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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: EAC 07 174 51929 Office: VERMONT SERVICE CENTER Date: AUG 07 2007.

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

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.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The decision of the director will be withdrawn and the petition will be denied.

The petitioner owns and operates a golf resort, hotel and spa [REDACTED]. It seeks to employ the beneficiaries as massage therapists for six months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the advertisement used to recruit United States workers, which was placed in the Gainesville Times on March 13, 14, and 15 2007, contained information different than that indicated on the Form ETA 750. The DOL determined that the advertisement only states "training required" while the Form ETA 750 states "six (6) months of training required". The director determined that sufficient countervailing had been submitted to overcome the objections of the DOL and approved the petition.

On notice of certification, the petitioner did not present additional evidence for consideration. Therefore, the record is considered complete.

The regulations at 8 C.F.R. 214.2(h)(6)(iv) states in pertinent part:

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be writing and shall address availability of United States workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification.

The DOL stated in its final determination notice dated April 2, 2007 that the recruitment report submitted by the petitioner shows that the petitioner disqualified four of the five United States workers referred by the State Workforce Agency for either "no training or experience" or "limited training experience. The DOL determined that the disqualifications are unlawful since the petitioner failed to list the amount of training required in the advertisement.

The petitioner submitted countervailing evidence in the form of a letter dated April 24, 2007. In the letter, the petitioner states that it agrees that the statement of training requirements in the advertisement differs from the statement of training requirements in the Form ETA 750. The petitioner also states in its letter that if the advertisement had stated that six months of training was required, not one of those responding would have qualified either. The petitioner acknowledges that it may have been at fault, but asserts that "stating '6 months' would have been more restrictive and would have received less responses."

In his decision, the director stated that responses to the advertisements were submitted along with letters from the petitioner to the applicants stating why they did not get the position. The director's decision states that four of the applicants did not have the experience and the fifth applicant did not respond to a phone message regarding the position.

Based on this letter, the director determined that sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed and that the need for the services to be performed is seasonal and temporary.

After review of the evidence contained in the record, the decision of the director is found to be incorrect.

The regulations at 20 C.F. R. § 655.203 states in pertinent part:

Assurances.

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer that:

(d) The employer will cooperate with the employment service system in the active recruitment of United States workers until the foreign workers have departed for the employer's place of employment by;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate, . . .

The petitioner must abide by the DOL regulations and the DOL policies implementing them that govern the processing of temporary alien labor certification applications. As indicated in the above regulatory requirement to "describe the nature" of the job opportunity, and as stated in the section of the DOL's denial notification that identifies the DOL policy requirement that advertisements "describe the job opportunity with particularity" and "state the minimum job requirements," the petitioner's advertisements were required to include the specific amount of training necessary for the job. Therefore, the petitioner must readvertise the proffered position to rectify the omission of six months of training in massage treatment in the previous advertisements. Absent such readvertisements of the proffered position, the petitioner has not complied with the DOL regulations and the petition cannot be approved.

This decision is without prejudice to the filing of a new petition accompanied by the proper documentation and fee.

ORDER: The decision of the director is withdrawn. The nonimmigrant visa petition is denied.