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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: SRC 03 127 50878 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, who certified her decision to the Administrative Appeals Office for review. The director's decision will be affirmed.

The petitioner operates a 22-carat gold jewelry business. It desires to employ the beneficiary as a jeweler for nine months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that its need for the beneficiary's services is temporary.

On notice of certification, counsel states that the petitioner has a contract with the beneficiary that reflects that the beneficiary will come into the United States on an intermittent basis with the purpose being to educate and train United States jewelers in the confection of Indian style jewelry.

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 petitioner indicates, in his letter dated July 15, 2003, that the employment is intermittent.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)((B)(4) states that for the nature of the petitioner's need to be an intermittent need, the petitioner must establish 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.

Upon review, the evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as an intermittent need. The petitioner has not shown that it occasionally or intermittently needs a jeweler to perform services, especially when the work contract is for nine months. The petitioner's need to have a jeweler specialized in 22 carat gold is clearly a principal function of the petitioner's business that will always exist.

Further, the need of a jewelry business to have a jeweler is clearly a permanent one. In a letter, dated July 15, 2003, the petitioner makes an attempt to establish the temporariness of its need for the beneficiary's services by stating that its company is in need of a jeweler, specialized in the repair and matching color for 22 carat gold jewelry, to train some workers. However, a training program has not been outlined in the record of proceeding

providing details of the training. The petitioner has not established that the beneficiary's activities will be limited to training other staff. *Matter of Golden Dragon Chinese Restaurant*, 19 I&N Dec. 238 (Comm. 1984). The petitioner has not shown that the nature of its need for a jeweler 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 decision of the director is affirmed. The petition is denied.