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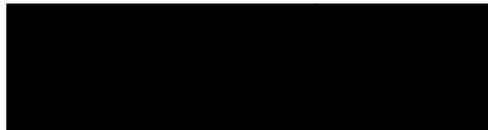
U.S. Citizenship
and Immigration
Services



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FILE: EAC 05 011 52928 Office: VERMONT SERVICE CENTER Date: DEC 08 2005

IN RE: Petitioner:
Beneficiary:



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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
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 The decision of the director will be withdrawn. The petition will be denied.

The petitioner engages in the business of jewelry design and sales. It desires to employ the beneficiary as a jewelry sales person for a period of four and one-half months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that the position is temporary and denied the petition.

On appeal, counsel states that the DOL and Citizenship and Immigration Services (CIS) erred in their determination that the job in question is not a temporary, peak-season job.

The director determined in his decision that the offered position is not temporary. However, it is the petitioner's need for the services that is controlling. Therefore, it must be shown that the petitioner's need for the beneficiary's services, not the position, is temporary.

Section 101(a)(15)(H)(ii)(b) of 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 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 must 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 seasonal.

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

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Assist clients in selecting and purchasing jewelry. Clean and repair jewelry. Creates attractive displays for jewelry and maintains appearance of store.

On January 11, 2005, the director requested the petitioner to submit evidence to establish that its need for the beneficiary's service is temporary. The director also requested that the petitioner submit a temporary labor certification issued by the DOL (Form ETA 750). On April 7, 2005, counsel provided a written explanation.

In its response, counsel states that the petitioner's jewelry sales are seasonal in nature. Counsel for the petitioner explains that the petitioner's jewelry sales begin on November 1 and end on February 14. Counsel states that the holidays surrounding these sales are Christmas, Hanukah, New Year's Day and Valentine's Day. Counsel also states that it is during this period that the petitioner needs temporary jewelry sales persons.

The AAO finds that the director erred in denying the petition for the reason stated in his decision. The petitioner has established a distinct seasonal need for the beneficiary's services and the services have been shown to be temporary. However, to remand this case to the director to render another decision would have no practical effect because the period of requested employment has passed. Moreover, this petition cannot be approved for another reason. The petitioner did not submit a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made when the petition was filed on October 15, 2004.

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 October 15, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. In its response to the director's request for evidence on January 11, 2005, the petitioner submitted Form ETA 750 that had not been certified by the DOL. The final determination notice from the DOL is dated January 20, 2005. The petitioner applied for a temporary labor certification on October 8, 2004 and a final determination was not rendered until January 20, 2005, subsequent to the petition's filing date.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states that:

After obtaining a determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by the labor certification

determination and supporting documents, with the director having jurisdiction in the area of intended employment.

Neither the statute nor regulations allow for the acceptance of a labor certification or notice detailing the reasons why such certification cannot be made subsequent to the filing of the petition. 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 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 director's decision dated May 24, 2005 is withdrawn. The petition is denied.