



U.S. Citizenship
and Immigration
Services

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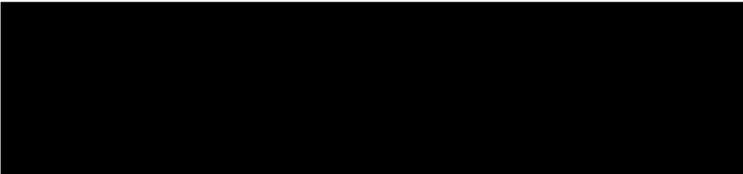


FILE: EAC 07 073 52061 Office: VERMONT SERVICE CENTER Date: SEP 12 2007

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:



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.

A handwritten signature in black ink, appearing to read "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 and the petition will be approved for the period of established need.

The petitioner filed the present petition to continue to employ the beneficiary, working as a Middle Eastern Confectionary Consultant, as an H-2B temporary non-agricultural worker under 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), and the implementing regulations for H-2B petitions at 8 C.F.R. § 214.2(h)(6).

Citizenship and Immigration Services (CIS) approved the previous H-2B petition, for the period July 7, 2006 to January 30, 2007, on finding that the petitioner had established that its need for the beneficiary's services qualified as a one-time occurrence as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B)(I). The present petition seeks to extend the beneficiary's H-2B classification for the one-year period February 1, 2007 to January 30, 2008.

The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. The DOL Final Determination letter stated that the position appears to be a permanent position, noting that the previous petition had also asserted that the petitioner's need was a one-time occurrence.

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 within the meaning of the regulations governing H-2B petitions. In the decision certified to the AAO, the director determined that the petitioner had established that approval of the petition should be extended, "but only for an additional six months," that is from February 1, 2007 to August 1, 2007. The director's recommendation to approve the instant petition is now before the AAO for review.

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

(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. . . .

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)(C) states in pertinent part:

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).

Section 101(a)(15)(H)(ii)(b) of 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) specifies the requirements of H-2B petitions. The section at 8 C.F.R. § 214.2(h)(6)(i) states:

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.

The initial petition for the beneficiary's services was approved on the basis of the petitioner's claim that in order to expand its baking capabilities, it needed to utilize the beneficiary's specialized culinary knowledge and facility with newly arriving equipment for the one-time period of July 7, 2006 to January 30, 2007. The petitioner now seeks to extend the beneficiary's H-2B classification on the grounds that, for reasons not anticipated at the time of the initial petition, the one-time need will continue for an additional period of one year, from February 1, 2007 to January 30, 2008. Thus, the petitioner relies upon 8 C.F.R. §§ 214.2(h)(6)(ii)(A) and (B)(I), which state:

(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:

(I) *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.

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.

As indicated in the precedent decision cited by counsel, *Matter of Golden Dragon Chinese Restaurant*, 19 I & N Dec. 238 (Comm. 1984), an employer may not use its H-2B beneficiary outside the scope of the temporary work that is the basis of the related visa petition.

The petitioner describes itself as a Middle Eastern Deli and Supermarket. The following statements accord with information submitted by the petitioner in support of this petition. The petitioner prepares and serves more than 40 combinations of falafel, gyros, lamb samosas, spanakopita, kebabs, souvlaki, hummus grape leaves and salads. It packages for sale to local markets "many of its signature items, including hummus, baba ghanouj and pita bread." The petitioner also wholesales some of its products "throughout local coops and markets as well as to larger grocers such as Cub Foods and Rainbow Foods. In order to meet an increasing demand for its products, the petitioner is now expanding its production capabilities and its product line. To realize this expansion, the

petitioner is "first creating a new, larger bakery division." The beneficiary's services are a critical element of this expansion.

Section 13 of the petitioner's application to DOL for temporary labor certification provides the following description of the beneficiary's job, which is presented as essential to the petitioner's bakery expansion plans:

Advise bakery manager in the start-up of a new division of the bakery. Advise in the development of the pastry items to be made. Observe placement of special bakery equipment imported from overseas, and make suggestions regarding [the] efficiency of work space and preparation. Supervise and train individuals in necessary care and maintenance of equipment. Consult with bakery manager to determine most popular items to be the first items produced for sale. Advise in the development of additional dessert items. Assist in planning the layout and design of the bakery for efficiency and ease of working conditions. Observe [the] bakery hiring process and provide recommendations for minimum qualifications and training opportunities.

The countervailing evidence submitted with the petition includes sufficient documentary evidence to establish that: (1) due to customs problems, delivery of the equipment needed for the bakery expansion and related equipment-training was delayed until October 3, 2006; (2) the delay in the arrival of the bakery equipment necessarily affected the beneficiary's ability to train in the use, care, and maintenance of that equipment; (3) the seven employees whom the beneficiary would train were hired in this sequence: August 14, 2006; August 18, 2006; October 9, 2006; November 2, 2006; December 19, 2006; December 29, 2006; and January 4, 2007; and (4) the beneficiary's work authorization was not received until August 1, 2006.

According to the petitioner, the bakery equipment could not be installed until space for the bakery was renovated. The petitioner does not specify the date on which the space renovation was completed, but its letter submitted in support of its application for DOL temporary labor certification indicates that the renovation was completed at least by the date of the letter, November 17, 2006.

The November 17, 2006 letter stated, "We anticipate completing the installation of new equipment by the end of this year." However, according to the counsel's January 15, 2007 letter in support of the petition, as of that letter's date the petitioner was still "installing the new equipment" and "thereafter" would begin training the new employees. As indicated in the director's decision, the petitioner's January 12, 2007 letter in support of the petition asserted that the beneficiary's training function would be completed by August 1, 2007: "At this time it is estimated that the completion of training employees on the usage of bakery equipment and production procedures will take approximately six months until August 1, 2007."

The petitioner's CEO's letter of reply to the director's request for additional evidence (RFE), dated May 4, 2007, states that, as of that date, "the equipment has been installed and the [beneficiary] is training new hires." Counsel's May 14, 2007 letter in reply to the RFE also acknowledged that "initial reconstruction and setting up of specialty equipment" had been accomplished by the date of that letter. However, the record does not establish either the date when the equipment was installed and ready to operate or the date when the beneficiary began actual training.

Counsel's May 14, 2007 letter in reply to the RFE described the petitioner's remaining need for the beneficiary's services as follows:

Though parts of the project, including the initial reconstruction and setting up of specialty equipment have been accomplished by now, there are still phases of the project that require the [beneficiary's] expertise. The petitioner requires the [beneficiary's] expertise in training new hires, advising in the development of pastries to be made, consulting the manager on determining items most popular, development of additional pastries and advising in the care and maintenance of the specialty equipment

According to the CEO's letter of May 4, 2007, the beneficiary was training new hires "in the preparation methods involved, equipment utilization on creating confections, and ensuring that the equipment and methods adhere to required standards." The letter does not state how long the training had been underway.

On August 24, 2007 counsel timely submitted to the AAO additional documents in response to the director's August 3, 2007 Notice of Certification in this case. These documents are: (1) a letter, dated August 23, 2007, from counsel to the AAO; (2) a copy of a Notice of Certification, dated July 24, 2007, whose content appears to be identical to the one before the AAO, which is dated August 3, 2007; (3) a copy of a Form I-797C (Notice) informing the petitioner of the transfer of the certification to the AAO; (4) a copy of the face of a CIS mailing envelope addressed to counsel, with a postage meter date of July 27, 2007; (5) copies of the cover page of the June 2007 edition of the Minneapolis/St. Paul Business Journal and a one-page article from that periodical about the petitioner's owner and CEO; (6) an e-mail bearing a multiple-page StarTribune.com article on the petitioner and its CEO; and (7) an e-mail bearing a multiple-page article on the petitioner from the July-August 2007 edition of Twin Cities Natural Food Co-ops.

Counsel's August 23, 2007 letter introduces the above listed articles as evidence that the petitioner is a "thriving business vital to the Minneapolis/St. Paul area of Minnesota.." The letter directs the AAO to "see the Petition for details" to support the petitioner's assertion that it "needs the Beneficiary for the entire year requested."

On the basis of the entire record of proceeding, the AAO makes the following findings. The petitioner has presented sufficient evidence to establish that its ability to fully utilize the beneficiary in bakery-equipment installation, training on the use and maintenance of that equipment, training in the preparation of confections requiring that equipment, and advice on the development of new confections to be produced by that equipment was delayed until January 4, 2007. By that date, the beneficiary was present and authorized to work in the United States, the equipment had been at its installation location for approximately 90 days (having been delivered on October 3, 2006), and the employees to be trained had been hired. Accordingly, the AAO finds a reasonable basis to extend the beneficiary's H-2B classification for six of the 12 months requested in the present petition. This provides the petitioner the opportunity to recoup the time that elapsed between the July 7, 2006 filing of the initial petition and January 4, 2007 before the petitioner was, or should reasonably have been, in a position to fully utilize the beneficiary's services. The AAO therefore concurs with the decision of the director.

Neither counsel nor the petitioner has provided documentary evidence that substantiates their assertion that the present petition should be approved for a full year. Nor have they established a temporary need beyond the six months recommended in the director's decision. The record of proceeding does not establish that the duration of the asserted one-time occurrence extends beyond six months. The record does not contain a detailed training regimen that establishes the duration of the training by the beneficiary, documentation of the specific tasks that have occupied the beneficiary and the trainees since the dates of their hire, or any evidence of extraordinary circumstances, beyond the late arrival of the bakery equipment, that have obstructed the work for which the beneficiary was hired. The documents submitted in response to the Notice of Certification contain no specific evidence regarding the beneficiary's efforts and accomplishments in the work for which he was hired. 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).

The petition will be approved for the period that the record of proceeding has established for the need of the beneficiary's services. The petitioner has provided sufficient evidence to establish that it needs those services for the sixth-month period February 1, 2007 to August 1, 2007, and that that the need is a continuation of a one-time occurrence and temporary. The Vermont Service Center will issue the appropriate approval notice.

ORDER: The decision of the director is affirmed. The nonimmigrant visa petition is approved for the period of established need, that is, from February 1, 2007 until August 1, 2007.