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

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PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

B4

DATE: APR 13 2011 OFFICE: [redacted] FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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, [redacted] Service Center, and certified to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed and the petition will be denied.

The petitioner is engaged in the training and racing of thoroughbred horses and it seeks to employ the beneficiaries as horse groomers, pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b), for the period from December 1, 2010 until May 31, 2011.

The director denied the petition concluding that the petitioner did not establish a temporary need for the beneficiaries' services. The director also discussed the issue of whether a labor certification substitution is permitted by the filing of the Form I-129 with United States Citizenship and Immigration Services (USCIS).

The director determined in his decision that the current petition is requesting a substitution of beneficiaries. The director noted that the petitioner filed a separate petition [redacted] for four named temporary workers for the position of horse groomer for the same period of employment as the current petition. The director and the petitioner also noted that the original labor certification was filed with the second petition [redacted] and the current petition has only a copy of the certified Form ETA 9142.

The director also noted that a substitution of approved beneficiaries with aliens who are outside of the United States must be requested by sending a letter from the petitioner, and a copy of the petitioner's approval notice, to the consular office where the alien will apply for a visa. The director concluded that a substitution of the beneficiaries is not permitted by the filing of a Form I-129 Petition at the Service Center.

The instant petition was filed on December 1, 2010 requesting new employment of four unnamed beneficiaries located outside of the United States. The petitioner submitted a photocopy of the ETA-Form 9142 [redacted] certified by the Department of Labor for eight nonfarm animal caretakers for the period of employment from December 1, 2010 until May 31, 2011.

In a letter dated January 19, 2011, counsel for the petitioner noted that a copy of the certified ETA 9142 [redacted] was submitted with this petition because it is filing a "separate petition seeking the employment of four (4) named workers," and the original ETA Form 9142 is attached to that petition. As noted by the director, the petitioner filed a separate petition [redacted] for employment of four named temporary workers and the original ETA Form 9142 is in that file.

The original ETA Form 9142 [redacted] is certified for eight individuals. The current petition has a photocopy of the same ETA Form 9142. In addition, the petition [redacted] was filed on December 1, 2011, the same day as the instant petition. On appeal, counsel for the petitioner stated that the petitioner "did not request more than the eight positions certified by the Department of Labor," and did not request substitution of the beneficiaries. Thus, AAO disagrees that the current petition is for a substitution of the beneficiaries since both petitions were filed on the

same day and the petitioner explained that the reason it filed two separate petitions for the same temporary need was because one petition named beneficiaries that were currently in the Untied States and requesting an extension of stay and the current petition is for unnamed beneficiaries abroad that will need to apply for a visa at the consular office abroad. Thus, the AAO will withdraw the portion of the director's decision that discusses substitution since this is not a case of substitution. Instead, the petitioner is applying for H-2B nonimmigrant status for four of the beneficiaries allotted in the certified temporary labor certification.

Moreover, the director denied the petition concluding that 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 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.
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> (ii) *Temporary services or labor*:
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> (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.
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> (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.
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> (*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.
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> (*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.
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> (*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 a peakload 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. 8 C.F.R. § 214.2(h)(6)(ii)(B).

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*).

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.

On the Form I-129, the petitioner explained its temporary need for the beneficiary's services as follows:

> [The petitioner] is engaged in the business of training race horses. Our season is defined by the horse racing schedule and constitutes our main revenue producing cycle and without proper staffing we cannot earn the revenues in this season. In peak season our facility needs the service of additional grooms to support our horse training operation. Our need to employ these additional grooms is temporary because the racing season is only from December 1 until May 31, 2011. Our temporary employment need qualifies as peakload need because we employ full-time permanent horse grooms to care for the racing horses year round, and the temporary workers are only needed during the busy racing season to supplement our permanent workers. Every year, when our horses race at [redacted] in [redacted] we need additional grooms to meet this peakload demand. As such, we request that our petition for nine (9) temporary grooms are approved based on the enclosed certified labor certification application.

In response to the director's request for evidence, counsel for the petitioner stated that the "trainers seek H-2B visas to hire temporary workers based upon specific job locations – namely race tracks that the trainers compete throughout the calendar year." Counsel explained that the petitioner is filing the current petition for its temporary need in the location of [redacted] for the race season in that specific location. Counsel also stated that the petitioner has a permanent staff year-round but needs temporary workers for the peakload season in [redacted] only for the race season from December 1, 2010 through May 31, 2011.

The petitioner submitted staffing and payroll charts for 2009 and 2010. According to the chart for 2009, there is an increase in staff and payroll starting in April and lowering in October. The chart indicated that that the petitioner employs 31 permanent workers from October until March and increases its staff to 38 workers in April until September. The chart also indicated that the petitioner did not employ any temporary workers in 2009.

The petitioner also submitted a staffing and payroll chart for January until September 2010. The chart indicated that there was an increase of permanent employees from April until September. The chart also indicated that the petitioner employed temporary workers from April until September.

In addition, the petitioner submitted the calendar from the [redacted] website from December 2010 until May 2011. It appears that [redacted] has race days from December through April. The May calendar is empty and the December calendar indicated that it has several simulcast days which was not explained by the petitioner.

As defined above, 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. *See Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982). In *Artee,* the petitioner was an employment agency that provided temporary employee leasing services on a continuous basis. The Board of Immigration Appeals (BIA) held that "it is not the nature or the duties of the position which must be examined to determine temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the positions." *Id.* The BIA concluded that the employment service's need was permanent since it must have a permanent cadre of employees to refer to its customers, even if the assigned job itself was temporary in nature and duration.

Counsel for the petitioner contends that the petitioner will have different peakload needs since it will race horses at several race tracks that each will have their own racing schedules but the current petition is for a specific peakload need that correlates with the racing schedule of [redacted] only. The petitioner also explained that once the petitioner moves the horses out to other racetracks around the United States, the need for the temporary workers in [redacted] will cease as the permanent staff can handle operations.

Although the petitioner requests that the peakload season be evaluated for one race track, [redacted] the regulations require that USCIS review the petitioner's entire need for temporary services and not just for one project performed by the petitioner. Thus, in this case, as noted by the petitioner, it will go to several racetracks around the United States that may have different race seasons. Thus, the petitioner's need for additional horse grooms is not dependent on just one race season in [redacted] but instead the AAO must review the petitioner's need for temporary workers for all of its races.

Also noted by the director, the petitioner was granted approval of H-2B classification for 15 temporary workers from May 13, 2010 to December 1, 2010. The current petition requested employment dates from December 2010 until May 13, 2011. Thus, it appears that the petitioner requires temporary workers all year round. This is also supported by the petitioner's claim that it trains and races horses at different race tracks in the United States with their own racing seasons.

In this instance, the petitioner has not carefully documented the temporary need through data on its annual historical need for additional supplemental labor. Consequently, the petitioner has not demonstrated that its need to supplement its permanent staff on a temporary basis is due to a

short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. 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)).

Furthermore, the petitioner does not provide evidence to demonstrate that it will not continue to receive offers to race at additional race tracks for their own racing seasons that would require extra work throughout the entire year. Thus, it appears that the petitioner will continue to need horse groomers for the entire year, especially from different regions of the country that have different peakload needs for horse racing in those regions.

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

ORDER: The decision of the director is affirmed. The petition is denied.