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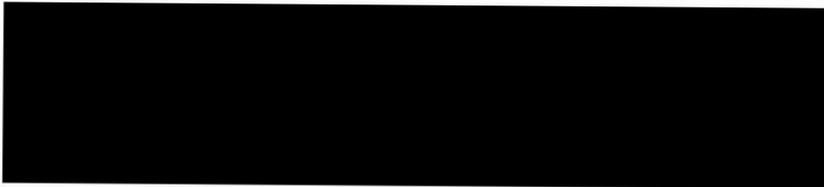


FILE: EAC 05 021 53169 Office: VERMONT SERVICE CENTER Date: **JUN 26 2006**

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director, Vermont Service Center. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a full service day spa and salon. It seeks to employ the beneficiary as an esthetician for one year 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 Department of Labor (DOL) determined that a temporary labor certification could not be issued, noting that the petitioner's advertisement of the proffered position in the Hartford Courant "did not indicate the temporary nature of the job opportunity with the 12-month duration of the employment." The director concurred with the DOL, ruling that the petitioner's advertisement of the position as "short-term" did not comply with DOL requirement that the advertisement "include[e] a statement that the job is temporary, or giv[e] the actual dates of employment."

On appeal counsel asserts that the words "short-term" and "temporary" have the same meaning. Therefore, the petitioner's advertisement of the proffered position as "short-term" complied with the DOL requirement that the advertisement specify the "temporary" nature of the position. Counsel submits a copy of a decision by the Vermont Service Center in 2004 on another H-2B petition, which the director approved after determining that the petitioner's advertisement of the position as "short-term" conveyed the temporary nature of the job.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(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 pertinent part, as follows:

(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.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states that 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.

In a letter accompanying the Form I-129 the petitioner stated that it needed the beneficiary's services as a one-time occurrence, from August 1, 2004 to July 31, 2005, to fill in for one of its permanent employees who was being granted maternity and personal leave to care for her newborn baby. The petitioner indicated that its permanent employee had requested leave until July 31, 2005 and was expected to resume her position at that time, thereby ending the need for a temporary employee. The petitioner submitted copies of its newspaper advertisement for an esthetician, advertising it as "short-term" position, as well as copies of a number of recent certifications by the DOL of other H-2B petitions which, like the instant petition, involved temporary positions that were advertised as "short-term" positions.

After consideration of the entire record, the AAO agrees with counsel that the definition of "short-term" does not substantively differ from that of "temporary" and that the petitioner's advertisement of the proffered position as "short-term" conveyed the meaning that it was of limited duration. The AAO determines that the petitioner's advertisement of the esthetician position as "short-term" complied with the DOL's requirement, as set forth in a letter from the Connecticut Department of Labor on June 15, 2004, that the advertisement "include[e] a statement that the job is temporary, or giv[e] the actual dates of employment." [Emphasis added.] The newspaper advertisement complied with the first of the two alternatives by indicating that the position was temporary.

The petition cannot be approved, however, because the time period requested for the beneficiary's H-2B classification – August 1, 2004 to July 31, 2005 – has already passed. Since the petitioner's need for a temporary worker was based on a one-time occurrence that ended on July 31, 2005, when the permanent employee's leave expired, the need for an H-2B worker is no longer extant. The instant petition is now moot. Accordingly, the AAO must dismiss the instant appeal.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden, but the petition may not be approved due to the passage of time.

**ORDER:** The appeal is dismissed. The petition is denied because it is moot due to the passage of time.