



U.S. Citizenship
and Immigration
Services

D3



FILE: EAC 08 189 50580 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:



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. The petition will be denied, although the matter is moot due to the passage of time.

The petitioner is engaged in providing temporary staff for cruise ships and country clubs, and it seeks to continue to employ the beneficiaries as cooks 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 May 1, 2008 until September 30, 2008.¹ The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor. The director determined that the countervailing evidence submitted by the petitioner was insufficient to overcome the DOL's decision.

On appeal, counsel for the petitioner states that the petitioner's need for the beneficiaries is "based exclusively on its obligation to fulfill a contractual arrangement with the resort that is seasonal in nature (the summer season from April 1, 2008 to September 30, 2008." Counsel further states that the petitioner "had no employment need for these individuals at any other time of the year." Counsel also states that the petitioner was previously approved for H-2B classification to place beneficiaries at a client site, and now the petitioner is requesting an extension so that the beneficiaries can continue to work at that same client site to complete a contractual obligation. Counsel contends that since the total requested time of stay in H-2B classification is one year, the petitioner should be approved because it falls under the statute for allotted time in H-2B classification. Counsel further states that DOL and the director were incorrect in placing a 10 month limitation of stay in H-2B 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

¹ On the Form I-129, the petitioner indicated the employment end date as October 31, 2008; however, the supporting documentation and the appeal indicated that the employment end date is actually September 30, 2008.

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 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.

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 seasonal.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

Upon filing the instant petition, the petitioner indicated that its need is seasonal. In the support letter, dated April 21, 2008, the petitioner stated that it wished to place the beneficiaries at the client site, [REDACTED] to fill the position of cooks. The petitioner explained that "our current temporary need for workers is based directly and exclusively on our client's need for cooks during the summer season." In addition, the petitioner stated that "these workers will not be employed in permanent positions but will fill a specific temporary need created by the high tourist summer season in Florida."

The petitioner also submitted its payroll sheets. The payroll records do not differentiate the temporary workers from the permanent workers.

On July 29, 2008, the director sent a request for further information. The director noted that the evidence does not demonstrate that the need for the beneficiaries is temporary, and requested further evidence to document a temporary and seasonal need. The director also explained that 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 (1) year.

In response, the petitioner submitted a chart for the position of cooks. The chart indicated each month of 2007, and in each month the chart showed the total number of employees, the rate of pay, the total hours worked and the total earnings. The chart indicated 8 employees for the months from April through October 2007. The chart stated that the petitioner does not employ permanent workers in this position. However, on appeal, counsel for the petitioner explained that it placed temporary employees at its client site from October 1, 2007 until April 30, 2008. The chart does not indicate any employees for January, February, March, November, or December. The chart is inconsistent with counsel's statements on appeal. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also submitted a letter from the petitioner's client, [REDACTED], signed on February 5, 2008, by both the client and the petitioner. The letter by the client states that, "we have entered into an agreement with [the petitioner] in order to provide 10 employees, as required by the demands of our summer seasons which will run from April 1, 2008 to September 30, 2008."

On appeal, counsel for the petitioner states that the director erred by putting a ten-month limit to the H-2B classification. However, as noted above, the director explained in its request for evidence that the H-2B classification can be obtained for one year, and even beyond one year if the petitioner provides evidence of extraordinary circumstances. Thus, the director did not deny the petition because the request for H-2B classification exceeded ten months, but instead denied the petition because the petitioner failed to submit sufficient evidence of its temporary and seasonal need.

In this instance, the petitioner has not documented the seasonal need of its client through data on the client's annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that its client needs to supplement its permanent staff at the place of employment on a temporary basis 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. A contract is not sufficient evidence to demonstrate a seasonal need.

In addition, the petitioner has not presented documentary evidence that demonstrates its client has a workload that has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. 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)).

Upon filing the instant petition, the petitioner indicated that its need is seasonal. The petitioner submitted a contract with [REDACTED] dated February 5, 2009, whereby the petitioner agreed to provide 10 employees to fill positions as cooks for the busy summer season. The petitioner did not present any evidence of the demands the client company has during the summer season. The petitioner did not provide any evidence such as staffing charts, sales reports or any other documentation to show that the client has a temporary need in the summer season.

In addition, the petitioner did not explain why they requested H-2B beneficiaries to be employed at the client site for the entire year. Counsel for the petitioner stated that the petitioner has two separate contractual agreements with the client company, however, this contradicts the notion of the client's temporary and seasonal need because it appears that it needs workers all year round. The petitioner had previously received an approval of H-2B classification for the beneficiaries to be employed by the client from October 1, 2007 until April 30, 2008. The current petition continues the need for H-2B classification from May 1, 2008 until October 31, 2008. The request for temporary employees all-year round does not show a seasonal need but rather a permanent need for cooks all year round. Thus, the petitioner has not shown that its need for the beneficiaries' services is tied to a seasonal trend or a particular event that recurs every year. Again, 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. at 190.

Further, the petitioner claims that it had two separate contracts with the client company that it was obligated to fulfill. The petitioner is engaged in providing staffing to companies and thus, it will continually have contracts with clients to provide individuals for employment. The petitioner has not established that it will not continually need to have employees available to provide to its clients in order to keep its business operational.

It is noted that the petitioner requested the beneficiaries' services from May 1, 2008 until October 31, 2008. Therefore, the period of requested employment has passed.

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 sustained that burden.

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