U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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NOV 19 2010

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiaries:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a labor contractor that seeks to employ the beneficiaries as waiters/waitresses, 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 the period of October 1, 2009 (or October 27, 2009) until April 1, 2010.[1] The Department of Labor (DOL) certified the petitioner's temporary labor certification (Form ETA-9142), valid from October 27, 2009 until April 1, 2010.

The director denied the petition because the petitioner did not respond to the director's request for evidence and thus, the petition is considered abandoned.

On appeal, the petitioner stated that it received the director's request for evidence and it had until January 15, 2010 to respond to the request. The petitioner also stated that it sent its response on January 13, 2010 to be delivered to the Vermont Service Center on January 14, 2010. The petitioner submitted a copy of the Federal Express tracking notice that indicated a package was delivered to St. Albans, Vermont on January 14, 2010. The petitioner also submitted its response letter, dated January 13, 2010, that requested the withdrawal of [redacted]

The AAO will withdraw the director's decision to deny the petition based on the fact that the petition was abandoned. However, in reviewing the record, the AAO will dismiss the appeal since the petitioner did not establish a temporary need for the beneficiaries' services.

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) 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

[1] On the Form I-129, the petitioner indicated the intended employment start date as either October 1, 2009 or October 27, 2009. The petitioner filed a temporary labor certification with the intended employment start date as October 1, 2009; however, it was certified with the validity period of October 27, 2009 until April 1, 2010. Thus, the petitioner indicated the alternative start date of October 27, 2009 on the Form I-129.

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 addition, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states the following:

> 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 or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a favorable labor certification determination as required by paragraph (h)(6)(iv) or (h)(6)(v) of this section.

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 seasonal. 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).

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*).

In the letter of support, dated September 30, 2009, the petitioner stated that it is a "service company specializing in temporary or emergency employment services," and it provides staffing to "country clubs that have demand for additional workers on a seasonal basis." The petitioner explained that it entered into a contract with a client to provide employees on a temporary basis to meet a seasonal need. Furthermore, the petitioner stated that its need for temporary workers "is based directly and exclusively on our client's need for their winter season."

The petitioner also submitted an independent contractor agreement between the petitioner and The Falls Country Club. The contract stated that the petitioner "has been engaged to provide management and operations services for certain bars and restaurant/kitchens at the Club." The contract also stated that the petitioner will provide 5 workers to perform services as waiters from October 1, 2009 until April 1, 2010.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that

the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

The petitioner is a staffing company and the nature of its business is to always provide workers to companies and therefore the petitioner's demand for workers is not a temporary or seasonal need.

The petitioner in this matter is the contracting company, and not the client site, The Falls Country Club. Thus, the [redacted] must determine the seasonal need of the petitioner and not the client site. The petitioner did not provide any evidence to establish its own seasonal need from October 1, 2009 until April 1, 2010. In this instance, the petitioner has not carefully documented the temporary need through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by its current situation or contracts. Consequently, the petitioner has not demonstrated that it needs to supplement its permanent staff on a temporary basis. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states in pertinent part: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project. . . ." Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business. The petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for personnel to fulfill its labor contracts, which is the nature of the petitioner's business, will always exist.

Furthermore, the petitioner does not provide evidence to demonstrate that it will not continue to receive contracts that would require extra work throughout the entire year. Thus, it is possible that the petitioner will continue to receive contracts for the entire year for waiters. It is also noted that the petitioner requested the beneficiaries' services from October 1, 2009 until April 1, 2010. Therefore, the period of requested employment has passed.

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

ORDER: The appeal is dismissed. The petition is denied, although the matter is now moot due to the passage of time.