

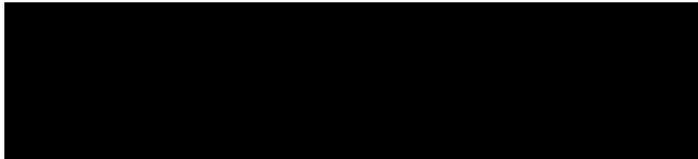
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U.S. Department of Homeland Security
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U.S. Citizenship
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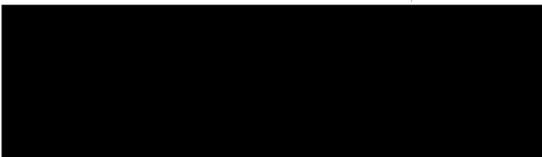
Date: MAR 13 2007

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 and the petition will be denied.

The petitioner is a management and consulting company that assists local area hotels in managing all facets for their housekeeping. It desires to extend its authorization to employ the beneficiaries as hotel housekeepers 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 eight months. The beneficiaries will be performing temporary services on various properties owned by Ocean Reef Resort Properties in Destin, Florida. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner, Ocean Reef Realty, Inc. dbw Avant Management Consultancy and Staffing Resources, had not provided adequate documentation to establish itself as an employer and therefore was not entitled to file and/or receive a temporary labor certification. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) in its own name and denied the petition.

On appeal, counsel explains that the beneficiaries are rendering their temporary services on properties owned by Ocean Reef Resort Properties and that Avant Management Company is the employer pursuant to the agreement made between both parties.

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 the 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 August 30, 2006 by Avant Management Company without a temporary labor certification in its own name, or notice detailing the reasons why such certification could not be made. A copy of the temporary labor certification (Form ETA 750) that accompanied the petition indicates at Item 4 that the name of the employer is Ocean Reef Realty, Inc. dbw Avant Management

Consultancy and Staffing Resources. Absent a temporary labor certification in the petitioner's name, [REDACTED] the petition could not be approved. Beyond the decision of the director, the petition cannot be approved for another reason. The petitioner, [REDACTED] has not established that it qualifies as an employer under the regulations.

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

(B) An H-2B petitioner shall be a United States employer, a United States agent, or a foreign employer filing through a United States agent. . . .

The regulation at 20 C.F.R. § 655.200(c) states in pertinent part:

Employer means a person, firm, corporation, or other association or organization (1) which currently holds a location within the United States to which United States workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises, or otherwise controls the work of such employees. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i) states in pertinent part:

(F) *Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

The DOL stated in its decision that the case file contained a contract for services to be provided by [REDACTED] to [REDACTED]. Therefore, the DOL determined that the actual employer seeking sponsorship of the H-2B workers is Avant Management Company. The DOL explained that the Atlanta National Processing Center telephoned Mr. [REDACTED] President of Ocean Reef Realty, and that he stated that he does not employ housekeepers on staff but instead uses contract workers. Mr. [REDACTED] also stated that [REDACTED] would not be paying the salaries of the H-2B workers, and that [REDACTED] would be responsible for salaries. Therefore, the DOL determined that Ocean Reef Realty, the employer listed on the Form ETA 750, does not meet the definition of "employer" and therefore, is not entitled to file and/or receive a temporary employment certification.

On appeal, counsel states that [REDACTED] is the employer pursuant to an agreement made between the parties.

A copy of the management agreement between [REDACTED] and [REDACTED] states in pertinent part, the following:

1. [REDACTED] as its agent for property maintenance and staffing management.
2. [REDACTED] shall be responsible for providing the staffing requirements necessary for the upkeep of [REDACTED] properties such as housekeeping, and at times, banquet set up, food service and general clean up of resort facilities.
3. Avant shall, for all intents and purposes, act as surrogate employer to the housekeeping staff. . . .
4. [REDACTED] agrees to compensate [REDACTED] and housekeeping staff under its management and supervision accordingly at agreed rates or fee, depending on size and location of property.
5. [REDACTED] further agrees to provide administrative and documentation support when deemed necessary in the recruitment of additional temporary workers through the guest worker program if A [REDACTED] is unable to acquire adequate staffing locally.

Counsel explains on appeal that A [REDACTED] got confused while completing the application and put itself as an agent for the [REDACTED] and as doing business with Ocean Reef thinking that since the workers were employed at the [REDACTED] Ocean Reef should have been listed as the employer pursuant to their intercompany agreement. Therefore, counsel states that the AAO should find that [REDACTED] labor certification was properly filed and that Avant's oversight was a harmless error.

The record of proceeding contains a copy of a letter dated June 26, 2006, signed by the president of [REDACTED] Mr. [REDACTED]. The letter states that [REDACTED] c. has commissioned [REDACTED] Management Company to oversee the housekeeping division. The letter states that [REDACTED] company's primary task is to ensure and maintain adequate housekeeping personnel for its growing list of resort properties that it owns and operates. The letter also states that [REDACTED] shall be responsible for restructuring the facilities maintenance division, which includes logistics, maintenance personnel management, scheduling, training, performance assessment, ensure policy compliance, supervise activities, manage and maintain associated insurance and benefits coverage, related inventory management and distribution, among other functions. The letter states that [REDACTED] is also empowered to recruit, replenish through local sources or otherwise to ensure continued support of the resort's existing staff, and availability of housekeeping personnel for deployment to various facilities within the scope of the resort's operations.

The record of proceeding contains a copy of a management agreement signed by both parties on August 29, 2006. Based on the management agreement, [REDACTED] has not established itself as the employer or the agent of the named beneficiaries. The petitioner, [REDACTED], has not established that it will retain control over the beneficiaries wherever they are to be employed. The petitioner has not established that it will be responsible for wages, firing, setting hours and working conditions, insurance, leave, and other employment-related factors. The agreement states that Ocean Reef Realty, Inc. agrees to compensate Avant and housekeeping staff. Although counsel states on appeal that it was an error that the ETA-750 listed [REDACTED] Resorts dbw Avant as the employer, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Therefore, the petitioner has not overcome the objections of the DOL. The petitioner has not provided adequate documentation to establish itself as an employer. Further, the record does not establish that the petitioner will be the agent of the beneficiaries or for the employer.

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

ORDER: The appeal is dismissed.