

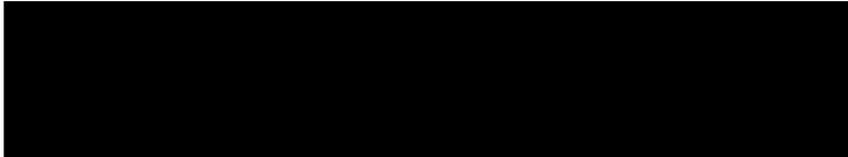
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

B<sub>3</sub>



FILE: EAC 07 118 51475 Office: VERMONT SERVICE CENTER Date: FEB 12 2008

IN RE: Petitioner: [Redacted]  
Beneficiaries: [Redacted]

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director of the service center, and it is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn; the petition will be denied because it is now moot due to the passage of time.

The petitioner is a restaurant that operates throughout the year in Falmouth, Massachusetts. In order to employ the beneficiaries as line cooks, the petitioner filed the present petition to classify them 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 AAO notes that the period of employment covered by the petition – April 1, 2007 to December 15, 2007 – has expired. Therefore, the petition is moot due to the passage of time.

The basis of the Department of Labor’s decision to not issue a temporary labor certification was its finding that the payroll summary reports submitted in support of the petitioner’s application indicated that the petitioner “has been employing Cooks on a year[-]round continuous basis since July 2005.” The Department of Labor’s Final Determination letter includes this comment:

[T]he H-2B program is not intended to allow H-2B employers, who need additional labor permanently, to rotate different alien workers through its business for periods beyond a full year. The Employer is attempting to use temporary criteria to satisfy permanent labor needs for Cooks. [The] Employer has not demonstrated a need to employ “Cooks” on a temporary basis in accordance with one of the four temporary occurrences of GAL No. 1-95. [The] Employer’s need for Cooks is permanent. Therefore, a temporary alien employment certification can not be issued.

The director cited several grounds for his decision to deny the petition. The director first focused on the petitioner’s tax documents. The director noted that the petitioner’s sales tax statements show “a substantial increase in business [from] June through September,” but that the petitioner’s Quarterly Federal Tax returns “do not substantiate [its] claim for the need for additional, temporary workers for this time period.” The director stated this interpretation of the returns:

In 2005 your staffing went from a total of 28 employees in the first quarter to a high of 37. Since then your staffing levels have remained relatively stable year round. You have employed 30-34 employees on a continuous basis throughout 2006. The substantial increase in staffing one would expect to see during a seasonal or peakload need is not shown.

The director next found that that the evidence of record does not substantiate the petitioner’s claim that it hires “an additional 15 to 18 workers during [its] peak season of mid-March through mid-December.” The director further stated that the evidence did not establish that its “need for workers is temporary rather than permanent,” but that the evidence did show that the petitioner “has been employing at least one temporary worker on a year round basis since at least July 2005.” Finally, the director stated that the submitted evidence does not overcome the reasons that the Department of Labor decided to not grant the petitioner’s application for temporary labor certification.

The AAO finds that the totality of evidence, as supplemented on appeal by the petitioner's three-page rebuttal of the director's decision and the addition of copies of employee timecards and by monthly payroll reports by the payroll service Paychex, Inc., is sufficient to overcome the grounds of the director's decision. The AAO finds that the petitioner has adequately explained why the documents submitted in support of the petition are not inconsistent with the asserted peakload. The AAO also finds in particular that the tables summarizing the monthly pay and staffing of line cooks and the reports of monthly sales indicate the peakload need asserted by the petitioner, and that they are not inconsistent with the tax records as explained by the petitioner on appeal. Also, the AAO finds that the petitioner has shown that the petitioner's temporary workers are U.S. workers. As such, their employment does not preclude the petitioner from supplementing its workforce with H-2B workers on a peakload basis. This particular record of proceedings supports approval of the present petition as satisfying an H-2B peakload need, in accordance with the regulation 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), which states:

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.

For the reasons discussed above, the director's decision will be withdrawn. However, the petition cannot be approved, because it is moot due to the passage of time.

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 met that burden.

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