

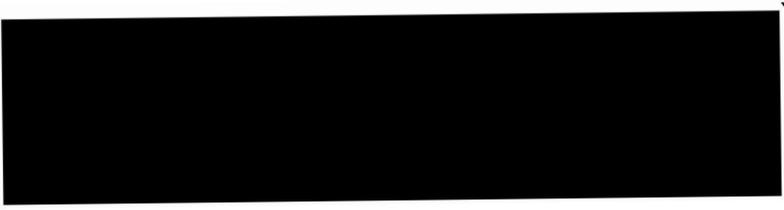
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**U.S. Citizenship
and Immigration
Services**

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FILE: EAC 08 093 51412 Office: VERMONT SERVICE CENTER Date: JUL 25 2008

IN RE: Petitioner:
Beneficiary:



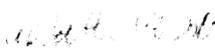
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

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 recommended to be approved by the Acting 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 The decision of the acting director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is a professional employer organization which provides personnel staffing and related services to the business community throughout New York and the tri-state area. It desires to extend the stay and change the employment of the beneficiary to the current petitioner. The petitioner intends to hire the beneficiary as a bookkeeper from October 30, 2007 to September 15, 2008. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because there is no provision under the H-2B program to transfer an alien beneficiary from one employer to another, or to extend the H-2B status of an alien beneficiary. The acting director determined that the petitioner submitted sufficient countervailing evidence to overcome the concerns of the DOL and recommended approval of the petition.

As discussed below, the AAO disagrees with the findings of the acting director. Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record does not support the acting director's decision to approve the petition. Accordingly, the AAO will remand the petition to the acting director for further action and consideration.

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

(D) Change of employers. If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. . . .

The DOL states in its final determination notice dated January 8, 2008 that there were no provisions under the H-2B program to allow an alien beneficiary currently in the United States to transfer employers or extend his/her status in the United States. Therefore, an unfavorable determination was rendered by DOL in this matter. However, in accordance with the above regulation, the petitioner is allowed to request a change of employer and an extension of the beneficiary's stay in the United States upon filing a petition, Form I-129, Petition for a Nonimmigrant Worker (Form I-129). The AAO finds that the petitioner followed the regulations in making this request to change the beneficiary's employer and extend his stay in the United States. However, the petition may not be approved for other reasons.

On October 29, 2007, counsel on behalf of the petitioner filed Form I-129, however, it was filed without the United States DOL's temporary labor certification or notice detailing the reasons why the certification could not be made. Therefore, counsel states that the petition was rejected by the United States Citizenship and Immigration Services (USCIS).

The petition was properly filed with USCIS on February 12, 2008. Upon filing, the petitioner included the final determination notice from the DOL which states that the temporary labor certification had not been certified. The Application for Alien Employment Certification, Form ETA 750, the application upon which DOL makes its

final determination, is not contained in the record of proceeding. Absent Form ETA 750, the AAO cannot determine whether the beneficiary qualifies for the job offer as specified on Form ETA 750. The petitioner has not shown that the beneficiary possesses any education, training, experience, or special requirements listed on Form ETA 750 or whether no qualifications were necessary to perform the duties indicated in the petitioner's letter dated October 22, 2007.

Further, the petitioner seeks approval of the proffered positions as a peakload need. However, the evidence submitted does not establish a temporary, peakload need.

To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The petitioner is a staffing company that currently employs 54 employees. The petitioner states in its letter dated October 22, 2007 that it is experiencing a larger client base than in the past and although it currently employs a permanent, full-time accountant, due to this overwhelming need, it requires the services of a temporary bookkeeper to support the current, permanent employee on a short-term demand basis. The petitioner provided a list of the duties the beneficiary will be responsible for as its bookkeeper.

The record as it is presently constituted does not contain evidence of the petitioner's growth as a business and its need for a bookkeeper. The petitioner states that it has a full-time accountant, however, the record contains no evidence that the petitioner has hired such an accountant and how the beneficiary will be of assistance to the full-time accountant. In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services thereby creating a "peakload need" that is different from its ordinary workload. 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 petitioner submitted a copy of its 2006 and 2007 payroll summaries indicating the total number of workers, the total hours worked and total earnings received for permanent and temporary workers. The summaries reflect an increase of two permanent workers in January 2007, which remained constant throughout 2007. The petitioner's summaries show a stable workforce of 40 temporary employees throughout 2006-2007. The petitioner has not established that its business has expanded or that it has a seasonal or short term need for a bookkeeper to perform temporary services for the company.

Since these deficiencies were not mentioned in the director's decision, this case will be remanded to the acting director in order to give the petitioner an opportunity to submit a copy of its temporary labor certification utilized in the current petition. The petitioner will also be given an opportunity to submit evidence to establish that its need for the beneficiary's services is peakload and temporary. At a minimum, the petitioner should be directed to provide copies of the petitioner's Employer's Quarterly Federal tax returns and records of Federal Unemployment (FUTA) Deposits and Filings, for the two years preceding the date that the petition was filed;

and any other documents that demonstrate that the labor or services sought in the petition constitute the type of H-2B temporary need asserted there. The acting director may also request any additional information or evidence that he deems necessary to adjudicate the matter at hand.

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 acting director's decision of July 9, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. Upon completion, the director shall certify the decision to the AAO for review.