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

U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

D4

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 08 2011

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be denied, although the petition is moot due to the passage of time.

The petitioner is a soccer school that seeks to employ the beneficiaries as soccer coaches 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 from April 1, 2010 until November 30, 2010. The Department of Labor (DOL) determined that the petitioner submitted sufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor.

On April 12, 2010, the director denied the petition concluding that the petitioner had not demonstrated that there exists a reasonable and credible offer of employment and failed to satisfactorily document its ability to comply with the terms of the ETA 9142.

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.
>
> (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.

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 petitioner indicates in its statement of temporary need that the employment is seasonal.

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 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.

Upon filing the instant petition, the petitioner indicated that its need is a seasonal need. In the petitioner's response to the director's request for evidence, dated March 25, 2010, the petitioner stated that the position of soccer coach is temporary and seasonal because the soccer season in the Seattle metropolitan area is limited to eight months each year, "beginning in late March or early April and ending at the end of November of each calendar year on a recurring, predictable basis." The petitioner also explained its temporary need for the alien's services as follows:

> [The petitioner] operates soccer camps and offers coaching services only during the 8-month soccer season, from late March or early April through November of each calendar year. [The petitioner] offers four types of soccer coaching services: team and club coaching, advanced development, one-on-one coaching, and day camps. Teams and club coaching is offered through [the petitioner's] RecAssist program, in which soccer coaches work with each team's coaches to provide detailed professional analysis, development and implementation of a structured enhancement program to improve team performance. Advanced development is a fast-paced, intense clinic focused on footskills and endurance designed to elevate players' technical ability in a short period of time. One-on-one coaching is offered to provide individual players with an assessment of overall technical ability as well as specific aspects of the game. Finally, day camps are offered to 6 to 14 years old in beginner to select skill levels, with coaches conducting and overseeing games, exercises and drills appropriate for each age and skill level.

Upon review, the AAO agrees with the director's finding that the petitioner's proposed employment does not meet the regulatory requirements to establish eligibility for the nonimmigrant visa.

On appeal, the petitioner submits a chart of total working hours for the 2010 soccer season. In reviewing the chart, the information is vague and not clear at all. For example, the chart indicates the total hours coaching/working for each week from April 5, 2010 until November 29, 2010 but the total hours run from 300 hours to 887 hours per week. If you divide these hours between 10 H-2B employees, the total work per employee would be anywhere from 30 hours per week to 88 hours per week. It is not clear how an individual can work 88 hours per week. In addition, the petitioner does not explain how it determined how many hours of coaching it will have to fill the chart for the upcoming soccer season. As further discussed below, the petitioner only submitted two current contracts that are vague in nature and do not specify how many hours of coaching the petitioner will provide from April until November. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted above, the petitioner submitted past and current contracts for the summer camps and coaching. The only two current contracts were from [redacted] which was for the spring and summer camps and coaching, and one from [redacted] that is just for the spring and summer camps. The agreement states that the soccer club "agrees to promote camps to soccer coaches and families," but it does not clearly state how many families will utilize the petitioner's services. Thus, the petitioner did not submit any information of actual contracts it has with individuals that wish to utilize its coaching services or sign up for its camps. In addition, the petitioner did not submit any documentation of individuals that have signed up for the summer camps. 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 submitted a list of its employees for 2008. According to the staffing chart of 2008, the petitioner employed 4 H-2B workers. In the current petition, the petitioner is requesting 10 H-2B workers. However, the petitioner has not explained why it will need more than double the amount of H-2B workers in the 2010 season compared to the 2008 season. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582.

Moreover, the petitioner stated on the Form I-129 that it has a gross annual income of $231,000 per year. The petitioner also stated that it will compensate the beneficiaries $30.00 an hour. It is

not clear how the petitioner can afford to pay $30.00 an hour to 10 beneficiaries when it has a gross annual income of $231,000 per year.

In this instance, the petitioner has not carefully documented the seasonal need through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the current situation or contracts. Consequently, the petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Furthermore, the petitioner did not present sufficient evidence to document that it has enough work for the 10 beneficiaries from April through November, or that it could afford to pay them $30 an hour for full-time work as indicated on the Form I-129. 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)).

It is also noted that the petitioner requested the beneficiary's services from April 1, 2010 until November 30, 2010. Therefore, the period of requested employment has passed.

As always, 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 although the matter is moot due to the passage of time.