

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

D4



FILE: WAC 07 252 52687 Office: CALIFORNIA SERVICE CENTER Date: **MAY 12 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:

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.

*for Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner operates a food and beverage concession at a seasonal ski resort. It desires to employ the beneficiary as a cashier 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 November 1, 2007 to May 31, 2008. The director determined that the petitioner had not provided a certified temporary labor certification indicating the employment starting and ending dates. The director also determined that the petitioner had not established a seasonal need for a cashier and denied the petition.

On appeal, the petitioner submitted additional evidence for consideration.

As discussed below, the AAO disagrees with the findings of the director. The AAO found that the petitioner had submitted sufficient evidence of having an approved temporary labor certification as required by the regulations. The AAO also found that the petitioner had established a temporary need for the beneficiary's services. The AAO will sustain this appeal.

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)(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 Petition for a Nonimmigrant Worker (Form I-129) was filed on August 27, 2007 with copies of the final determination notice and the Application for Alien Employment Certification (Form ETA 750). The director denied the petition because the petitioner submitted a copy of Form ETA 750 and in the section entitled "Endorsements", the DOL's certifying officer did not indicate the validity period of the certification and the date the certification was approved. The validity period of the certification coincides with the exact dates the petitioner intends to employ the beneficiary. In the instant petition, the exact dates the petitioner intends to employ the beneficiary, as stated on its Form ETA 750, is from November 1, 2007 to May 31, 2008.

On October 6, 2007, the director requested the petitioner to submit a certified copy of Form ETA 750 showing the employment starting and ending dates (validity period of temporary labor certification). In its response to the director's request for evidence, the petitioner submitted a copy of the United States Department of Labor's final determination notice and once again, a copy of the Form ETA 750. The director found that the Form ETA 750 was not the original and failed to indicate the employment starting and ending dates. The director stated that without the petitioner's certified Form ETA 750 indicating the starting and ending dates, the DOL's cover letter (final determination notice) by itself did not serve any purpose and denied the petition.

On appeal, the petitioner provided another copy of the final determination notice and the original Form ETA 750. The original Form ETA 750 indicates the form was received at the local DOL office on July 3, 2007. At the bottom of the original Form ETA 750 are written the numbers 07218-26791. These numbers also appear on the petitioner's final determination notice as the ETA Case Number. The final determination notice also lists the same occupation listed on the Form ETA 750, that of a cashier. Moreover, the final determination, dated August 6, 2007, states the period of certification is from November 1, 2007 to May 31, 2008, which is the same period stated on the Form ETA 750 and Form I-129. Therefore, it appears that the DOL inadvertently omitted the validity period of the certification on the Form ETA 750.

Upon review, the AAO finds that the final determination notice is enough to show that the petitioner's Form ETA 750 was certified for the period November 1, 2007 through May 31, 2008. Further, the petitioner's labor certification determination was made on August 6, 2007, which is prior to the filing date of the petition. Therefore, the petitioner has obtained a temporary labor certification prior to the filing of the petition on August 27, 2007. However, the petition cannot be approved for another reason. The petitioner has not established that the need for the beneficiary's services is temporary.

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).

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 section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Greet customers, clean work area, ring up items, collect money, and give change.

Upon filing the instant petition, the petitioner indicated that its need is seasonal. The petitioner states in its letter submitted with the petition that the positions they are seeking are temporary in nature because they are a concession at a ski resort and are only open in the winter season when the resort is operating. This statement has been substantiated by documentary evidence that confirms the petitioner is located at Squaw Valley Ski Resort in the Lake Tahoe area of California and offers seasonal work. In the instant case, the petitioner has established that the position of cashier for its concession at the Squaw Valley Ski Resort is a temporary seasonal position.

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.