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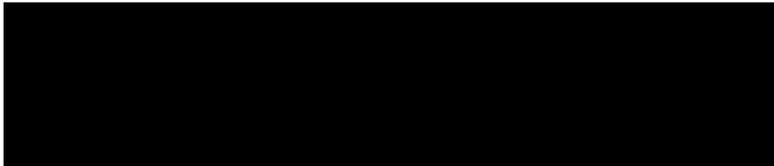
FILE: EAC 06 148 52872 Office: VERMONT SERVICE CENTER Date: **NOV 30 2006**

IN RE: Petitioner:
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:



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, Vermont 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 is a full-service, temporary and permanent placement employment service that provides on-site and managed services. It desires to employ the beneficiaries as waiters 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 nine months. The beneficiaries will be performing services for the Muttontown Country Club in East Norwich, New York. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not overcome the objection addressed in the DOL's decision and denied the petition.

On appeal, counsel states that the petitioner submitted countervailing evidence to rebut the decision by the DOL when it filed the petition. Counsel resubmits this evidence for consideration with the appeal.

As discussed below, the AAO agrees with the finding of the director. Upon careful review of the entire record of proceeding, the AAO finds that the director's decision to deny the petition was correct. The evidence submitted does not establish the petitioner's temporary need for the beneficiaries' services. The AAO will dismiss the 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) provides, in part:

(6) Petition for alien to perform temporary nonagricultural services or labor (H-2B):

(i) General. An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing 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.* 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:

(2) *Seasonal need.* The petitioner must establish that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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 regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

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 seasonal need.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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 petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Take food orders and serve food and beverages to members of the country club and their guests in a formal setting. Present menus to patrons and answer questions about menu items, making recommendations upon request.

In its final determination notice, the DOL stated that the petitioner had not provided documentary evidence, from the customer (The Muttontown Club), establishing a temporary need for labor.

Upon filing the instant petition, the petitioner submitted one chart showing the number of waiters The Muttontown Club used each month during the years 2004 and 2005, and another chart showing the total number of employees employed by The Muttontown Club and their total earnings, for each month, from January 2004 until December 2005. However, the charts have not been substantiated by financial or any other documentary evidence to confirm their accuracy and establish that the petitioner's business activity has formed a pattern where its need for temporary workers is for a certain time period and will recur next year at the same time. The petitioner has not shown that its need for the beneficiaries' services is tied to a particular event that recurs every year. Simply 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 Muttontown Club's payroll information charts show an increase in the total number of waiters and employees from May through October of 2004 and 2005 and a decrease in the total number of waiters and employees from November through April of the same years. Accordingly, the charts do not substantiate the petitioner's need for temporary workers for the period of time requested on the petition, which is from May 1, 2006 through January 30, 2007.

The petitioner states on appeal that due to the shortage of workers in Suffolk and Nassau Counties, they are in need of 13 waiters for the restaurant at The Muttontown Club. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. The services to be performed by the beneficiaries are ongoing and an essential part of the petitioner's business. Absent evidence of the seasonal demand to justify the petitioner's seasonal need for the beneficiaries' services, this petition cannot be approved. The petitioner has not established that its need for the beneficiaries' services is seasonal 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.