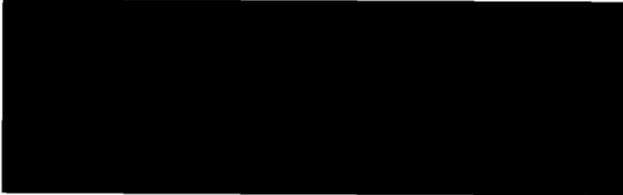




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Date: JUN 22 2006

IN RE:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a restaurant/catering business. It desires to employ the beneficiaries as food preparation workers for eight and one-half months pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b). The Department of Labor (DOL) issued a temporary labor certification, but the director determined that the petitioner failed to establish that it had a peakload need for the beneficiaries' services.

On appeal the petitioner reiterates its claim that it needs to supplement its permanent restaurant staff on a temporary basis to accommodate the peakload demand of its customers during the high season, which includes the demand of local businesses for catering services. For the reasons discussed hereinafter, the AAO determines that the petitioner has not established its eligibility for the requested benefit.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(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) provides, in pertinent part, as follows:

(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:

(3) *Peakload need.* 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.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states that 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 food preparation positions as a peakload need from April 1 to December 15, 2006. To establish that the nature of its need is "peakload," the petitioner must demonstrate that it regularly employs permanent food preparation workers and that it needs to temporarily supplement the permanent staff due to a seasonal or short-term demand. The petitioner must also establish that the temporary workers will not be permanently added to its employee staff. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

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

Perform a variety of food preparation duties other than cooking, such as preparing cold foods and shellfish, slicing meat and brewing coffee or tea.

The director found that the documentation submitted by the petitioner – including its quarterly federal tax returns (Form 941s) for calendar year 2005 and a month-by-month chart of its employee totals for the year – failed to show a peakload need for additional temporary employees. The foregoing documentation listed employee totals of 25 in the winter months of January and February, 32 in March, and between 41 and 44 during the months of April to December. The director concluded that the stability of the petitioner's employee totals during the last nine months of the year undermined its claim that it had a peakload need for temporary workers during those months, and implied that the petitioner was able to satisfy its manpower needs during 2005 through normal hiring and management practices.

The AAO determines that the evidence of record fails to demonstrate that the petitioner has a peakload need for ten temporary food preparation workers from April 1 to December 15, 2006. The petitioner has furnished no evidence showing how many permanent food preparation workers it regularly employs on its staff. No documentation has been submitted – such as business records of the petitioner's month-by-month income over the past several years from the restaurant, from catering contracts, and from special events – to demonstrate that the petitioner's business activity has a pattern of higher volume and income level during the spring, summer, and fall months, which requires additional food preparation workers during that time. While the petitioner submitted its 2005 federal quarterly wage records showing that it employed 9-12 fewer workers in the first quarter than in the last three quarters of 2005, one year of such experience does not establish a seasonal demand. Nor has the petitioner established that it is experiencing a short-term demand for the beneficiaries' services. No business forecast been submitted, supported by corroborating documentation, to

demonstrate the petitioner's need for ten temporary food preparation workers during the requested time period of April 1 to December 15, 2006. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See 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)).

Absent documentary evidence of the petitioner's peakload situation to justify its need for the temporary services of the beneficiaries, the instant petition cannot be approved.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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