U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 01 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) 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.

On the Form I-129 visa petition, the petitioner describes itself as a 50-employee jewelry store established in 1977. In order to employ the beneficiary in what it designates as a goldsmith position, the petitioner seeks to classify him as a temporary nonagricultural worker pursuant to 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).

The director denied the petition on the basis of her determination that the petitioner had failed to establish a temporary need for the services of the beneficiary based upon a peakload need.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Applicable Law

Section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker, in pertinent part, as follows:

> [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)(6) states, in pertinent part, the following:

> *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*—
>
> (i) *Petition.*
>
> (A) *H-2B nonagricultural temporary worker.* An H–2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform 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.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(*1*) *One-time occurrence.* 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.

In accordance with the precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), the test for determining whether an alien is coming "temporarily" to the United States in order to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. Accordingly, pursuant to *Matter of Artee* it is the nature of the petitioner's need rather than the nature of the duties that controls.

Discussion

The petitioner stated on the Form I-129 that its need for the services of the beneficiary is a temporary one, based upon a peakload need. In order to establish that the nature of its need is a temporary one based upon a peakload need pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), the petitioner must demonstrate the following: (1) that it regularly employs permanent workers to perform the services or labor at the place of employment; (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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

The petitioner first filed an H-2B petition regarding the claimed temporary, peakload need that is the subject of this petition on February 3, 2010. It was approved, with dates of validity from May 20, 2010 through March 15, 2011.[1] The beneficiary was issued an H-2B visa on September 3, 2010, and he entered the United States in H-2B status on September 30, 2010. The petitioner filed for an extension of the beneficiary's status, and that petition was approved with dates of validity from March 16, 2011 through March 15, 2012.[2]

The petitioner filed the instant petition on March 14, 2012, and claimed that its temporary, peakload need for the services of the beneficiary would last for another year: from March 16, 2012 until March 16, 2013.

In its March 8, 2012 letter of support, the petitioner stated that it owns and operates jewelry stores in Guam. The petitioner claimed that it requires the services of the beneficiary as a goldsmith because it is experiencing an increase in its business as a result of the increasing presence of the United States military in Guam:

> Currently, there is an increase in the temporary deployment of U.S. military presence to Guam as well as collateral civilian personnel coming to Guam in support [of] the Department of Defense mission. As a result, the Petitioner is experiencing an increase in its business.

---

[1] *See* filed February 3, 2010 and approved May 25, 2010, with dates of validity from May 20, 2010 through March 15, 2011.

[2] *See* filed March 16, 2011 and approved July 21, 2011, with dates of validity from March 16, 2011 through March 15, 2012.

The petitioner also claimed to be experiencing an increase in business due to "the recent upswing in Guam's tourism industry." In pertinent part, the petitioner stated the following:

> Guam's tourists are primarily from Japan and East Asia, where out-bound tourist traffic can be negatively impacted by adverse regional events such as the [recent] Japan earthquake, tsunami, and nuclear fallout disasters . . . Due to recent stability in Japan and East Asia, however, Guam is enjoying an upswing in its tourism industry which is resulting in an increase in business for the company.

In her March 31, 2012 RFE the director requested additional evidence regarding the petitioner's claimed peakload need for the services of the beneficiary. In her June 22, 2012 letter submitted in response to the RFE, counsel discussed the U.S. military buildup in Guam and submitted copies of several newspaper articles discussing the buildup. Counsel also repeated the petitioner's earlier claim that the petitioner is experiencing a peakload demand for its jewelry as a result of the military buildup. Counsel also claimed that Guam is experiencing an upswing in tourism from Japan, Taiwan, Korea, China, and Russia, and submitted information indicating that tourist arrivals to Guam increased between 2011 and 2012.

The director found counsel's response unpersuasive, and denied the petition on August 16, 2012. Making arguments similar to those she made below, counsel contends on appeal that the director erred in denying the petition.

Upon review, it is found that the record of proceeding does not establish that the petitioner has a temporary, peakload need for the services of the beneficiary as a goldsmith. The petitioner has established that it regularly employs permanent workers to perform services or labor at the place of employment and has therefore satisfied the first criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one, based upon a peakload need. However, the petitioner has satisfied neither of the remaining two criteria.

The second criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one based upon a peakload need requires the petitioner to demonstrate 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. The petitioner's claimed basis for eligibility under this criterion is two-fold: (1) the U.S. military buildup on Guam; and (2) the recent upswing in Guam's tourism industry. As will be discussed, neither of these claimed bases has been established.

The petitioner has failed to demonstrate that it is experiencing a peakload demand for its jewelry as a result of the increase of U.S. military and associated civilian personnel in Guam because it has not established that demand for its jewelry has increased at all since the buildup began, let alone connected any such increase to the buildup. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure*

Craft of California, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Nor has the petitioner demonstrated that it is experiencing a peakload demand for its jewelry as a result of the claimed upswing in Guam's tourism industry. Again, the petitioner has not established that demand for its jewelry has increased at all since this claimed upswing began, let alone established that any such increase was due to the upswing. *Id.*

For all of these reasons, the petitioner has failed to satisfy the second criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one, based upon a peakload need.

The third criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one based upon a peakload need requires the petitioner to demonstrate that the temporary addition to its staff will not become a part of its regular operations. In that portion of her August 16, 2012 denial addressing this requirement of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), the director noted that this is the second extension petition the petitioner has filed on behalf of the beneficiary. As noted by the director, "the duties to be performed are presently shown to be on-going and lasting year-round." The AAO agrees. Although counsel argues on appeal that it is possible to spend up to three years in H-2B status, the fact that three years in H-2B status is possible does not mean it will be granted as a matter of right. To the contrary, the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) specifically states that "[g]enerally, that period of time will be limited to one year or less[.]" Furthermore, the petitioner has failed to establish that its need for the services of the beneficiary "will end in the near, definable future," as required by 8 C.F.R. § 214.2(h)(6)(ii)(B), as the petitioner has not submitted evidence establishing that the two events it claims necessitate the beneficiary's continued H-2B employment – the U.S. military buildup on Guam and a claimed general upswing in Guam's tourism industry – have clear end-dates and could not extend years into the future.

For all of these reasons, the petitioner has failed to satisfy the third criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one, based upon a peakload need.

The petitioner has therefore failed to satisfy all three criteria described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), and it has consequently failed to establish that its need for the services of the beneficiary is a temporary one, based upon a peakload need, as required by section 101(a)(15)(H)(ii)(b) of the Act and 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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