

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D4.

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



FILE: EAC 07 144 53675 Office: VERMONT SERVICE CENTER Date: OCT 09 2007

IN RE: Petitioner: [Redacted]
Beneficiaries: [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 director of the service center denied the H-2B nonimmigrant visa petition after the Department of Labor (DOL) issued a temporary labor certification. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a hotel in Destin, Florida. In order to continue to employ the beneficiaries as housekeeping cleaners from April 2, 2007 to October 31, 2007, the petitioner filed the present petition to extend their status as H-2B temporary non-agricultural workers under 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), and the implementing regulations for H-2B petitions at 8 C.F.R. § 214.2(h)(6).

As indicated in this excerpt from his decision, the director denied the petition upon finding that the petitioner's pattern of hiring housekeeping cleaners indicates that the petitioner's need for this type of temporary workers is permanent:

On May 5, 2007 the petitioner was asked where the aliens would be working. They [sic] were also asked to submit copies of the ETA 750 for the prior approvals. With this information and upon further investigation the Service believes that the need for workers is a year round need[,] not a temporary need, a one time occurrence, or a peak load need. Prior ETA 750s were approved from 4/1/06 to 11/1/06 and again from October 1, [2]006 to April 30, 2007. Those dates suggest a year round need. With the ETA 750 in the present petition, had this petition been approved, the need would be ongoing for one and one half years. The service does not agree with the temporary need certified by the Department of Labor.

Section 101(a)(15)(H)(ii)(b) of the 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.

While a factor to be considered by CIS in its adjudication of an H-2B petition, DOL's approval of a temporary labor certification is advisory only and not binding upon CIS. As stated at 8 C.F.R. § 214.2(h)(6)(iii)(A):

The labor certification shall be advice to the director on whether or not the United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers.

For the reasons discussed below, the AAO finds that the petitioner has established that its need for housecleaning workers during the period of requested employment qualifies as a peakload need under the standard of 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), which states:

Peakload need. The petitioner must establish [1] that it regularly employs permanent workers to perform the services or labor at the place of employment and [2] 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 [3] that the temporary additions to staff will not become a part of the petitioner's regular operation.

In conjunction with the rest of the evidence, the record of proceeding's certified tables of monthly payrolls for the years 2004, 2005, 2006 establish that the present petition satisfies the three qualifying elements of 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The petitioner has established that it maintains a permanent housekeeping cleaner staff; that a recurrent, seasonal demand generated by the annual tourist season in its section of Florida requires the petitioner to supplement the permanent staff during the period of requested employment; and that that the temporary additions to staff will not become a part of the petitioner's regular operation.

The AAO recognizes that, under certain sets of facts, the history of an employer's H-2B petitions may indicate petitioning practices that conflict with the H-2B regulations. A service center's review of an employer's petitioning history is not inappropriate. However, this particular proceeding's evidence of record about the recently continuous chain of petitions does not provide cause to doubt the credibility of the certified information that the petitioner has provided about its employment of the H-2B workers in question.

The merits of the petitioner's prior H-2B petitions are not at issue in this proceeding. The AAO notes, however, that on appeal the petitioner provides an explanation of the recent continuity of H-2B petitions as a function of extraordinary occupation rates generated by an influx of FEMA personnel and the displacement of people from other states in the aftermath of Hurricanes Katrina and Rita.

Because the evidence of record on petition presently before the AAO establishes an H-2B peakload need for the period now requested - April 2, 2007 to October 31, 2007 - the appeal will be sustained and the petition will be approved. The Vermont Service Center will issue the appropriate approval notice.

ORDER: The appeal is sustained, and the nonimmigrant visa petition is approved.