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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 035 55751 Office: CALIFORNIA SERVICE CENTER Date: JUN 03 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:

[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.

Mari Johnson

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 premiere wedding services business. It desires to extend its authorization to employ the beneficiaries as dispatchers for one year. The Governor of Guam determined that a temporary certification by the Secretary of Labor could be made. The director determined that the petitioner had not established that the need for the services to be performed is temporary.

On appeal, counsel states that Citizenship and Immigration Service's (CIS) denial based on its determination that the positions are permanent and no peakload condition exists, is arbitrary, erroneous and contrary to the evidence in support of the petition and constitutes an abuse of discretion.

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 must 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 peakload.

To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

The petition was properly filed on November 13, 2002. The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Assign motor vehicles and drivers for conveyance or freight or passengers: Compiles list of available vehicles. Assigns vehicles according to factors, such as length and purpose of trip, freight or passenger requirements, and preference of user. Issues keys, record sheets, and credentials to drivers. Records time of departure, destination, cargo, and expected time to return. Investigates overdue vehicles. Directs activities of drivers, using two-way radio. May confer with customers to

> expedite or locate missing, misrouted, delayed, or damaged merchandise. May maintain record of mileage, fuel, repairs made, and other expenses. May establish service or delivery routes. May issue equipment to drivers. Greets customers at airport, informs them of itinerary and escorts them to waiting limousine. Greets customers upon arrival at company office, explains the services to be provided, and assists customers to receive services including advising them of procedure to secure valuable possessions in lockers.

The supplemental page to Form ETA 750 entitled Foreign Language Requirements states that the petitioner's business provides a full range of wedding services to the public, including retail sales of accessories, rental of gowns and tuxedos, make-up services, photography, the marriage ceremony and transportation services from the clients arrival until their eventual departure. It goes on to state that the petitioner's company caters almost exclusively to the Japanese tourists visiting the island, a group comprising over 85 percent of all tourists. Counsel's letter, dated April 1, 2003, states that due to the unpredictable and irregular demand for its services by a fluctuating tourist trade the petitioner needs to supplement its permanent staff for one year. Counsel states in his brief, dated August 4, 2003, that clearly by the petitioner performing 712 weddings in June 2002 to performing 171 in December 2002, the tourists' demand for the petitioner's business is peakload.

The petitioner is attempting to show that its need for workers is due to an unusual increase in the demand for its services. However, the petitioner intends to supplement its permanent staff for the entire year without documenting its asserted peakload situation by providing data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The pamphlet entitled *Wedding, Dive and Waterpark, Inventory and Clientele 2001*, does not account for the number of weddings and other related services provided monthly by the petitioner. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, there is no specific period of time in which the petitioner does not need the beneficiaries' service or labor. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

The petitioner also wants to show the temporariness of the beneficiaries' services by stating that they will help the permanent employees learn enough Japanese language to communicate with the clients without their assistance. Petitions pursuant to section 101(a)(15)(H)(ii) of the Act for a class or type of employee for which the petitioner has a permanent need where the petitioner makes attempts to establish the temporariness of its need for the beneficiary's services by stipulating that the beneficiary will function as a trainer or instructor rather than in a productive capacity must be accompanied by evidence of the existence of a training program, by evidence that the petitioner has recruited or hired trainees, and by evidence that the petitioner can viably employ a full-time instructor and can viably simultaneously operate a training program and a commercial or other enterprise. The record does not contain a training program explaining the petitioner's method of teaching its permanent employees the Japanese language. Absent a training program, the petitioner has not established that the beneficiary will not be engaged in productive full-time employment. *Matter of Golden Dragon Chinese Restaurant*, 19 I&N Dec. 238 (Comm. 1984).

Counsel also objects to the director's decision to deny the petition after its previous approval of a petition involving the same beneficiaries. However, CIS has the authority to question prior determinations. Adjudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has

not been demonstrated, merely because of a prior approval that may have been erroneous. *Matter of Church Scientology International*, 19 I&N Dec 593, 597 (Comm. 1988). In this particular case, there has been a misapplication of a regulatory requirement to the facts at hand. The petitioner has not established that its need for the services or labor is a peakload need 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.