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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 181 50765 Office: CALIFORNIA SERVICE CENTER Date: APR 0 8 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 is a general building contractor. It desires to employ the beneficiaries as cement masons for one year. The Government of Guam, Department of Labor, determined that a temporary labor certification by the Governor of Guam 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 states that its need for importing H-2B workers is temporary, since all building contracts have a target completion date.

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 intermittent and that the temporary need is periodic.

To establish that the nature of the need is "intermittent," the petitioner must demonstrate that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*4*).

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

> Smooth[es] and finishes surfaces of poured concrete to specified textures, using hand tools or power tools, including floats, trowels, and screeds: spreads concrete to specified depth and workable consistency, using float to bring water to surface and produce soft topping. Levels, smoothes, and shapes surfaces of freshly poured concrete, using straight edge and float or power screed. Finishes concrete surfaces using trowel, or wets and rubs concrete with abrasive stone to impart finish. Removes rough or defective spots from concrete surfaces, using power grinder or chisel and hammer and patches holes with fresh concrete or epoxy compound.

Upon review, the evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as intermittent. Instead, the petitioner has a permanent need for workers to fulfill its construction

contracts, which is the specific nature of the petitioner's business. The petitioner has not shown that it occasionally or intermittently needs cement masons to perform services, especially when the petitioner's need for workers is for one year.

The petitioner must demonstrate that it has not employed permanent or full-time workers to perform the services or labor but occasionally needs workers to perform services for short periods. The petition indicates that the petitioner currently employs eight individuals. The petitioner explains that its need for the beneficiaries' services is due to the scarcity of local and United States skilled workers, even after placing its ads locally, and with the Guam Employment Services Department of Labor. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Consequently, the petitioner has not established that its need for the beneficiaries' services is intermittent and temporary.

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.