

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

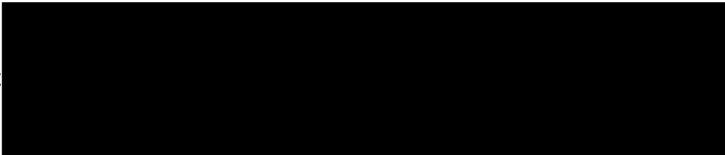
PUBLIC COPY

8 31



FILE: EAC 06 264 51616 Office: VERMONT SERVICE CENTER Date: OCT 23 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:

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, 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 petition will be denied although the matter is moot due to the passage of time.

The petitioner is a restaurant, and it desires to employ the beneficiaries as waiters/waitresses 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 the period from November 16, 2006 to April 15, 2007. The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor. The acting director determined that the petitioner had not overcome the objections addressed in the DOL's decision and denied the petition. The director also noted several discrepancies between the information the petitioner provided to DOL and the U.S. Citizenship and Immigration Services (CIS).

On appeal, the petitioner indicates that the seasonal need for supplemental workers is recurrent every year and critical to the success of the company. The petitioner also explained on appeal that it presented documents and evidence to DOL based on two restaurants, one located in Boulder and one in Avon, Colorado, with two seasonal peak loads, one from November until April, and one "smaller peak period of about two-three months in summer."

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:

(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 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 AAO notes that the petitioner altered its job description, its job location, and date of employment from the information indicated on the Form ETA-750 and from the Form I-129. The information listed on the Form ETA-750 stated that the petitioner consists of two restaurants located in [REDACTED] Colorado. The petitioner also requested an employment period of November 16, 2006 until September 15, 2007. However, the Form I-129 stated an employment period from November 16, 2006 until April 15, 2006, and the attachment to the Form I-129 stated that the petition is for workers who will be employed in only one restaurant, located in [REDACTED]. It is apparent that the DOL's final determination notice is inconsistent with the information contained in the record of proceeding. The inconsistencies of the information contained in the record of proceeding make it impossible to consider the information contained in the labor certification program specialist's letter.

The director asked the petitioner to clarify the inconsistencies in a request for evidence. In its October 17, 2006, response to the director's request for evidence, the petitioner acknowledged that the information submitted to DOL for the issuance of a temporary labor certification was for two restaurants with two separate peak seasons which may have resulted in the denial by the Department of Labor. The petitioner indicated in its response that the instant petition was for the peak season of only one restaurant, located in [REDACTED], which runs from November through April.

In addition, in response to the director's request for evidence, the petitioner explained the inconsistencies between the information submitted to the DOL and the information submitted to CIS as follows:

Furthermore, the season in [REDACTED] areas is just knocking at the door and there is no time to restart the whole process of applying to the Department of Labor with all the details of expected duties and responsibilities including the one required for May and June period (deep cleaning). Hence we decided to submit this request with the same roles and responsibilities which was specified in the original Department of Labor.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of [REDACTED]*, 17 I&N Dec. 248 (Reg. Comm. 1978). On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, or the associated job responsibilities, or its location, or dates of employment. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of [REDACTED]*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). As noted above, the petitioner acknowledged that the information submitted with the instant petition was not based on the same information submitted to DOL for the issuance of the temporary labor certification. The regulations pursuant to 8 C.F.R. § 214.2(h)(6)(iv) state that the petitioner must present countervailing evidence for the reasons why the Secretary of Labor could not grant a labor certification. In the instant case, the

petitioner did not provide countervailing evidence but instead altered the information, which was inconsistent with the information provided to DOL. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of* [REDACTED] 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of* [REDACTED], 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

It is noted that the petitioner requested the beneficiary's services from November 16, 2006 until April 15, 2007. Therefore, the period of requested employment has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, 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.