U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 06 035 50459 Office: TEXAS SERVICE CENTER Date: APR 05 2006

IN RE: Petitioner:
Beneficiaries: [redacted]

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

The petitioner is a Mexican restaurant. It desires to employ the beneficiaries as food preparation workers for ten months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not submitted sufficient evidence to prove that United States workers were not available. The director also determined that the petitioner had not established that the need for the beneficiaries' services is temporary and denied the petition.

On appeal, the petitioner submitted the three ads it had posted in *The Advocate* on October 13th, 14th, and 15th, of 2005 to show that the positions were offered to United States workers. The petitioner submitted a letter stating that there were no responses to these ads. Further, the petitioner submitted a letter from the Louisiana Department of Labor stating that the recruitment period for the application had ended and that there were no referrals from the Job Service office. Accordingly, the petitioner has submitted sufficient evidence to show that no United States workers are available for the proffered positions. Therefore, this issue will not be further addressed in this proceeding.

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 seasonal and that the temporary need recurs annually.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*).

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

> Performs a variety of duties such as stuffing, cutting, peeling, and slicing meat, chicken, vegetables; cleaning up work area after work is finished. Must be able to be standing for long hours. Must pass drug-screening test.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

Herewith, the petitioner has submitted its Employer's Quarterly Federal Tax Returns showing the gross wages paid to its employees in each of the four quarters of the year 2004 and the three quarters of the year 2005. The petitioner submitted the Louisiana Department of Labor Status Report that shows the total number of employees working during the first quarter of the 2004 calendar year; the Employer's Wage Report that gives the number of covered workers who worked or received pay for the 1st, 2nd and 3rd quarters; and the Quarterly Report of Wages Paid that gives the number of the employees and the total wages earned for the three quarters. The petitioner has also attached a sheet listing the employees by name, their social security numbers and gross wages earned for the four quarters of the year 2004 and the three quarters of the year 2005.

The petitioner states that its business needs extra help from January 15, 2006 to November 15, 2006. The petitioner explains that due to its location in Baton Rouge and being close to Louisiana State University, it is affected by tourism, office and school schedules as well as Baton Rouge public events. The 2004 and 2005 Quarterly Tax Returns show an increase in wages paid during the 2nd and 3rd quarters of each year by approximately $20,000 to $40,000 and a decrease in wages paid during the 1st and 4th quarters of each year. The financial documents show that the petitioner's business activity increased from April 1st until September 30th of 2004 and 2005. The evidence does not substantiate the petitioner's need for additional workers from January 1st thru March 31st and October 1st thru November 15th. The petitioner has not submitted documentary evidence to show how tourism, office and school schedules and public events affects its business. The financial documentation submitted and the actual dates the petitioner needs the services to be performed do not establish the seasonal nature of the petitioner's business.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C.§ 1361. Here, the petitioner has not met that burden.

ORDER: **The appeal is dismissed. The petition is denied.**