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U.S. Citizenship
and Immigration
Services

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FILE: WAC 05 016 50988 Office: CALIFORNIA 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:

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, Director
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 dismissed.

The petitioner is a pizzeria. It desires to employ the beneficiary as a first line supervisor and manager for one year. The director determined that the petitioner had not submitted a temporary labor certification (Form ETA 750) that had been certified by the Department of Labor (DOL) or notice stating that such certification could not be made and denied the petition.

On appeal, the petitioner states that the beneficiary should be granted the classification.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii) states in pertinent part:

(C) The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor . . . within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv). . . .

The regulations stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on October 18, 2004 with a temporary labor certification (Form ETA 750) that had not been certified by the DOL. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

The petition cannot be approved for other reasons. The petitioner has not established that the beneficiary qualifies for the job offer as specified on Form ETA 750. The record, as it is presently constituted, does not contain evidence of the beneficiary's two years of training and one year of experience in the job offered as stipulated on Form ETA 750. 8 C.F.R. § 214.2(h)(6)(vi)(C).

Further, 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 petition indicates that the intended employment is for one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. The petitioner does not indicate whether the employment is seasonal, peakload, intermittent or a one-time occurrence.

The nontechnical description of the job on Form ETA 750 reads:

Takes responsibility for the daily operations of pizzeria. Coordinates activities among various departments, such as kitchen and delivery room, and ensures that customers are satisfied with their dining experience. Oversee the inventory and ordering of food, equipment, and supplies and arranges for the administrative and human-resource functions of running the business,

including recruiting new employees and monitoring employee performance and training. Ensures that orders are served properly and in a timely manner. Investigates and resolves customers' complaints about food quality or service. Monitors orders in the kitchen to determine where backups may occur, and remedies any delay in service. Monitors the actions of the employees on a continual basis to ensure the personal safety of everyone. Please also refer to further job description attached hereto.

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. The services to be performed by the beneficiary are ongoing and the petitioner's need to have an additional worker to perform these services has not been shown to be seasonal, peakload, intermittent or a one-time occurrence.

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

ORDER: The appeal is dismissed.