



U.S. Citizenship
and Immigration
Services

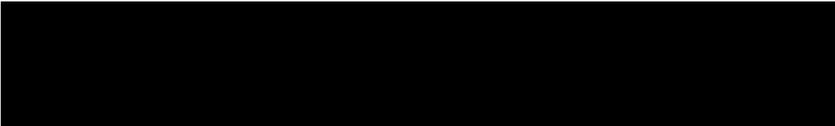
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FILE: WAC 07 159 51051 Office: CALIFORNIA SERVICE CENTER Date: AUG 16 2007

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:

SELF-REPRESENTED

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.

for Michael T. Kelly
for Robert P. Wiemann, 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 sustained and the petition will be approved.

The petitioner operates a hotel and resort. It desires to employ the beneficiaries as housecleaners 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 seven and one-half months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the job requirements as stated in item 15 of ETA 750 make no mention of a pre-employment drug test being required, thereby making the job opportunity unduly restrictive and more favorable to foreign workers. The director denied the petition. The director agreed with the DOL and determined after review of the countervailing evidence submitted by the petitioner that the petitioner had not proved all of its employees are required to pass a pre-employment drug test. The director also determined that the petitioner had not submitted a temporary labor certification (Form ETA 750) from the Department of Labor (DOL), or notice detailing the reason(s) why such certification could not be made.

On appeal, the petitioner submits additional evidence for consideration and states that all its employees are required to drug test.

Upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to deny the petition. As discussed below, the AAO finds that the petitioner has established that its job requirements are not unduly restrictive and that, upon filing the petition, the petitioner submitted a notice detailing the reasons why a certification could not be made. The AAO will sustain the appeal.

Upon careful review of the entire record of proceeding, the AAO finds that the job opportunity does not contain requirements or conditions which precluded consideration of United States workers or otherwise prevented their effective recruitment. The petitioner explains on appeal that it has always required a drug test for its employees. The petitioner also submitted copies of its drug test consent form and forms that were completed by its foreign workers. The AAO finds that the petitioner's explanation for requiring the drug test in the proffered position is reasonable and that the evidence presented has overcome the objections of the DOL. In this case, the petitioner has established that the job requirements are not unduly restrictive.

The remaining issue is whether the petitioner submitted a temporary labor certification (Form ETA 750) from the Department of Labor (DOL), or notice detailing the reason(s) why such certification could not be made prior to the filing of the petition.

The AAO finds that the I-129, Petition for a Nonimmigrant Worker (Form I-129) was filed on May 2, 2007. In its decision, the director states that the petitioner had not submitted an approved Form ETA 750, or notice detailing the reason(s) why such certification could not be made. However, 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). A review of the record of proceeding revealed that the petitioner had submitted its final determination notice from the DOL, dated March 26, 2007, indicating that such certification could not be made. Therefore, the petitioner has overcome the objection addressed by the director in her decision.

The petitioner has now submitted sufficient countervailing evidence to show that qualified persons in the United States are not available, that the employment policies of the DOL have been observed and that the need for the services to be performed is peakload and temporary.

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 met that burden. The California Service Center will issue the appropriate approval notice.

ORDER: The appeal is sustained. The petition is approved.