed by the company. The petitioner has not provided evidence of its permanent staff and its projects showing a clear termination date. Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

The petitioner states that there are no able and willing United State painters in the labor market in metropolitan Richmond, Va. 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 states that it cannot name the twelve beneficiaries at this time because it has yet to identify them. 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 that would have allowed the director to 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.