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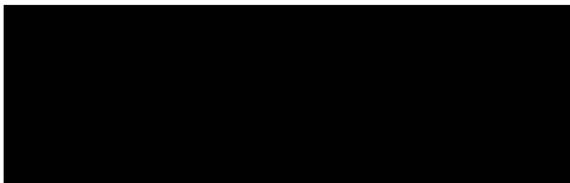
U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



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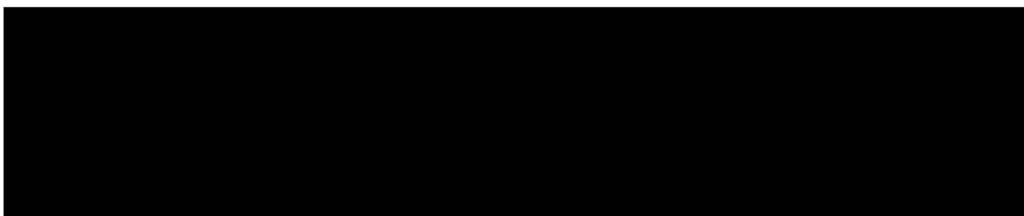
Date: **MAR 28 2008**

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.

for Michael T. Kelly
Robert P. Wfemann, 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 engages in the design and conversion of limousines and luxury vehicles. It desires to continue to employ the beneficiaries as limousine manufacturing upholsterers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from November 7, 2007 to July 7, 2008. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could be made. The director determined that the petitioner had not established that the need for the beneficiaries' services is temporary and denied the petition.

On appeal, the petitioner states that it has demonstrated a well established, recurring peakload need from September through June as supported by industry standards and the company's historical sales. The petitioner submitted additional 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:

(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.

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 peakload need.

To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Operate sewing machines to join and cut fabric parts to fabricate upholstery coverings for limousine parts.

The director determined that the petitioner failed to adequately document and submit evidence of its peakload need. On November 8, 2007, the director issued a request for evidence stating that the evidence must specifically be supportive of one of the temporary needs as described in 8 C.F.R. §214.2(h)(6)(ii)(B).

In response, the petitioner submitted a letter in support of the petition explaining its peakload need for 10 upholsterers to supplement its staff of 50 United States workers. In this letter, the petitioner states that its peak period is always September to June when the newer car models are available for sale. The petitioner also submitted a letter from Acton Lincoln Mercury explaining the annual market sales trend in the automotive industry and how that trend affects the petitioner, a client of Acton Lincoln Mercury. In its letter Acton Lincoln Mercury states that it facilitates car sales to coachbuilders year-round and historically, and that the limousine sales to the coachbuilders are most prevalent in October thru June. The petitioner also provided its actual and projected car sales from 2004 through 2008. However, the petitioner's actual car sales 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 or particular event and will recur next year at the same time. The petitioner has not carefully documented its peakload situation through data such as payroll records, staffing records, sales tax records and any other documentation that might show its usual workload and staffing needs for limousine manufacturing upholsterers. 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)). The evidence provided does not substantiate the petitioner's need for temporary workers for the period of time requested on the petition, which is from November 7, 2007 through July 7, 2008.

In review, the documentation submitted does not demonstrate that the petitioner is experiencing an unusual increase in the demand for its services that is different from its ordinary workload. The documentation submitted does not demonstrate a substantial increase in the number of employees to justify a peakload need during the dates of the intended employment. The petitioner has not demonstrated that the additional personnel needed to fill the peakload position will be engaged in different duties or have different specialty skills than the 50 workers currently employed by the petitioner thereby creating a short-term demand. The petitioner has not provided evidence of its permanent staff of 50 workers. The services to be performed by the beneficiaries are ongoing and an essential part of the petitioner's business. The petitioner has not established that its need for the beneficiaries' services is peakload 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.