

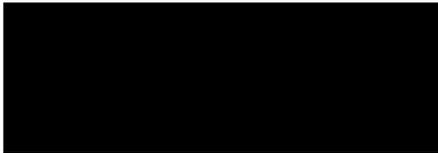
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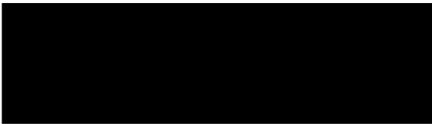
D4

FILE: EAC 07 145 53015 Office: VERMONT SERVICE CENTER Date: NOV 29 2007

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, Chief
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 appeal will be sustained and the petition will be approved.

The petitioner is a seafood supplier located on Long Island, New York. It filed this petition in order to employ the alien beneficiary as a plant helper from April 1, 2007 to January 5, 2008, pursuant to the provisions for H-2B nonagricultural workers at section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b), and the implementing regulations at 8 C.F.R. § 214.2(h)(6).

The Department of Labor (DOL) denied the petitioner's application for a temporary employment certification, based upon its finding that the documentation submitted in support of the application indicated that the petitioner's need for a plant helper is not a temporary need as defined at 8 C.F.R. § 214.2(h)(6). The following excerpt from DOL's Final Determination expresses the basis of DOL's denial:

Form ETA 750 [the application for temporary labor certification] indicates the date of need to be from April 5, 2007 to January 5, 2008. However, the Temporary needs letter provided in support of the Form ETA 750 indicates a need from April to November, contradictory to the date of need indicated by the employer in the Form ETA 750.

General Administration Letter (GAL) No. I-95, Procedures for H-2B Temporary Labor Certification Applications in Nonagricultural Occupations, states an employer must establish the temporary need for the position offered is either: a one-time occurrence, seasonal, peak load, or intermittent need.

The employer submitted a graph showing the salaries for temporary employees for the years 2004-2006; a graph demonstrating the employer's sales for years 2002-2006; and copies of the employer's "quarterly state report of wages paid to each employee"; all of which demonstrate that temporary workers are employed all year round.

Since the information in the case file indicates the employer's need for workers is part of the employer's on-going business, the Department of Labor is not able to render a favorable determination in the matter of this application.

In accordance with the H-2B regulations at 8 C.F.R. § 214.2(h)(6), the petition was filed with countervailing evidence to address the concerns that led DOL to deny the application for temporary labor certification. At the appropriate section on page 8 of the Form I-129 Supplement H, the petitioner identified its need for a plant helper as a peakload need that recurs annually. Upon consideration of the petition, including the countervailing evidence regarding DOL's concerns, the service center director accepted the petitioner's explanation for the discrepancy in the statements about the period of need, but denied the petition as based on a permanent need. The director's decision states, in part:

[T]he chart of employee staffing and payroll summary shows that the most need that you have for temporary workers is from June through September. Therefore, with the rise and fall of the sales and wages of employees throughout the year it is not evident that you have a temporary need for the workers from April through December each year. Instead, there

appears to be a possible need for additional workers from April through October, at the most, with a decline in work in November, and then additional work in December. This evidence does not substantiate that your office has a specific season to employ temporary H-2B workers each year. Furthermore, the evidence does not support that temporary workers are needed for a specific period of time each year. Instead, it is evident that the Department of Labor's findings that your office employs temporary workers year round is factual with your office requiring permanent employees.

As discussed below, based upon its review of the entire record of proceedings the AAO finds that the petitioner has submitted sufficient evidence to prevail on the issues raised by DOL and the director. Accordingly, the appeal will be sustained and the petition will be approved.

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), *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*, provides, in part:

(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.

(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.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

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

The petitioner seeks approval of the proffered position as a peakload need. In addition to the petitioner's letters of explanation, the record of proceedings includes these documents in support of the petition: (1) a table

summarizing the petitioner's staffing levels and its payroll for each month of 2006 and 2007; (2) a table displaying the petitioner's monthly sales totals for the years 2002 to 2006 and for January and February 2007; (3) a graph depicting sales by month for 2002 through 2006; and (4) a graph depicting the salaries of temporary employees by month for the years 2004 through 2006.

The AAO agrees with the director's assessment that the petitioner has established that incorrect advice by former counsel was responsible for the difference in the period of need asserted in the petition approved last year. This leaves only one issue for resolution, namely, whether the evidence of record establishes a peakload need.

As indicated in the regulation excerpts above, to establish that its need for a plant helper is a peakload need within the meaning of 8 C.F.R. § 214.2(h)(6)(B)(3), the petitioner must show: (1) that it regularly employs permanent plant helpers at the place of employment, (2) that it needs to supplement its permanent staff of plant helpers at the place of employment on a temporary basis, (3) that the need for supplementation is generated by a seasonal or short-demand for plant helpers, and (4) that the temporary addition of the alien worker will not become a part of the petitioner's regular operation. The AAO finds that the evidence satisfies all four of these elements.

As acknowledged in the petitioner's letters and reflected in its tables, the petitioner has supplemented its permanent staff with temporary workers throughout the year. However, the record, and an AAO search of CIS records, indicate that the temporary workers employed outside the period that is the subject of this petition have not been H-2B workers. On such facts, the AAO disagrees with the interpretations of the director and DOL that the employment of temporary but non-H-2B workers throughout the year precludes a finding of peakload need. Also, in contrast to the director, the AAO finds that the supporting documents show a peakload need that includes the month of November.

In summation, the record of proceeding overcomes the concerns addressed in the director's decision. The petitioner has submitted sufficient evidence to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed, and that the petitioner's need for a plant helper is peakload and temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.