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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: EAC 09 227 52093 Office: VERMONT SERVICE CENTER Date: **SEP 24 2009**

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review in accordance with 8 C.F.R. § 103.4(a). The decision of the director will be withdrawn and the petition will be approved.

The petitioner wishes to employ the 66 unnamed beneficiaries as wait staff and servers in multiple country clubs in the State of Florida. Pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b), the petitioner filed this nonimmigrant visa petition seeking to employ the beneficiaries for the period from October 1, 2009 to May 31, 2010. The Department of Labor (DOL) certified the petitioner's ETA Form 9142, Application for Temporary Employment Certification, determining that a sufficient number of able, willing and qualified U.S. workers were unavailable and that the proposed employment would not adversely affect the wages and working conditions of workers in the United States.

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)(6)(i)(A) states:

(A) *H-2B nonagricultural temporary worker.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.

Regarding the nature of "temporary services or labor," the regulation at 8 C.F.R. § 214.2(h)(6)(ii) provides, in part:

(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.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load 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.

In the initial filing, the petitioner asserted that it has a seasonal need for temporary workers.

The director issued a request for evidence (RFE) on August 21, 2009. In the RFE, the director noted that it had reviewed the petitioner's website, [REDACTED] and discovered that in addition to recruiting country club workers for Florida during the winter months, the petitioner also recruited workers for country clubs during the summer months for New Jersey, North Carolina, New York, Illinois, Pennsylvania, and Connecticut.¹ The director requested that the petitioner "[s]ubmit documentary evidence to support your seasonal need, such as copies of your payroll records and staffing level during the past 24 months to include the position of Servers."

¹ The AAO notes that the director did not supplement the record with the purported derogatory evidence, i.e., copies of the website pages that were reviewed by the adjudicating officer. This petition may not be denied based on inferences or conclusions that are not supported by the record. *See generally*, 8 C.F.R. § 103.2(b)(16).

In response to the RFE, the petitioner stated that the director had referenced the website of a different corporation, [REDACTED]. The petitioner asserted that [REDACTED] is a separate legal entity from the petitioner, [REDACTED]. In response to the request for documentary evidence of the petitioner's seasonal need, counsel for the petitioner noted that [REDACTED] had only been in existence since April 2008 and could not show its temporary employment needs for a full 24 months. Counsel noted that the petitioner had submitted a copy of all 21 contracts with the petitioner's clients; quarterly tax returns for 2008 and 2009; and correspondence dated June 22, 2009 between the petitioner's Controller and the payroll processing service ADP, which indicates that the petitioner was "finished with payroll processing for the season."

After reviewing the petitioner's response, the director determined that the petitioner had not established that its need for the duties to be performed is temporary. *See* 8 C.F.R. § 214.2(h)(6)(ii). The director noted that the two companies share the same address, telephone number, owner and "are in the same business of providing contract labor." Citing 8 C.F.R. § 103.2(b)(14), the director also noted that the petitioner failed to submit the requested payroll records and staffing charts. The director concluded that the petitioner had not established that its need was temporary, seasonal, peakload, or intermittent.

On certification, counsel for the petitioner submits a brief and additional evidence. Counsel again emphasizes that the two entities, [REDACTED] and [REDACTED], are separate legal entities with two distinct business operations. Counsel states that the petitioner, [REDACTED] is a direct employer that supplies temporary staff solely to country clubs in south Florida during the fall and winter seasons. The second company, [REDACTED], does not directly employ any temporary workers, but instead serves as a year-round recruiter of temporary workers for placement at other businesses. Counsel notes that the president of both companies is the same person, but that the two companies are separate entities with distinct businesses.

With respect to the petitioner's failure to submit payroll records, counsel notes that the director requested that the petitioner "[s]ubmit documentary evidence to support your seasonal need, *such as* copies of your payroll records . . ." (Emphasis added.) Complying with the permissive request, the petitioner attempted to explain that a full 24 months of payroll records were not available and instead submitted alternative documentation. On certification, the petitioner now submits the petitioner's payroll records for the record.

Upon review of the evidence contained in the record, the petitioner has established that [REDACTED] has a seasonal need for temporary workers and that the need for the employees will end in the near, definable future.

It is a long-held principle of immigration law that a corporation is a separate and distinct legal entity from its owners and stockholders and from other corporations. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In the present case, the

petitioner has established that _____ is a separate legal entity with a separate business objective. Accordingly, this entity must be the focus of the inquiry into the nature of the petitioner's employment needs.²

With regard to the petitioner's failure to submit the requested payroll records and staffing, the AAO agrees that the director did not issue a specific and compulsory request for this evidence. The director used permissive rather than mandatory language in the request for evidence and stated that the petitioner should submit evidence "such as" payroll records.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). If a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Upon review, the petitioner made a good faith effort to comply with the director's request for evidence. While the petitioner did not submit the specific evidence named in the RFE, the petitioner submitted additional evidence that furthered the director's line of inquiry. Accordingly, the AAO will accept the submitted payroll records on certification.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

The decision of the director will be withdrawn and the petition will be approved. The Vermont Service Center will issue the appropriate approval notice.

ORDER: The decision of the director is withdrawn. The petition is approved.

² The AAO agrees with the director that it would be problematic if the two companies were to employ temporary workers in south Florida in the fall and winter, and then shift the same workers to the northern United States in the spring and summer. Although there would still be issues with the nature of the separate legal entities, the companies would then appear to have a permanent and intertwined need for the requested services or labor. Based on the record before the AAO, this is not the situation in the current case.