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U.S. Citizenship
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Services

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FILE: LIN 05 272 50911 Office: NEBRASKA SERVICE CENTER Date: JUN 29 2006

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, Chief
Administrative Appeals Office

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

The petitioner operates an Indian restaurant. It desires to employ the beneficiary as a waiter pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for three years. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made. The director also determined that the petitioner had not established a temporary need for the beneficiary's services and denied the petition.

On appeal, counsel states that he has additional evidence to present with regards to the labor certification and the temporary nature of the employment. Counsel also states that a brief and/or evidence will be sent to the AAO within 30 days. To date, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

As discussed below, the AAO agrees with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record supports the director's decision to deny the petition. The AAO will dismiss this 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)(6)(iii) states in pertinent part:

> (C) The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor . . . within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv). . . .

The regulations stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on September 26, 2005 without a temporary labor certification, or notice detailing the reasons why such certification could not be made. Absent such evidence, the petition could not be approved.

On October 17, 2005, the director requested the petitioner to submit the original Form ETA 750, Application for Alien Employment Certification, that was certified by an official of the United States Department of Labor, along with other evidence to establish that the petitioner's need for the beneficiary's services is temporary. In its response to the director's request for evidence, counsel submitted a copy of an uncertified Form ETA 750 and requested that the time period for the temporary employment be changed from three years to nine months. Neither the statute nor regulations allow Citizenship and Immigration Services (CIS) to amend a petition. The petitioner must file an amended petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training. 8 C.F.R. § 214.2(h)(2)(i)(E). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The director also determined that the petitioner had not established a temporary need for the beneficiary's services.

The petitioner seeks approval of the proffered position as a one-time occurrence. To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*).

The petitioner has not established that its need for the beneficiary's services is a one-time occurrence. The petitioner must demonstrate 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. The petition clearly indicates that it currently employs eight individuals. The petitioner has not established that of the eight individuals, no person holds the position of waiter. Also, the petitioner has not established that it has an employment situation that is otherwise permanent, but a temporary need of short duration has created the need for a temporary worker. Given the nature of the petitioner's business, the petitioner would need to employ a waiter on a permanent, continuous basis in order to effectively operate its restaurant. It is the nature of the need, not the nature of the duties, that determines whether a position is temporary. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982). Thus, the petitioner has not demonstrated 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. The petitioner has not established that its need for the beneficiary's services is a one-time occurrence and temporary.

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.