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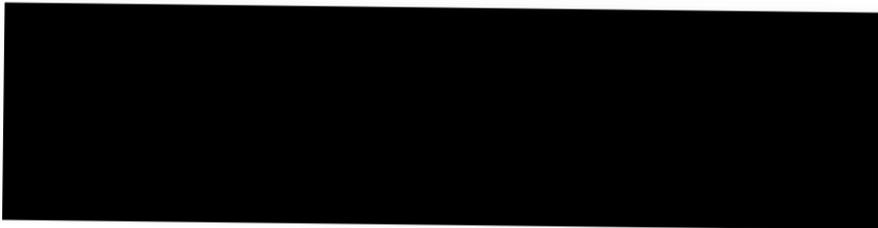


FILE: EAC 05 225 53333 Office: VERMONT SERVICE CENTER Date: MAR 27 2006

IN RE: Petitioner: [Redacted]  
Beneficiaries: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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.

*for* *Michael T. Kelly*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner operates a fast food restaurant specializing in Indian cuisine. It desires to employ the beneficiaries as dosa chefs for nine months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the employer did not establish a temporary need. The acting director determined that the petitioner had not established a temporary need for the beneficiaries' services and denied the petition.

On appeal, counsel states that the denial violated previous granted cases identical to this case, and therefore, CIS is not following its own procedures.

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 a one-time occurrence. The petitioner also states, in its letter dated May 25, 2005, that there is a seasonal need for these employees.

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).

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the service(s) or labor are 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).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Prepare and make a variety of dosa crepes for high-speed delivery and fast food take out (at least 40 dosas/Hr.).

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.

In order for the petitioner's need to be 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. The petition indicates that the petitioning entity was established in the year 2000 and currently has five employees. The petitioner states that its newest venture, which is the delivery of dosas to customers at their residence, started in the spring and summer of 2002. The petition was filed on July 21, 2005. Consequently, the petitioner has not demonstrated that it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future.

The petitioner contends that this concept has not been introduced anywhere because as a general rule Indian food does not lend itself to a delivery type situation. However, the petitioner asserts that dosas are like pizzas and can be made very quickly. The petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. Its need for dosa chefs to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist. Moreover, this venture represents a new and continuing line of business for the petitioner. Therefore, the petitioner has not established that a temporary event of short duration has created the need for dosa chefs and that its need for the beneficiaries' services is a one-time occurrence and temporary. Moreover, the petitioner has not presented documentary evidence that demonstrates that its workload 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. Simply 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)).

Counsel states that CIS has earlier approved a prior petition filed by this petitioner and therefore, there is precedence for an approval. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to

suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engineering, Ltd.v. Montgomery*, 825 F.2d 1084 (6<sup>th</sup> Cir. (Mich) 1987), *cert denied*, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert denied*, 122 S.Ct 51 (2001).

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

**ORDER:** The appeal is dismissed.