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U.S. Citizenship and Immigration Services

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MAR 01 2007

[redacted]

FILE: EAC 06 259 52263 Office: VERMONT 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, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Japanese restaurant. In order to employ the beneficiary as a sushi chef for the period October 1, 2006 to September 30, 2007, the petitioner filed this petition to attain classification of the beneficiary as an H-2B nonimmigrant worker pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b).

The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not established that the need for the beneficiary's services is temporary. In his notice denying certification of the petitioner's application for temporary labor certification, the DOL certifying officer stated that the petitioner had not established a temporary need as defined in the DOL's General Administration Letter (GAL) No. 1-95, "Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations." The criteria for temporary need identified in the GAL mirror the criteria at the Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 214.2(h)(6)(ii)(B), quoted below. Based upon her determination that the petitioner had not submitted sufficient countervailing evidence to overcome DOL's objections, the acting director denied the petition.

On appeal, counsel contends that the director's decision was not supported by the evidence of record before her. Counsel also submits additional evidence, which includes documents that indicate that there is a shortage of sushi chefs in the petitioner's geographical area and that the petitioner's efforts to recruit a sushi chef for its restaurant have been unsuccessful.

As discussed below, the acting director's decision to deny the petition was correct.

Section 101(a)(15)(H)(ii)(b) of the 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 regulation at 8 C.F.R. § 214.2(h) provides, in part:

> (6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*:
>
> (i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.
>
> (ii) *Temporary services or labor.*

(A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* 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:

(*1*) *One-time occurence.* The petitioner must establish 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.

(*2*) *Seasonal need.* The petitioner must establish that the services or labor is 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.

(*3*) *Peakload need.* The petitioner must establish 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.

(*4*) *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.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of

> the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.
>
> (E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states 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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner seeks approval of the proffered position as a peakload need.

As discussed below, the petitioner has not established that the nature of its need for the beneficiary's services is "peakload" as defined in the controlling regulatory provision at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), which requires the petitioner to demonstrate (1) that it regularly employs permanent workers to perform the services or labor at the place of employment and (2) 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 (3) that the temporary additions to staff will not become a part of the petitioner's regular operation.

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

> Cuts and slices vegetables and seafood, such as fish and shrimp, with Bento knife; uses sushimaki sudare or makisu and shjwaku press to make sushi; prepares Japanese-style dishes such as sushi, sashimi, miso soup, sushi meshi, and shari; makes eel sauces, shoyu and tamago nomoto; orders food for sushi bar.

At page 8 of the Form I-129 Supplement H the petitioner explained its need for temporary services as follows:

> The petitioner has employed a Sushi Chef in the past but has had great difficulty in recent months in finding qualified job applicants for the position. Competition from other Japanese-style restaurants in the geographic area surrounding the petitioner's place of business has resulted in no applicants for this position, although it has been advertised in the local newspaper and placed on the State Employment Service job bank. This is a temporary need that may be alleviated either by the training of a U.S. worker to fill the position or by an application from a qualified U.S. worker.

The petitioner's letter of November 30, 2006 states:

> Due to not being able to find any other applicants qualified to fill the role of sushi chef, it is imperative that [the beneficiary] fill this empty and much needed position. The reason that we are unable to find anyone to fill this position is because of the high number of Japanese restaurants in the Shelby County area. More than twenty restaurants in the local area offer sushi. The unemployment rate in Shelby County is also very low. The unemployment rate for the month of October 2006 was down to an incredibly low 4.9%. Due to the competitive nature of the business and the very low employment rate, we have been unable to find anyone else to fill the position. [The beneficiary] has been the only applicant for the position.

The evidence of record establishes the following. The petitioner intends to keep the position filled on a long-term basis, as it views the position as an integral part of its Japanese restaurant business. Due to intense hiring competition from other Japanese restaurants in its part of Tennessee, the petitioner has been unable to secure the services of a sushi chef. The petitioner is attempting to use the H-2B petition as an interim measure to temporarily remedy the shortage of sushi chefs in its labor market prior to finding a U.S. worker to fill the proffered position.

The facts related in the record of proceeding do not comport with peakload need as defined by the governing regulatory provision, at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*). The petitioner is seeking not to supplement already existing sushi-chef staff, but to obtain such staff, albeit in the person of a single chef. The petitioner's need is not a function of a seasonal or other short-term surge in customer demand that requires a temporary augmentation of staff to meet it. Further, as the nature of the petitioner's need for sushi chef services appears to be coextensive with the life of the petitioner's business, the need does not meet the temporary need standard stated in *Matter of Artee* and 8 C.F.R. § 214.2(h)(6)(ii)(A), above.

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. The petition is denied.