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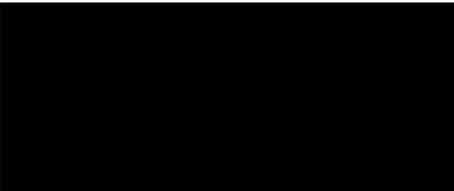
U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship
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Services

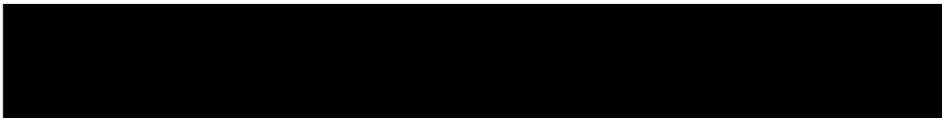
D4



OCT 16 2007

FILE: EAC 07 215 53361 Office: VERMONT SERVICE CENTER Date:

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:

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
Robert P. Wiemann, Chief
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 affirmed in part. The petition will be approved in part, that is, only for the workers identified by name in the petition and only for the period May 1, 2007 to November 30, 2007.

The petitioner is a fast food restaurant. It desires to employ the beneficiaries as fast food cooks from April 1, 2007 to November 30, 2007. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made.

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 need for the services to be performed is temporary. The director's recommendation to approve the instant petition is now before the AAO for review.

The petition will be approved for only part of the period of intended employment specified in the Form I-129 (Petition for Nonimmigrant Worker).

The regulation at 8 C.F.R. § 214.2(h)(9)(iii)(B)(2) states in pertinent part :

(ii) Approval. In any case where the director decides that approval of the H-2B petition is warranted despite the issuance of a notice by the Secretary of Labor . . . that certification cannot be made, the approval shall be certified by the director to the Commissioner pursuant to 8 C.F.R. § 103.4. . . If approved, the petition is valid for the period of established need not to exceed one year. . . .

The Form I-129, at item 8, specifies the dates of intended employment as April 1, 2007 until November 30, 2007. To substantiate its need for the intended dates of service, the petitioner provides a copy of its monthly payroll reports for the calendar years 2005 and 2006. The reports show that workers are employed throughout the year. The reports also show an increase in the total number of workers and hours worked from May through November of 2005 and 2006.

After review of the documentary evidence contained in the record, the petition will be approved for the period for which the evidence of record establishes an H-2B temporary need in accordance with the regulation at 8 C.F.R. § 214.2(h)(6). The petitioner has provided sufficient evidence to establish that the need for the beneficiaries' services is from May 2007 until November 2007 and that the need is peakload and temporary as defined at 8 C.F.R. § 214.2(h)(6). The evidence of record does not establish that the period of need includes the month of April 2007.

Next, the petition will be approved only for the eight (8) persons that it identifies by name.

Section 214(g)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1184(g)(1)(B), sets a numerical limitation on the number of H-2B visas that may be issued each fiscal year. The regulations at 8 C.F.R. §§ 214.2(h)(8)(i)(C) and (h)(8)(ii) implement this section of the Act. The Form I-129 here was filed for 25 workers, of which 17 are unnamed. The 17 unnamed workers are not qualified for H-2B status. The numerical cap related to the instant H-2B petition was reached on March 16, 2007, a date that preceded the filing

of this petition (July 16, 2007). Therefore, only those aliens qualify for consideration for the benefits of this petition who are both named in the petition and also certified by the petitioner as having been admitted into the United States in H-2B status, or having changed there to H-2B status, in the last three fiscal years. Therefore, the director's decision is incorrect with regard to the workers who may benefit from approval of the petition.

The regulation at 8 C.F.R. § 214.2(h)(9)(i)(A) instructs that the director's approval notice "shall cover only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act." Accordingly, the Vermont Service Center's approval notice must specify that the only persons for whom the petition is approved are the eight workers who were identified by name in both the petition and the petitioner's H-2B Returning Worker Attestation.

The Vermont Service Center will issue the appropriate approval notice, consistent with the above discussion.

ORDER: The decision of the director is affirmed in part, as follows. The nonimmigrant visa petition is approved only for the eight workers who are named in both the petition and the petitioner's H-2B Returning Worker Attestation; and the petition is approved only for the period for which the temporary need is established, that is, May 1, 2007 to November 30, 2007. Withdrawn are the parts of the director's decision that recommended that the beneficiaries of the approved petition include the 17 unnamed workers and that the period of approval include the month of April 2007.