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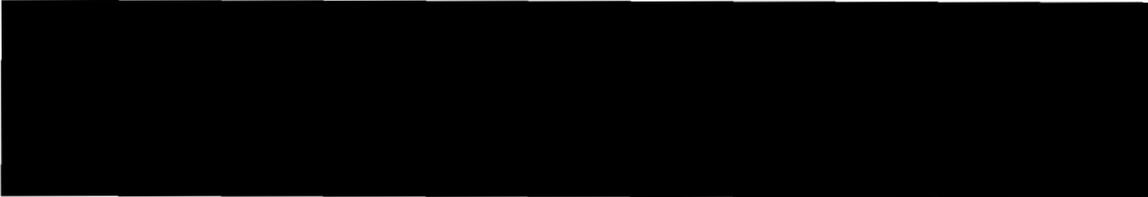
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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FILE: WAC 08 124 51508 Office: CALIFORNIA SERVICE CENTER Date: **SEP 12 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:

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, 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 owns and operates [REDACTED] and [REDACTED] in Custer, South Dakota. It desires to extend the stay and change the employment of the beneficiaries to the current petitioner. The petitioner intends to hire the beneficiaries as kitchen attendants 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) from April 1, 2008 to November 1, 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 a peakload need and temporary and denied the petition.

On appeal, the petitioner states that the documentation and explanation provided will show that it is a seasonal temporary employer, with an obvious peak in revenue during the tourist season.

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 a seasonal and temporary need for the beneficiaries' services. The AAO will sustain 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 states on appeal that it is a seasonal temporary employer, with an obvious peak in revenue during the tourist season.

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:

Seasonal/Temporary: Clean work areas, utensils, dishes and silverware, wash, peel and/or cut various foods to prepare for cooking/serving. Prepare a variety of foods according to customers orders or supervisors instructions, following approved procedures. Assist cooks/kitchen staff with various tasks as needed, and provide cooks with needed items.

In its final determination notice dated January 30, 2008, the DOL stated that the Application for Alien Employment Certification, Form ETA 750, had been certified for 15 kitchen helpers from April 1, 2008 to November 1, 2008. The director determined that the duties to be performed are shown to be on-going and lasting year-round, and therefore, the petitioner's need could not be considered as temporary.

The AAO disagrees with the finding of the director. The current Form I-129, Petition for a Nonimmigrant Worker, was filed on March 27, 2008 to temporarily employ kitchen attendants from April 1, 2008 to November 1, 2008. The previous petitions filed by the petitioner were for different occupations, specifically cafeteria and dining room attendants and the petitioner continues to be consistent in its seasonal need for temporary workers during the months of March through April and ending in October. The petitioner has shown that its business does not need temporary workers to supplement its workforce from January through February and November through December as all three restaurants are closed in the off season. To substantiate its need for the intended dates of service, the petitioner provided a copy of its sales graphs from 2001 through 2007. The graphs show that from January through February and November through December, the petitioner had no sales activity. The petitioner also provided its 2006 Employer's Quarterly Federal Tax Returns and its 2007 Employer's Quarterly Contribution, Investment Fee and Wage Reports for the 2nd and 3rd quarters as evidence of its seasonal need from April through October.

The record of proceeding establishes that the petitioner conducts a seasonal business and that its need for seasonal, temporary workers is from April through October. The petitioner has established that the beneficiaries' 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 has provided sufficient evidence to establish that its need for the beneficiaries' services is seasonal and temporary. The California Service Center will issue the appropriate approval notice.

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.

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