U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 08 123 51662 Office: CALIFORNIA SERVICE CENTER Date: OCT 0 6 2008

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:

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner operates the concession at Mount Rushmore National Memorial in the Black Hills of South Dakota. It desires to extend the stay of the beneficiary as a dining room and cafeteria attendant 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) from April 1, 2008 to November 1, 2008. The Department of Labor (DOL) 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 beneficiary's services is a peakload need and temporary and denied the petition.

On appeal, the petitioner states that the documentation submitted shows a significant increase in visitors during the tourist season beginning in March and ending in October. The petitioner states that all recruiting is done for the seasonal peak need period. Additional evidence has been provided for consideration with the appeal.

Upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to deny the petition. As discussed below, the AAO finds that the petitioner has established a peakload need for the beneficiary's services. The AAO will sustain the 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 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:
>
> *(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.

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.

In the petition, the petitioner requests approval of the proffered position as a peakload need.

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

> Seasonal/Temporary: Facilitate food service, clean tables, carry dirty dishes, replace soiled table linens, set tables, replenish supply of clean linens, silverware, glassware, and dishes, supply service bar with food, and serve water, butter and coffee to patrons.

In its final determination notice dated January 3, 2008, the DOL stated that the Application for Alien Employment Certification, Form ETA 750, had been certified for 35 dining room attendants from April 1, 2008 to November 1, 2008. The director determined that the petitioner has not demonstrated that its need for dining room and cafeteria attendants is a peakload need and temporary.

The AAO disagrees with the finding of the director. The current Form I-129, Petition for a Nonimmigrant Worker, was filed on March 26, 2008 to temporarily employ one dining room and cafeteria attendant from April 1, 2008 to November 1, 2008. To substantiate its need for the intended dates of service, the petitioner provided a copy of its 2006 and 2007 monthly payroll reports. The reports indicate that the petitioner has a staff of five permanent workers that were employed throughout both years. The reports also indicate that from April through October of each year, there was an increase in the number of temporary workers employed and the amount of total hours worked by those employees. This serves as evidence of its peakload need from April through October. The petitioner also provided its 2002-2007 seasonal sales fluctuations figures and graph showing that the sales consistently increased starting from March through October; its 2005 monthly percentage of total sales which show an increase in sales from April through October, its 2006 through June 2008 seasonal visitor fluctuations figures and graph showing an increase in visitors from March through October which is substantiated by the petitioner's 2007 through June 2008 Monthly Public Use Reports.

The record of proceeding establishes that the petitioner's need for temporary workers is from April through October. The petitioner has established 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. The petitioner has provided sufficient evidence to establish that its need for the beneficiary's services is peakload and temporary.

The AAO also finds that the beneficiary may be ineligible for an extension of status. However, a determination of the beneficiary's eligibility for an extension of status is not within the AAO's jurisdiction. Thus, this issue will not be addressed.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.