

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



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

PUBLIC COPY



D4

FILE: EAC 04 009 50265 Office: VERMONT SERVICE CENTER Date: **OCT 19 2005**

IN RE: Petitioner:
Beneficiary:



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.

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, Vermont Service Center. In a subsequent motion to reconsider, the acting director affirmed her previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in travel, insurance and accounting services. It desires to employ the beneficiary as a corporate/travel agent for one year. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. The acting director determined that the petitioner had not established that the position is temporary or a one-time occurrence. A motion to reconsider was subsequently filed, and the acting director affirmed her previous decision.

On appeal, the petitioner states that the position is definitely temporary. The petitioner explains that the beneficiary will train her staff in the United States and then return to Ecuador to set up a business there and be the tourist guide.

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 is unpredictable.

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).

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

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

Travel to and from South America to obtain the best prices for groups and corporate travelers, negotiate hotel, conference rooms and convention rates. Contact group transportation companies in South America and reserve airline, hotel, meals and excursions. Must be bilingual with the flexibility to travel to and from the USA-South America with appropriate visa and passport.

The director determined in her decision that the offered position is not temporary. However, it is the petitioner's need for the services that is controlling. Therefore, it must be shown that the petitioner's need for the beneficiary's services is temporary.

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 three employees. Moreover, the petitioner's need to have an additional worker perform these services has not been shown to be intermittent and temporary. The services to be performed by the beneficiary are ongoing since he will be helping the petitioner establish a South American market for its special needs travel department. The petitioner has not submitted any financial evidence to demonstrate that its business activity has formed a pattern where its needs for a travel agent are occasional or intermittent or for short periods. Moreover, the intended employment is for one year.

The petitioner states in its letter submitted with the appeal that the beneficiary will be opening its office in Guayaquil, Ecuador, and in essence, be the petitioner's tourist guide in Ecuador. The petitioner explains that in Ecuador, the beneficiary will receive the potential clients upon arrival, as well as sell air and land packages to clients wishing to travel to the United States. As stated previously, the petitioner currently has three employees. Consequently, the petitioner has not demonstrated that it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future.

Further, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for a corporate agent to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist. Therefore, the petitioner has not established that a temporary event of short duration has created the need for a corporate/travel agent and that its need for the beneficiary's services is a one-time occurrence and temporary.

This petition cannot be approved for an additional reason. The DOL stated in its final determination notice that the petitioner had not submitted a recruitment report for two workers whose resumes were forwarded to the

petitioner. The record does not contain evidence of these two workers being contacted and interviewed for the position. The petitioner states that: “although there are United States workers who are available for the job, I specifically indicated that I needed a worker [whose] primary residence was in South America.” However, the newspaper advertisement does not indicate that the beneficiary’s primary residence must be in South America. Therefore, the petitioner has not demonstrated that qualified persons in the United States are not available to do the job.

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.