U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D4

[redacted]

FILE: WAC 04 057 50635 Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2005

IN RE: Petitioner:
Beneficiary: [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:

[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, Director
Administrative Appeals Office

DISCUSSION: 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.

In order to employ the beneficiary as an audio equipment sales representative for a period of ten and a half months, the petitioner, an audio equipment wholesaler, endeavors to classify the beneficiary as a temporary nonagricultural 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).

The director denied the petition, stating the following:

> The petitioner has not provided any supporting document to establish that the need for the beneficiary is one-time occurrence or a seasonal, a peakload, or an intermittent need [sic]. Therefore, the beneficiary is ineligible for classification as a nonimmigrant temporary worker and the petition is denied.

On appeal, counsel contends that the director erred in denying the petition. Counsel asserts that the petitioner submitted the evidence requested in the director's request for evidence (RFE), that the director did not offer an adequate explanation of his reasoning in the denial, and that the denial contradicts the language of the RFE.[1]

The statute at section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(ii)(b), defines an H-2B temporary worker as an alien:

> [H]aving 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 petition indicates that the employment is a one-time occurrence, and that the temporary need is unpredictable.

Pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), in order to establish that the nature of the petitioner's need is a "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

[1] The AAO notes that the director inadvertently labeled his April 21, 2004 letter as both an RFE and a notice of intent to deny. For ease of reading, the AAO will refer to that document in this decision as an RFE.

> 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.

The petitioner specializes in the retail distribution of stereo and disc jockey equipment. It wishes to expand its base of operations by marketing products to potential customers who speak Pashtun and Farsi. It will focus its promotion efforts on disc jockey and karaoke equipment, as such equipment is purchased in large quantities by Middle Eastern restaurants and nightclubs in the United States.

The petitioner offers the following information regarding its desire to employ the beneficiary:

> If [the petitioner] wants to successfully launch its marketing campaign in Farsi and Pashtun speaking communities, it currently needs an employee who is fluent in Farsi and/or Pashtun and is willing to work for [the petitioner] on a temporary basis. [The petitioner] believes that once it launches its marketing campaign and creates a strong Middle Eastern customer base in the United States, it will no longer need an Audio [equipment] Sales Representative who specifically speaks Farsi and/or Pashtun. The purpose of hiring a temporary sales representative who is fluent in Farsi and/or Pashtun is to assist [the petitioner] during the first 10 months of its marketing campaign.

The nontechnical description of the job duties as listed on the Form ETA-750, Application for Alien Employment Certification, reads as follows:

> Assist during [s]pring, [s]ummer, and [f]all season[s] on a temporary basis to help with marketing effort targeting Pashtun and Farsi speaking clients.
>
> Will answer questions relating to specifications and function of electronic audio equipment. Will take [e]-mail and telephone orders, compute prices, complete order[s] and keep records of orders, and ordering [sic] additional materials, supplies, and equipment.

In the initial H-2B submission and RFE response, no evidence, other than statements by counsel and the petitioner, was submitted to establish that the nature of the petitioner's need for the beneficiary's services was temporary. On appeal, counsel submits copies of advertising contracts and agreements with the Rang-a-Rang Television Network, the Afghan Network iNteractive, and the Iranian Directory Yellow Pages.

However, these items do not establish the petitioner's need as temporary. The marketing campaign was planned in advance of the beneficiary's arrival in the United States, as demonstrated by the advertising contracts submitted on appeal. The beneficiary will perform such tasks as taking orders and answering technical questions, and the need for such tasks will not disappear once the advertisements stop appearing, since, if successful, the marketing campaign will establish a large Farsi- and Pashtun-speaking customer base. Both counsel and the petitioner have repeatedly stated that someone with Farsi and Pashtun language skills is needed to perform these tasks but have not stated that the petitioner will no longer need to answer questions and take orders from customers who speak those languages after the beneficiary returns to Canada.

Thus, the director was correct to deny the petition. As noted above, there are two ways a petitioner can prove that its temporary need is a one-time occurrence. Here, the petitioner has met neither. The first prong, requiring the petitioner to establish that it has not employed a worker in the past to perform the services, cannot be met, as counsel conceded in the RFE response that the petitioner has employed workers in the past to perform the services or labor. The second prong, which requires showing that a temporary event of limited duration has created a need for a temporary worker in an otherwise permanent employment situation, has not

been met, either. If successful, the petitioner's media campaign will widen the petitioner's customer base, resulting in an increase in the number of Farsi- and Pashtun-speaking clients. The petitioner will have the beneficiary to communicate with such clients while he is in the United States. However, someone will be needed to communicate with the increased client base after the beneficiary departs. Thus, this is not a temporary event of limited duration.

If the petitioner is experiencing a severe labor shortage, that shortage may be alleviated through the issuance of immigrant visas. The services to be performed by the beneficiary are ongoing and the petitioner's need to have workers perform these services is not a one-time occurrence.

Counsel's assertion that the petitioner complied with the terms of the RFE is unpersuasive. While the AAO acknowledges that counsel sent the twenty-one pieces of evidence requested in the RFE, all of these documents related to either the qualifications of the beneficiary or the petitioner as a business entity. While the evidence submitted in the RFE response did verify that the petitioner is in fact conducting business and that the beneficiary is qualified for the proposed position, the letter submitted did not establish that its need for the beneficiary's services is temporary. The letter consisted of five paragraphs. Only two of them dealt with the temporary nature of the petitioner's need, and the assertions were not supported by documentary evidence.[2]

Counsel next seeks to prove that the petitioner's need for the services of the beneficiary are temporary in nature by asserting the following: "[r]egulation also states that an employer's statement is sufficient to establish the employer's temporary need for services."

However, this assertion fails for three reasons. First, it is not the statements of the petitioner but rather whether the evidence presented in the petition meets the legal definition of "temporary" that establishes whether the petitioner's need for the beneficiary qualifies as temporary. Second, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Third, the regulation cited, 8 C.F.R. § 214.2(h)(6)(H)(vi)(D) does not stand for the proposition claimed by counsel.

The regulation at 8 C.F.R. § 214.2(h)(6)(H)(vi) simply lists the documents that must accompany all H-2B petitions. Subsection (D) requires that a statement from the petitioner explaining the temporary need be submitted. However, the director is not prevented from asking for evidence to corroborate the statements contained in the letter.

Finally, counsel's assertion that the director's decision did not comply with the norms of administrative law fails. Counsel is correct that the director of a service center is required to explain the reasons behind a decision. The director has an affirmative duty to explain the specific reasons for a denial, including informing a petitioner why the evidence submitted failed to satisfy the petitioner's burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

However, until counsel submitted the contracts and receipts from the advertisers on appeal, no evidence, other than unsubstantiated statements from the petitioner, had been submitted to support the contention that the petitioner's need was temporary in nature. As noted previously, none of the twenty-one pieces of evidence submitted in response to the RFE, other than the petitioner's letter, addressed the issue of the

[2] The tax returns referenced in, and attached to, the letter were not relevant for the purposes of determining whether the petitioner's need for the beneficiary's services is temporary.

petitioner's temporary need. The letter contained no supporting documentation to support its claims. Thus, contrary to counsel's claims otherwise, the director correctly found that the evidence submitted did not establish that the petitioner's need was temporary.

For all of these reasons, the petition may not be approved.

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

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