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FILE: EAC 06 266 52044 Office: VERMONT SERVICE CENTER

Date: DEC 20 2007

IN RE: Petitioner:  
Beneficiaries:

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:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied although the matter is moot due to the passage of time.

The petitioner is a fast food restaurant. It filed this petition in order to employ the alien beneficiaries as fast food cooks from October 1, 2006 to September 30, 2007, pursuant to the provisions for H-2B nonagricultural workers at section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b), and the implementing regulations at 8 C.F.R. § 214.2(h)(6).

As required by regulation, prior to filing the petition the petitioner filed with the Department of Labor (DOL) an application for employment certification (Form ETA 750) for six aliens as H-2B fast food cooks for the period October 1, 2006 to September 30, 2007. On September 11, 2006, DOL issued its Final Determination notice that it could not issue a temporary alien employment certification. According to the notice, DOL based its decision upon the failure of the petitioner to satisfy DOL's General Administration Letter (GAL) No. 1-95 requirement to "establish that the temporary need for the position offered is based on either: a one-time occurrence, seasonal, peak-load, or intermittent need." While expressing its sympathy for the shortage of local labor to fill the cook positions, the DOL decision states that the petitioner had failed to document that its need for cooks satisfied any of the four H-2B categories described in GAL 1-95. Also, the final paragraph of the DOL notice of denial states that, based upon the nature of its business, the employer-applicant's need to employ fast food cooks "is permanent and continuous in nature and need."

On September 28, 2007, the petitioner filed the Form I-129 (Petition for Nonimmigrant Worker) and allied documents. At part 1 of section 2 of the Form I-129 Supplement H, the petitioner identified the employment in question as a "one-time occurrence" whose temporary need is "unpredictable."

With the Form I-129 the petitioner filed only one document addressing the nature of its need for the cooks. This is a letter, dated September 28, 2006, from the petitioner's director of human resources to the Vermont Service Center. This letter includes the following assertions about the petitioner's fast food business and the proposed employment of H-2B workers as fast food cooks. The petitioner acquired a Burger King restaurant in San Destin, Florida in May 2006. Only when it acquired the restaurant did the petitioner discover that it "was staffed by J-1 and H-2B workers whose right to work [would expire] on September 30, 2006." By July 2006, after intensive recruiting efforts that began in May, it became apparent to the petitioner that it needed "to request Temporary H-2B Workers in order to get through the next season."

The letter provides this description of the restaurant's workload:

Our season normally runs from February to September. A second season for "snowbirds" starts in September and runs through the Winter. As a result, our operations do not shut down in September. Unfortunately, after the Summer ends, the local pool of labor dries up as high school and college kids return to school. We have made enormous efforts to attract local U.S. workers to our restaurant, but they are simply not there. We did not foresee this staffing problem when we acquired the restaurant.

In the letter the petitioner “concedes” that the “jobs are regular, full-time positions in the restaurant,” but the petitioner presents its situation as a one-time occurrence “based upon an unforeseen and temporary need for additional labor” generated by the combination of “the local labor shortage” and the “unique circumstances connected to the very recent acquisition of this restaurant.”

The director’s decision to deny the petition quotes the regulatory provisions at 8 C.F.R. §§ 214.2(h)(6)(ii)(A) and (B), and 8 C.F.R. § 214.2(h)(6)(iv)(D).<sup>1</sup> The provision at 8 C.F.R. § 214.2(h)(6)(ii)(A) defines H-2B temporary services or labor as referring 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.” The director presented this excerpt from 8 C.F.R. § 214.2(h)(6)(ii)(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 labor or services must 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. . . .

The provision at 8 C.F.R. § 214.2(h)(6)(iv)(D) requires that when, as here, DOL has denied the related application for temporary labor certification, the subsequent H-2B petition must be accompanied by countervailing evidence to overcome the grounds of the DOL denial. This provision states:

*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.

Application of the above regulatory provisions to the facts of this case led the director to the following findings:

Evidence submitted was not persuasive to overcome [DOL’s] denial of the Form ETA 750A. In accordance with [GAL] No. 1-95, Temporary Labor Certification Application in Nonagricultural Occupations, Processing Procedures, an employer must establish that the temporary need for the positions offered is based on either: a one-time occurrence, seasonal, peak-load or intermittent need. After the review of the evidence submitted the Service is compelled to agree with [DOL], in which the lack of documentation of the shortage of United States workers did not overcome the temporary need for the employing business [named] as the countervailing evidence was not submitted with the petition.

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<sup>1</sup> For the provision on attachment of countervailing evidence to the petition the director mistakenly cited 8 C.F.R. § 214.2(h)(6)(ii)(D), instead of the correct C.F.R. section, 8 C.F.R. § 214.2(h)(6)(iv)(D). This clerical error has no bearing on the merits of the appeal.

You have failed to establish that your need meets the regulatory need of temporary services or labor as described in 8 C.F.R. § 214.2(h)(6)(ii).

In visa petition proceedings, the petitioner bears the burden of establishing eligibility for the benefits sought. *See Matter of Brantigan*, 11 I & N Dec. 493 (BIA 1966).

Therefore, your petition is denied.

In his letter on appeal, counsel contends that both the DOL and the director's decisions were based upon an erroneous analysis and a misapplication of the definition of H-2B temporary labor and services. The AAO will separately evaluate each of the two decisions in the light of counsel's comments.

According to counsel, DOL's analysis "ignores the definition of temporary labor or services, which focuses upon the employer's need and not whether or not the job is permanent." Counsel asserts that "the DOL analysis is completely wrong in that it is the very shortage or unavailability of U.S. workers that creates a one-time, seasonal, peakload, or intermittent need for additional workers."

DOL used the correct standard for its evaluation of the record's evidence regarding H-2B temporary need. DOL referred the petitioner to the four categories of H-2B temporary need described in DOL's GAL 1-95. Those categories match the definitions of H-2B temporary services or labor at 8 C.F.R. § 214.2(h)(6)(ii)(B), which states:

*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:

(1) *One-time occurrence.* The petitioner must establish 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.

(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 is 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.

(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.

(4) *Intermittent need.* The petitioner must establish 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.

The record of proceeding contains no documentation presented to DOL other than the completed Form ETA 750. This document identifies the employer as a restaurant; identifies the title of the job as "Cooks, Fast Food"; briefly describes the major duties of the job; and states the period of expected employment as the one-year period from October 1, 2006 to September 30, 2007. The information on the Form ETA 750 does not establish any of the H-2B temporary categories defined at 8 C.F.R. § 214.2(h)(6)(ii)(B) and GAL 1-95. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, DOL's finding the employer's need for fast food cooks "is permanent and continuous in nature and need" is supported by the information on the ETA Form 750: it identifies a one-year need for a type of worker continuously employed at a fast-food restaurant, and it is not accompanied by any documentation relevant to the asserted need as a one-time occurrence, seasonal, peakload or intermittent need.

There is no basis in the record for counsel's assertion that "the DOL analysis ignores the very purpose of the H-2B program, which is to permit an employer to employ foreign workers to overcome the inability to find enough U.S. workers to do the work." Counsel's statement of the purpose of the H-2B program is incomplete. It fails to recognize that, regardless of labor market shortages, the terms of the program only authorize the hire of temporary workers if one of the four temporary need categories at 8 C.F.R. §§ 214.2(h)(6)(ii)(B) has been satisfied. DOL based its decision, correctly, on the petitioner's failure to provide evidence establishing any of these categories. Labor shortage is not an element of any of them. The decision comports with the regulations governing the H-2B program.

As discussed above, there is no merit to counsel's contentions that DOL based its denial upon an erroneous analysis of the relevant regulations.

The AAO also finds no merit in counsel's assertions against the validity of the director's decision to deny the petition. As noted above, the director denied the petition on the basis of insufficient countervailing evidence to overcome the DOL determination of failure to establish any of the H-2B temporary need categories.

The decision's content does not support counsel's assertion that the decision is "indecipherable and makes no sense," and that its conclusion is "obtuse" and stated in language that "simply makes no sense." The AAO agrees with counsel that the words "in which the lack of documentation of the shortage of United States workers did not overcome the temporary need for the employing business" do not make sense. While the director's language could have been more direct, when read as a whole, the decision communicates that its

basis is the petitioner's failure to provide sufficient countervailing evidence to overcome the grounds of the DOL denial. On the basis of its review of the entire record of proceeding, the AAO finds that the petitioner has not overcome any of those grounds. Thus, even though confusing in part, the director's decision to deny the petition was correct.

The evidence presented with the petition does not overcome the grounds of the DOL denial, namely, the petitioner's failure to establish that its asserted need for fast food cooks qualifies as an H-2B temporary need under any one of the categories at 8 C.F.R. § 214.2(h)(6)(ii)(B). The only countervailing evidence in the record of proceedings is the September 28, 2006 letter described earlier in this decision. The letter does not satisfy the elements of any of the categories at 8 C.F.R. § 214.2(h)(6)(ii)(B). The letter suggests "one-time occurrence" as the temporary need category upon which the petitioner relies – specifically, this category's coverage of an employment situation which is, in the words of the regulation, "otherwise permanent, but a temporary event of short duration has created the need for a temporary worker." However, the content of the letter does not explain why the labor shortage, which is cited as creating the need for H-2B fast food cooks, qualifies as a temporary event of short duration. Further, the letter is not accompanied by any documentation that would substantiate the cited labor shortage as a temporary event of short duration. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena; Matter of Laureano; Matter of Ramirez-Sanchez*.

Finally, neither statute nor regulation supports counsel's contention, unsupported by citation, that "shortage or unavailability of U.S. workers creates a one-time, seasonal, peakload, or intermittent need for additional workers." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena; Matter of Laureano; Matter of Ramirez-Sanchez*.

It is noted that the period for which the petitioner requested the beneficiaries' services (October 1, 2006 to September 30, 2007) has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed. The petition is denied although the matter is moot due to the passage of time.