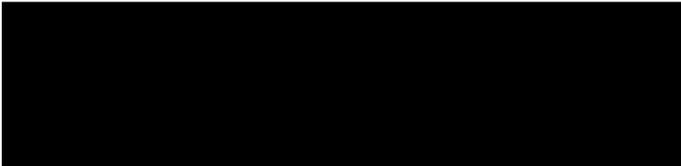


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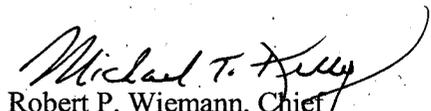
IN RE: Petitioner: [Redacted]  
Beneficiaries: [Redacted]

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:  
[Redacted]

**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*   
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was approved for 17 beneficiaries 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 The decision of the director will be withdrawn and the petition will be denied, although the matter is moot due to the passage of time.

The petitioner operates and manages all-inclusive vacation resorts in over 30 countries. It desires to extend its authorization to employ the beneficiaries as child-care workers 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) from May 1, 2007 to November 1, 2007. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner did not establish that its need for the beneficiaries' services is temporary.

The director recommended approving the 17 workers named in the petition. 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 DOL have been observed and that the petitioner's need for temporary workers, based on the petitioner's occupancy chart, appears to be from May through September and not through November, as requested by the petitioner. The director's decision is now before the AAO for review.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

As an initial matter, it is noted that the Form I-129, Petition for a Nonimmigrant Worker, was filed for 17 workers, all of whom are named. In a letter dated October 17, 2007, counsel on behalf of the petitioner stated that [REDACTED] had returned to her country of residence, and that her name may be withdrawn from the petition. Therefore, [REDACTED] has been withdrawn from consideration of H-2B status in this petition, thereby reducing the number of requested workers from 17 to 16.

As discussed below, the AAO agrees with the findings of the DOL that the petitioner has not established a temporary need for the beneficiaries' services. Upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to approve the petition. Accordingly, the director's decision recommending approval of 17 beneficiaries will be withdrawn, to be replaced by the AAO's finding, below, that the petition will be denied, although the matter is moot due to the passage of time.

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) 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:

(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 regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. 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 petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

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 peakload need.

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

Watch over children to ensure their security and safety. Ensure that parents sign register when dropping off and picking up children. Inquire about medical conditions of children and special treatments to be followed. Direct the children in eating, resting and toileting as necessary. Ensure that meals and refreshments are served. Participate in entertainment with children. Apply first aid and/or CPR when needed.

In its final determination notice, the DOL stated that the petitioner had not established a temporary need for the beneficiaries' services. The DOL stated that the petitioner was previously certified for 60 employees in the occupation of child care worker with dates of need from November 1, 2006 to May 1, 2007, and that under the current application, the petitioner asserts its dates of need to be from May 1, 2007 to November 1, 2007. The petitioner was also previously certified for 60 employees in the occupation of child care worker with dates of need from May 1, 2006 to November 1, 2006. The DOL concludes that the overlapping dates of need from one application to the next suggest that the petitioner's need is more likely permanent than temporary.

Upon review, the services to be performed by the beneficiaries have been shown to be ongoing, and the countervailing evidence provided with the petition does not overcome the reasons for the DOL denial of the petitioner's request for temporary labor certification. Contrary to counsel's assertions, the evidence of record does not establish an H-2B peakload need. The petitioner has continuously employed temporary workers year-round, from May 1, 2006 to May 1, 2007 and currently, the Form ETA 750 specifies the dates of intended employment as May 1, 2007 to November 1, 2007. Based on the evidence contained in the record of proceeding, the petitioner has not given a period of time when the beneficiaries are not needed. In summation, the petitioner has not demonstrated 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.

This petition cannot be approved for another reason. The record, as it is presently constituted, does not contain evidence of all of the beneficiaries' work experience, such as letters from the beneficiaries' previous employers. Also, the record does not contain evidence that all of the beneficiaries have CPR and First Aid certification.

The regulation at 8 C.F.R. 214.2(h)(6)(vi) requires the petitioner to submit:

(C) *Alien's qualifications.* Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary.

The regulation at 8 C.F.R. § 103.2(b) states:

(3) *Translations.* Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The Application for Alien Employment Certification (Form ETA 750) at Part A indicates that the minimum amount of experience needed to perform satisfactorily the job duties is six months of experience in the job being offered or six months of experience in a related occupation, specifically, camp, school or organized child care experience. Form ETA 750 at item 15 also lists other special requirements as:

**CPR & First Aid Certification.**

Upon review, the AAO found that only one of the 16 named workers, specifically, [REDACTED] has the requisite experience. The petitioner provided the beneficiary's Form I-94 (Arrival/Departure Record) that shows the beneficiary was admitted into the United States as an H-2B worker on November 12, 2006 until May 11, 2007. The evidence the petitioner provided for the other 15 named beneficiaries does not show that they possess the requisite six months of experience in the job being offered or six months of experience in a related occupation, specifically, camp, school or organized child care experience. Further, the evidence provided only showed that three of the named beneficiaries, specifically, [REDACTED] and [REDACTED] have CPR and First Aid certification. The other evidence does not establish that the beneficiaries have the requisite CPR and First Aid as stipulated in the Form ETA 750; [REDACTED] (CPR training only); [REDACTED] (First Aid training only); [REDACTED] (CPR training only); [REDACTED] (CPR training only); and [REDACTED] (CPR training only). [REDACTED] does not have evidence of any CPR or First Aid training in the record.

The petitioner also submitted evidence of the beneficiaries' CPR and First Aid training in the French language without an English translation for the following beneficiaries: [REDACTED] and [REDACTED]. Such evidence is not acceptable without a full English language translation of the foreign language document in accordance with 8 C.F.R. § 103.2(b).

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 director's decision of December 5, 2007 approving the petition is withdrawn. The petition is denied although the matter is moot due to the passage of time.