

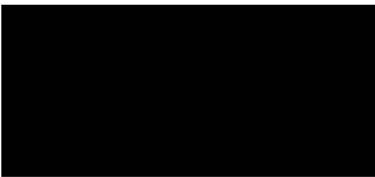
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U.S. Citizenship  
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Services

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FILE: EAC 08 069 51964 Office: VERMONT SERVICE CENTER

Date: **AUG 11 2008**

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.

A handwritten signature in black ink that reads "Robert P. Wiemann".

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.

The petitioner engages in the pallet repair and reconditioning business. It desires to continue to employ the beneficiaries as pallet assemblers from December 1, 2007 to December 1, 2008. The petition indicates that the beneficiaries will be working at the petitioner's facility in Jermyn, Pennsylvania. The director determined that the petitioner submitted a certified temporary labor certification (Form ETA 750) from the Department of Labor (DOL) that failed to cover the intended period of employment beginning December 1, 2007. The director also determined that the petitioner had not established that the beneficiaries were maintaining valid nonimmigrant status at the time the petition extension was filed.

On appeal, counsel on behalf of the petitioner states that the petition was filed on November 21, 2007 before the beneficiaries' authorized stay expired on December 1, 2007. Counsel states that the workers maintained proper status.

Upon careful review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition. The AAO finds that although the petitioner provided a copy of its Form ETA 750 that had been certified by the DOL prior to the filing of the petition, the validity period of the temporary labor certification does not cover the entire period of intended employment beginning December 1, 2007. Additionally, the AAO finds that the petition cannot be approved for another reason. The petitioner did not establish that its need for the beneficiaries' services is a peakload and/or seasonal, temporary need. The petition will be denied.

The first issue is whether the petitioner submitted the proper Form ETA 750 certified by the DOL that covers the entire period of intended employment beginning December 1, 2007.

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 record of proceeding contains a Notice of Action (I-797) dated December 26, 2007 that was sent by Citizenship and Immigration Services (CIS) to counsel of record returning the Petition for a Nonimmigrant Worker (Form I-129) with its supporting documents and fee because the petitioner did not submit an Application

for Alien Employment Certification (Form ETA 750) that covers the entire period of requested employment or a statement from the DOL stating why certification could not be made.

The record of proceeding contains an affidavit written by [REDACTED] Assistant to [REDACTED], Esquire, dated May 15, 2008. The affiant states that on January 9, 2008, an e-mail was received by their office indicating CIS had received the Form I-129 petition for premium processing on January 8, 2008. Thereafter, the affiant states that it received a Notice of Action (Form I-797C) indicating the Form I-129 petition was received on January 8, 2008 and accepted as a premium processing case. This date coincides with the received date marked on the Petition for a Nonimmigrant Worker (Form I-129), which reads January 8, 2008. The AAO finds that the Petition for a Nonimmigrant Worker (Form I-129) was properly filed on January 8, 2008.

The record of proceeding also contains another I-797 dated January 15, 2008, in which CIS again requested counsel to submit Form ETA 750 certified by the DOL for the position, the number of workers and the requested period of employment. In response to the director's request for additional information, the petitioner submitted an ETA 750 for the year 2008.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states that:

After obtaining a determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by the labor certification determination and supporting documents, with the director having jurisdiction in the area of intended employment.

The regulations at 8 C.F.R. § 214.2(h)(15)(ii) states in pertinent part:

*(C) H-2A or H-2B extension of stay.* An extension of stay for the beneficiary of an . . . H-2B petition may be authorized for validity of the labor certification or for a period of up to one year. . . .

The Form ETA 750 certified by the DOL is for 73 unnamed beneficiaries from Mexico for the petitioner's facility in Jermyn, Pa. The temporary labor certification was approved on November 8, 2007, prior to the filing date of the petition, January 8, 2008, and the certification is valid from February 1, 2008 until December 1, 2008. The director denied the petition because the dates of intended employment on the Form I-129 are from December 1, 2007 to December 1, 2008. However, the Form ETA 750 was certified for a starting date of February 1, 2008. Therefore, the director determined that the petitioner failed to cover the total requested period of employment beginning December 1, 2007.

As stated in the regulations, an extension of stay may be authorized only for the validity of the labor certification. In the instant case, the temporary labor certification is valid from February 1, 2008 until December 1, 2008. The petitioner intends to employ the beneficiaries from December 1, 2007. The petition extension cannot be approved since the ETA 750 does not cover the entire period of the intended employment, specifically, December 1, 2007

through January 31, 2008. Neither the statute nor the regulations allow the petitioner to change the validity period of the temporary labor certification.

The petition may not be approved for another reason. The petitioner has not established that its need for the beneficiaries' services is a peakload and/or seasonal, temporary need.

The petition indicates that its need for the beneficiaries' services is seasonal. The petitioner states that it has a substantial and continuing need for workers to remain and be extended for a period of time so that the business can continue. The petition indicates that the beneficiaries' dates of intended employment are for one-year, from December 1, 2007 to December 1, 2008.

Upon review, the petitioner has not established a temporary need for the beneficiaries' services for a period of one year. The petitioner has not demonstrated 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. The petitioner has not established 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 has been shown to have a year round need for the beneficiaries' services.

The petitioner has not submitted its contractual history and/or financial evidence to demonstrate that its business activity has formed a pattern where its need for workers is traditionally tied to a season of the year and will recur next year at the same time. The petitioner has not shown that its need for the beneficiaries' services is tied to a particular pattern or event that recurs every year. The petitioner has not specified the periods of time during each year it does not need the beneficiaries' services. The petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Simply 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)). The services to be performed by the beneficiaries and the petitioner's need to have additional workers to perform these services have not been shown to be a seasonal need.

The petitioner also states at item 21 of the Form ETA 750 that "due to the lack of appropriate labor for our peakload work, coupled with the high turnover in our industry, we are requesting labor certification to hire these temporary, foreign workers."

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload as pallet assemblers. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or have different specialty skills than the 200 workers currently employed by the company. The petitioner has not provided evidence of the contracts showing a clear termination date. The petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Consequently, the petitioner has not

demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

The petitioner states that failure to obtain these workers will have a profound and significant impact on the business, and that if the unavailability of these H-2B workers continues for a substantial period of time, the business may be unable to meet its production obligations, suffer the financial consequences and fail. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

The director also found that the beneficiaries were not maintaining valid nonimmigrant status at the time the petition extension was filed. This issue is not within the jurisdiction of the AAO and will not be addressed.

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. The petition is denied.