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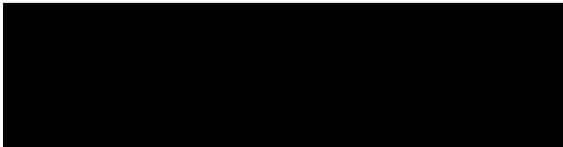


FILE: SRC 06 045 50045 Office: TEXAS SERVICE CENTER Date: JUN 08 2006

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(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, Chief
Administrative Appeals Office

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

The petitioner is a property management company that provides hospitality services to resort hotels in Florida. It desires to extend its authorization to employ the beneficiaries as hotel maids pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for a period of five months. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made. The director also determined that the petitioner had not established that the need for the beneficiaries' services is temporary and denied the petition.

On appeal, counsel states that the case was wrongly denied. Counsel also states that a brief and/or evidence will be sent to the AAO within 30 days. To date, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

As discussed below, the AAO agrees with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record supports the director's decision to deny the petition. The AAO will dismiss this appeal.

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 regulation at 8 C.F.R. § 214.2(h)(6)(iii) states in pertinent part:

(C) The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor . . . within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv). . . .

The regulations stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on November 25, 2005. In his decision, the director states that the petitioner had not obtained the labor certification determination prior to filing the petition. On December 15, 2005, the director requested the petitioner to submit the original certified temporary labor certification (Form ETA 750) issued by the Department of Labor (DOL). In response to the

director's request for evidence, the petitioner submitted a copy of the final determination notice from the DOL, dated December 22, 2005, and a copy of the original labor certification (Form ETA 750) that had not been certified by the DOL. Although the petitioner applied for a temporary labor certification, prior to the filing of the petition, a determination was not rendered until December 22, 2005, subsequent to the petition's filing date.

The petitioner requests that Citizenship and Immigration Services (CIS) consider acceptance of the late submission of the DOL notice, given the facts that the beneficiaries would be going out of status on December 1, 2005 if the cases were not timely filed. However, neither the statute nor regulations allow for the acceptance of a labor certification obtained subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, the petition cannot be approved.

The director also determined that the petitioner had not established that the need for the beneficiaries' services is temporary. The regulation at 8 C.F.R. § 214.2(h) provides, in part:

(6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B):*

(i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

(ii) *Temporary services or labor:*

(A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* 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:

(2) *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and are 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).

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states 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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner seeks approval of the proffered position as a seasonal need.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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 are 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).

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Cleans rooms and other premises of hotel, motel, tourist home or other lodging facility performing any combination of the following tasks, Dusts and cleans venetian blinds, furniture and other surfaces. Sorts, counts, folds, marks or carries linens. Turns mattresses and makes beds. Moves and arranges furniture and hangs drapes. Cleans and polishes metal work and porcelain bathroom fixtures. Spot-cleans walls and windows. Empties wastebaskets and removes trash. Removes soiled linens for laundering. Replenishes room supplies. Reports need for repairs to equipment, furniture, building and fixtures.

In its final determination notice, the DOL states that the employer had not established a temporary need for the beneficiaries' services. The DOL also states that neither the period of the temporary need, nor the number of workers requested has been documented with appropriate payroll records and the number of housekeepers, permanent and temporary, that have been employed by the petitioner over the past 24 months. The DOL concludes that the job offer is for permanent employment.

In response to this finding, the petitioner stated that it submitted two contracts specifying its period of need, limiting the dates of hospitality services to be provided by the petitioner. The record of proceeding contains a copy of one service agreement between the petitioner and Tradewinds Island Grand Beach Resort and does not contain another contract. The copy of the service agreement does not contain the signatures of either party, and therefore cannot be considered a valid agreement. Moreover, the petitioner has not submitted any other contractual and/or financial evidence to demonstrate that its business activity has formed a pattern where its need for hotel maids is traditionally tied to a season of the year and will recur next year at the same time.

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. Thus, the AAO will not disturb the decision of the director.

ORDER: The appeal is dismissed. The petition is denied.