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U.S. Citizenship
and Immigration
Services

D4

[redacted]

APR 2 0 2004

FILE: SRC 03 218 50216 Office: TEXAS SERVICE CENTER Date:

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:

[redacted]

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, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a painting company. It desires to employ the beneficiaries as painters for one year. The Secretary of Labor determined that a temporary certification could not be made. The director determined that the petitioner had not presented countervailing evidence to overcome the objections of the Department of Labor (DOL) and denied the petition.

On appeal, counsel states that additional evidence is being prepared in order to provide the missing information. To date, no additional information has been received. Therefore, the record will be reviewed as it is presently constituted.

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:

> Applies coats of paint, varnish, stain, enamel, or lacquer to decorate and protect interior or exterior surfaces, trimmings, and fixtures of buildings and other structures. Selects premixed paints, or mixes required portions of pigment, oil, and thinning and drying substances to prepare paint that matches specified colors. Simulates wood grain, marble, brick, or tile effects. May carry out specialist decorative finishes. Must be knowledgeable in using different spraying techniques and color shading.

The DOL determined that the petitioner did not provide any documentary evidence or information to establish a temporary need for the five beneficiaries. The DOL also determined that the petitioner had not established that

qualified United States workers were unavailable. Moreover, DOL determined that the training of additional United States workers was not mentioned in the advertisements, or on the ETA 750. Therefore, the DOL denied the application. In her decision, the director concurred with the DOL.

Upon review, the petitioner's need cannot be considered a one-time occurrence. The petition indicates that the petitioner currently employs five individuals. The president of the petitioning entity states in a letter that the company has a contract to paint a large resort hotel complex in Orlando, Florida. The petition indicates that the beneficiaries' services are needed for one year. Painting, which is the nature of the petitioner's business, will always need to be performed. Therefore, the petitioner has not established 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 a temporary event of short duration has created the need for painters. Consequently, the employment cannot be considered a one-time occurrence and for a temporary period. Moreover, the petitioner has not provided sufficient countervailing evidence to overcome the objections made in the decision by the Department of Labor regarding its recruitment efforts.

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.