



U.S. Citizenship  
and Immigration  
Services

D3



FILE: EAC 09 048 50788 Office: VERMONT SERVICE CENTER Date: DEC 01 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
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, noting that the matter is moot due to the passage of time.

The petitioner is engaged in cleaning and custodial services, and it seeks to employ the beneficiaries as custodial workers 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 the period from December 12, 2008 until September 25, 2009. On October 3, 2008, the Department of Labor (DOL) issued a temporary labor certification on behalf of the petitioner for 36 janitors for the employment period of December 12, 2008 until September 25, 2008. The director denied the petition, concluding that the petitioner did not establish that the beneficiary's nonagricultural services or labor is temporary based upon a one-time occurrence need.

On appeal, the petitioner states that it does meet the criteria and that the beneficiaries qualify for this classification.

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:

(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.

The precedent decision [REDACTED] 8 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. [REDACTED] holds that it is the nature of the need, not the nature of the duties, that is controlling. *Id.*

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. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is a one-time occurrence and that the temporary need is unpredictable.

To establish that the nature of the need is a “one-time occurrence,” the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary’s services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

Upon filing the instant petition, the petitioner indicated that its need is an unpredictable one-time occurrence. On the Form I-129, the petitioner stated that “due to unexpected contractual requirements, our business obtained much more business than we had expected as we opened. We need temporary workers to supplement our regular workforce in order to meet this unexpected demand for janitorial services.”

On December 18, 2008, the director sent a request for further information. The director requested a spreadsheet of all temporary labor certifications applied for by the petitioner, and evidence of a temporary need, such as graphs showing the permanent and temporary employees or payroll charts. The director noted that the petitioner appeared to be a staffing agency and thus requested signed work contracts, letters of intent or statements of work.

In the petitioner's response letter, dated December 28, 2008, the petitioner explained that it never before filed for a temporary labor certification since it's a new company and started business approximately six months prior to filing the instant petition. The petitioner also did not submit employee records for the past two years because it is a new company. The petitioner submitted a service agreement with [REDACTED]. The petitioner stated that the service agreement will "demonstrate the employer's need for the work to be performed is tied to a limited period of time (from 12/2008 to 8/25.2009), and that will not recur next year because it's a one-time occurrence project."

The petitioner has not demonstrated that the additional personnel needed to fill the one-time occurrence positions will be engaged in different duties or had different skills than the workers currently employed by the company. A contract is not sufficient evidence to demonstrate a short-term demand. A staffing company cannot be approved for H-2B classification just by showing a contact with a client; this would defeat the H-2B regulations because it fails to provide any evidence of the actual employer's, in this case the client company's, temporary need. Consequently, the petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation.

The petitioner stated that "our business obtained much more business than we had expected as we opened." The demand for temporary employees due to a company being successful and obtaining more work is not a one-time occurrence because this issue will continue to arise every year. In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload in the cleaning services business. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner is engaged in providing cleaning services and received a contract for that type of business. Even though this contract will terminate on a set date, this contract may be renewed or the petitioner will continue to obtain service agreements to keep the petitioner operational. As seen on appeal, the petitioner submitted a second cleaning services agreement with [REDACTED] Inc. with no end date. The petitioner has not established how the one contract submitted with the petition is a one-time occurrence when the nature of its business is to provide cleaning services and it is reasonable to believe that the petitioner will constantly enter into contracts for cleaning services to continue its business operations. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

The petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for custodial workers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

In addition, the petitioner explained that it was having a difficult time in finding individuals to fill the position of custodial worker. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Absent evidence of the petitioner's one-time occurrence situation to justify its need for the beneficiaries' services, this petition cannot be approved.

It is also noted that the petitioner requested the beneficiary's services from December 12, 2008 until September 25, 2009. Therefore, the period of requested employment has passed.

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

**ORDER:** The appeal is dismissed. The petition is denied, although the matter is now moot due to passage of time.