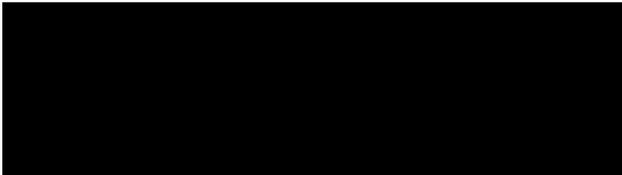




U.S. Citizenship
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Services

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FILE: EAC 06 108 52719 Office: VERMONT SERVICE CENTER Date: DEC 14 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the acting director of the service center, and it is now before the Administrative Appeals Office (AAO) on appeal. The decision of the acting director will be withdrawn, although the petition is now moot.

The petitioner is a sandwich shop located in a shopping mall in Pittsburgh, Pennsylvania. In order to employ the named aliens as sandwich artists, the petitioner filed the petition for the classification of these aliens as H-2B temporary nonagricultural workers in accordance with 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), and its implementing regulations at 8 C.F.R. § 214.2(h)(6).

The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner did not provide documentation establishing that the asserted need qualified under any of the H-2B temporary need categories at 8 C.F.R. § 214.2(h)(6). The acting director denied the petition on the basis that the petitioner failed to submit with the petition either a temporary labor certification from DOL or a DOL notice stating why such certification cannot be made. The director cited the regulatory provisions at 8 C.F.R. § 214.2(h)(6)(iv)(A), *Labor determinations, except Guam*, which state:

Secretary of Labor's determination. An H-2B petition for temporary employment in the United States, except for temporary employment on Guam, 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 similar employed United States workers; or
- (2) A notice detailing the reasons why such certification cannot be made. Such notice shall address the availability of U.S. workers in the occupation and the prevailing wages and working conditions of U.S. workers in the occupation.

On appeal, the petitioner contends that, contrary to the acting director's decision, it had complied with 8 C.F.R. § 214.2(h)(6)(iv)(A) by timely submitting the DOL's notice of the decision to deny the temporary labor certification. The petitioner's letter Form I-290 (Notice of Appeal) stated that a brief and/or other evidence would be submitted to the AAO within 30 days. As no such brief or evidence has been submitted, the appeal is ready for adjudication, and the AAO renders this decision on the record as presently constituted.

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 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).

The regulation at 8 C.F.R. § 214.2(h)(6), *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*, provides, in part:

(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:

(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.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after 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.

On its Form I-129 (Petition for Nonimmigrant Worker) the petitioner asserts that its need for temporary sandwich artists qualifies as a one-time occurrence that is periodic. In its letter dated April 25, 2006, the petitioner asserts that the period of temporary need cited on the Form I-129 (April 15, 2006 to September 25, 2006) is its "Peak Load Need."

Based upon its review of the entire record of proceeding, the AAO makes several findings, as discussed below.

The petition and the issues raised on appeal are moot, as the period of H-2B classification requested in the petition expired on September 25, 2006.

The director's decision to deny the petition was based upon an incorrect finding. As asserted on appeal, the petitioner timely submitted the DOL notice of denial of the petitioner's application for temporary labor certification. The record indicates that, in response to the request for evidence of April 17, 2006, the petitioner submitted the DOL denial notice, and that this notice (dated January 18, 2006) predated the filing of the petition (on February 21, 2006.) For this reason, the director's decision will be withdrawn. Remanding this petition would have no practical effect, however, because the period of requested employment has passed.

Beyond the decision of the director, the petition may not be approved for another reason. The AAO notes this discrepancy between the periods of requested employment as specified in the Form I-129 and the application for temporary labor certification (Form ETA 750): the Form I-129 petition requests a work period of April 15, 2006 to September 25, 2006, whereas the Form ETA 750 specified January 10, 2006 to June 10, 2006. While CIS could not approve a period of temporary need that extends earlier or later than that cited in the Form ETA 750, it could approve the period where the times specified in the Form I-129 and the Form ETA

750 overlap (here, April 15, 2006 to June 10, 2006), provided that the evidence supports that time as a period of temporary need under 8 C.F.R. § 214.2(h)(6).

However, the record of proceeding is insufficient for approval of the petition, even for the reduced period described above, as the petitioner has not provided evidence that substantiates its temporary need for workers under 8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioner has not provided documentation that supports its assertions about the nature of its temporary need for sandwich artists, in its letter of April 26, 2006 and elsewhere, even though this deficiency was the basis of the DOL denial of the labor certification application. The AAO will not remand the petition to the director to issue a request for evidence on this evidentiary deficiency, as the petition is now moot.

For the reasons discussed above, the appeal will be dismissed, and the petition will be denied.

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

ORDER: The petition is denied because the matter is moot due to the passage of time.