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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 018 50907 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2004

IN RE: Petitioner: [redacted]
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: 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner operates a fast food restaurant. It desires to extend its authorization to employ the beneficiaries as specialty cooks for one year. The Governor of Guam determined that a temporary certification could be made. The director determined that the petitioner had not established that its need for the beneficiaries' services is temporary.

On appeal, the petitioner requests reconsideration pending the results of the beneficiaries' permanent residency applications.

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 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. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is a one-time occurrence and the temporary need is unpredictable.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*).

The nontechnical description of the job on the Application for Alien Employment Certification (GDOL 750) reads:

> Plans menu and cooks Filipino style dishes, desserts and other foods according to the recipe. Prepares meat, soup, sauces, vegetables, and other foods prior to cooking. Seasons and cooks according to prescribed method. Portions and garnishes food and serves to waiter on order. Estimates food consumption and requisitions or purchases supplies.

The petitioner explains on the petition that the current need for the beneficiaries' services is temporary until willing and able applicants or workers are available. The petitioner also indicates that there has been a constant turnover of employment in this occupation.

Upon review, the petitioner's need cannot be considered a one-time occurrence. The preparation of food is the nature of the petitioner's business, and the need to have someone to prepare the food will always exist.

Moreover, the petitioner states that it is essential that the beneficiaries be allowed to continue their employment. The continuation of their employment would be for a period of one year. The petitioner states that without these employees, its business would lose sales and existing contracts for catering, and it would have no recourse but to close. Therefore, the petitioner has not established that they have 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 a temporary event of short duration has created the need for specialty cooks. Consequently, the employment cannot be considered a one-time occurrence and for a temporary period.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.