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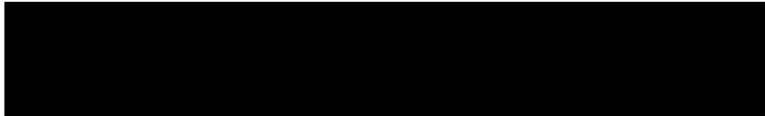
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FILE: EAC 07 167 52401 Office: VERMONT SERVICE CENTER Date: JUN 11 2008

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.

for Michael T. Kelly
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 sustained. The petition will be approved for the period of established need although the matter is moot due to the passage of time.

The petitioner engages in the manufacture of games (table soccer, table hockey, bumper pool and arcade games) for the home recreation market. It desires to continue to employ the beneficiaries as production helpers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b) from May 8, 2007 to January 31, 2008. The director determined that the petitioner had not established a temporary seasonal need for the beneficiaries' services and denied the petition.

On appeal, the petitioner states that it has clearly demonstrated in its monthly payroll reports for the years 2005 and 2006 that its highest seasonal need for temporary production helpers was in January, July and August through December of 2006 and that its highest seasonal need for temporary production helpers was in May through December of 2005.

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:

(2) *Seasonal need.* The petitioner must establish that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

(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.

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.

The petitioner seeks approval of the proffered position as a seasonal need.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

The petitioner described the duties of the proffered position at Part A, section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

A production helper will bring lumber to milling machines, measure lumber to be cut, cut lumber to precise tolerances, assemble cut lumber into cabinets and package cabinets for shipment.

The petition indicates at Part 5, item 8 that the dates of intended employment are from May 8, 2007 until January 31, 2008. To substantiate its need for the intended dates of service, the petitioner provided a copy of its 2005 and 2006 monthly payroll reports. The reports show that in the years 2005 and 2006, the petitioner employed permanent and temporary workers all year round. Therefore, the petitioner does not have a seasonal need when both temporary and permanent workers were employed by the petitioner all year-round. However, the petitioner can establish a peakload need. The petition indicates that the petitioner regularly employs 142 permanent workers to perform the services or labor at the place of employment. In its letter dated March 9, 2007 signed by [REDACTED], President, the petitioner states that "the bulk of our sales come in the last four months of the year in anticipation of Christmas, but our production needs begins earlier. . . The market then builds up through Christmas and then falls off after the first of the year." This is substantiated by the 2006 monthly payroll report that shows an increase in the number of temporary employees employed by the petitioner in September (113 workers), and October (120) until tapering off in November, to 110, and in December, to 108. The petitioner has established 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.

After review of the documentary evidence contained in the record, the petitioner has provided sufficient countervailing evidence to establish that its need for the beneficiaries' services is from September 2007 through December 2007. The petition will be approved for the period of established need. The Vermont Service Center will issue the appropriate approval notice.

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. . . .

The regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) states that, if a petition is approved after the date the petitioner indicates that the service will begin, the approved petition and approval notice should show a validity period commencing with the date of approval and ending with the date requested by the petitioner.

It is noted that the petitioner requested the beneficiaries' services from May 8, 2007 to January 31, 2008. However, the documentation provided only established a peakload need for the beneficiaries' services from September 2007 through December 2007. Therefore, the period of requested employment has passed. The petition will be approved for the period of established need although the matter is moot due to the passage of time.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved for the period of established need although the matter is moot due to the passage of time.