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FILE: EAC 05 059 51553 Office: VERMONT SERVICE CENTER Date: AUG 04 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [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.

Robert P. Wiemann, Director  
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 The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is the personnel company for all of the restaurant franchises within the company, specifically, the seven Burger King restaurants and the 11 Kentucky Fried Chicken restaurants at different locations in Massachusetts. It desires to employ the beneficiary as an assistant restaurant manager for nine and one-half months. The director determined that the evidence did not demonstrate the petitioner's temporary need for an assistant restaurant manager; rather, it established the temporary need for a district supervisor. The director determined that the petitioner's need for an assistant restaurant manager is not temporary.

On appeal, counsel states that the director's decision was based on a misunderstanding of the relationship between the job title and responsibilities of the permanent employee whose position is being replaced temporarily.

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 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. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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 intermittent and that the temporary need recurs annually.

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 a letter the petitioner explains that the district supervisor is currently on disability leave. The petitioner states that the position is a multi-functional position and includes duties and responsibilities of a restaurant manager and supervision of two additional restaurant managers of restaurants in the area who are less experienced. The petitioner explains that it is not trying to temporarily replace the district supervisor but rather needs someone to fill in for the restaurant manager portion of the district supervisor's position on a temporary basis. The petitioner

states further that the petition was filed so the beneficiary could be responsible for the district supervisor's duties as a restaurant manger. The petitioner also asserts these duties are usually performed temporarily by an assistant restaurant manager.

In summary, the terms and conditions of employment set forth by the petitioner are found to be appropriate for the temporary position offered. The petitioner's need to fill in the position of district supervisor while its permanent employee is on leave of absence due to knee surgery and rehabilitation has been shown to be a temporary event of short duration that created a temporary need for a worker at the petitioner's place of business. Consequently, the petitioner has shown that its need for an assistant restaurant manager is a one-time occurrence and temporary. However, the petition cannot be approved for another reason.

The regulation at 8 C.F.R. 214.2(h)(6)(vi)(C) states:

*Alien's qualifications.* Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary.

The Application for Alien Employment Certification (Form ETA 750) at Part A indicates that the minimum amount of education required to perform satisfactorily the job duties is:

2-4 years of college education. Will accept any equivalent combination of academic training and work experience.

Academic training or equivalent work experience in the field of economics, accounting, and management or in any other field that is relevant to personnel supervision and management.

The record as it is presently constituted does not contain evidence that the beneficiary possesses two-four years of college education. The foreign educational documents submitted have not been evaluated by a reliable credentials evaluation service that specializes in evaluating foreign educational credentials. Therefore, the petitioner has not established that the beneficiary is eligible for the job as stipulated on the labor certification.

Since this deficiency was not mentioned in the director's decision, this case will be remanded in order to give the petitioner an opportunity to submit any additional information or evidence that the director deems necessary to adjudicate the matter at hand. The director may also request additional evidence that is pertinent to the adjudication of this case.

Finally, the AAO notes that the beneficiary entered the United States on July 29, 2003 with a J-1 visa. The visa bears the notation "Bearer is subject to Section 212(e)." The beneficiary must obtain a waiver of this requirement in order to be eligible for a change of nonimmigrant status under section 248 of the Act. However, the AAO will not address this issue, as issues relating to a change of nonimmigrant status are not within the AAO's jurisdiction.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision of January 21, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.