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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: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 03 2004

IN RE: Petitioner: [redacted]
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:

[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

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The decision was appealed, and the director treated the appeal as a motion to reopen, affirming her prior decision, but inadvertently failing to notify the petitioner of its right to appellate review. The director has now reopened the case on her own motion and entered a new decision that has been certified to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed, and the petition will be denied.

The petitioner operates a Brazilian steakhouse restaurant. It desires to employ the beneficiary as a waiter trainer for one year. The Secretary of Labor determined that a temporary certification could not be made. The director determined that the petitioner had not established that its need for the beneficiary's services is temporary. The director also decided that the petitioner had not established that it actively or fairly advertised for United States citizens to perform the job.

The Petition for a Nonimmigrant Worker (Form I-129) was filed on August 5, 2003. The director denied the petition on October 6, 2003 because the petition was filed without the temporary labor certification from the Department of Labor (DOL), or notice stating that such certification could not be made. The decision was appealed on October 17, 2003. The director treated the appeal as a motion to reopen. The motion to reopen was denied, and the director's previous decision was affirmed on October 30, 2003.

The regulations provide that an appeal may be treated as a motion only if the officer is going to take favorable action. 8 C.F.R. § 103.5(a)(8). The director's decision to deny the motion to reopen and affirm her previous decision is not in accordance with the aforementioned regulation. Consequently, the director's decision is withdrawn since it is contrary to the proper action to take when treating an appeal as a motion.

The director also dismissed the motion and affirmed her previous decision without notifying the petitioner of its right to appellate review. It appears that the director, recognizing her own omission, reopened the proceeding on her own motion, entered a new decision and certified that decision to the AAO for review. It is this notice of certification, dated October 30, 2003, that the AAO will review in this proceeding.

On certification, counsel states that the application was denied for two reasons; no submission of the Application for Alien Employment Certification (Form ETA 750), that was submitted on a later date, and the lack of evidence that this is in fact a one-time occurrence. Counsel states that both reasons were clarified on appeal.

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*).

On August 11, 2003, the DOL determined that the petitioner had not established a temporary need for the beneficiary. The DOL also determined that the petitioner had not provided a training curriculum to justify the period of time requested, or provided the number or the names of persons to be trained. Moreover, DOL determined that the terms and conditions of employment for United States and foreign workers were not equivalent; the foreign worker was offered a basic 40-hour work week while the advertised job offer to United States workers included Saturday. Therefore, the DOL denied the application, and in her decision, the director concurred with these findings.

Upon review, the petitioner has not provided sufficient countervailing evidence to overcome the objections of the DOL, which are also the basis for the director's decision. Counsel for the petitioner indicates that the employment situation is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. The petition indicates that the beneficiary will train waiters in Brazilian style. The training program is said to consist of a total of 40 waiters, divided into groups of ten that are trained for three months per group. Counsel for the petitioner states that on a daily basis, the waiter trainer will have to, after previous instruction, supervise the waiters when preparing the meat, carrying it to the tables, securing it on a spit, slicing each meat in a particular way, and guaranteeing the atmosphere found in Brazilian restaurants.

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 training curriculum provided deals in generalities with no fixed time schedule, objectives, or means of evaluating the trainees. 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).

Further, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. Counsel states that on a daily basis the beneficiary will have to supervise the waiters when they are performing their various tasks in the restaurant. Therefore, the petitioner has not established that a temporary event of short duration has created the need for a waiter trainer. 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 DOL regarding its recruitment efforts.

This petition may not be approved for another reason beyond the decision of the director. As previously stated, the Petition for a Nonimmigrant Worker (Form I-129) was filed on August 5, 2003. The Final Determination Notice from the DOL is dated August 11, 2003. The regulation requires that, prior to filing a petition with the director to classify an alien as an H-2B worker, the petitioner must apply for a temporary labor certificate with the Secretary of Labor for all areas in the United States, except the Territory of Guam. 8 C.F.R. § 214.2(h)(6)(iii)(A). In this case, the petitioner did not apply for a temporary labor certification prior to the filing of the petition.

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 decision of the director is affirmed. The petition is denied.