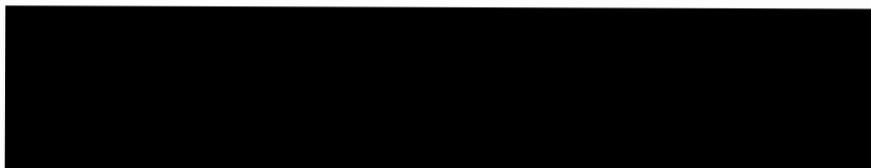


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FILE: EAC 07 146 53310 Office: VERMONT SERVICE CENTER Date: **MAY 29 2008**

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:

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, 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 dismissed and the petition will be denied although the matter is moot due to the passage of time.

The petitioner operates a resort. It desires to employ the beneficiaries as dining room attendants pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from April 1, 2007 to October 31, 2007. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiaries' services as described in 8 C.F.R. 214.2(h)(6)(ii)(B). The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the objections of the DOL and denied the petition.

The petitioner states on appeal that its business will be severely affected this summer season without the 23 dining room attendants. The petitioner submits additional evidence to show the failed efforts to advertise the jobs locally and the other steps that have been taken to fill the 23 positions.

As discussed below, the AAO agrees with the finding of the DOL that the petitioner has not established a temporary need for the beneficiaries' services. Upon careful review of the entire record of proceeding, the evidence of record supports the director's decision to deny the petition. The AAO will dismiss the appeal.

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) provides, in part:

(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:

(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.

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

To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The petitioner described the duties of the proffered position at Part A, section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Perform serving, stocking and cleaning duties. Replace soiled table linens and set tables. Carry food, dishes and trays from kitchen to serving areas.

In its final determination notice, the DOL stated that the petitioner had not provided adequate documentation to support a peakload need. Therefore, a temporary labor certification could not be issued.

Upon review, the nature of the asserted need appears to be continuous and ongoing, and the countervailing evidence provided with the petition does not overcome the reasons for the DOL denial of the petitioner's request for temporary labor certification. Contrary to the petitioner's assertions, the evidence of record does not establish an H-2B peakload and/or seasonal need as defined at 8 C.F.R. §§ 214.2(h)(6)(ii)(B)(2) and (B)(3).

The petitioner's dining revenues and dining guest numbers for the 2005 and 2006 calendar years show that the petitioner has a temporary peakload need for the beneficiaries' services from May through October. However, the monthly payroll reports for the 2005 and 2006 calendar years for the designated occupation of dining room attendants establish that temporary workers were employed by the petitioning entity for the entire year during both years. The 2005 and 2006 monthly payroll reports do not establish a break where the petitioner does not employ any temporary workers in the proffered occupation.

Further, the petitioner submitted several copies of its approval notices (Forms I-797B) received during the 2005 and 2006 calendar years. The approval notices indicate the approval of several Forms I-129, Petition for a Nonimmigrant Worker, for the petitioner and states the workers' names, the number of workers approved under the classification (H-2B), consulate (Kingston) or port of entry and validity period of each petition. On three of the 15 approval notices submitted by petitioner, the dates of authorized employment overlap with other periods of authorized employment. For example, EAC-06-019-52791, shows a period of authorized employment from November 14, 2005 through November 13, 2006; EAC-06-030-52226 shows a period of authorized employment from December 1, 2005 through April 1, 2006; and EAC-06-120-53927 shows a period of authorized employment from April 1, 2006 through December 31, 2006. Therefore, the combined employment periods demonstrate that the petitioner's need for the beneficiaries' services is needed year-round to fulfill its obligations with its customers. These figures, which indicate a year-round use of temporarily employed dining room attendants, are materially inconsistent with either of the types of H-2B temporary need asserted in the petition. That is, the figures show neither a short-term demand for dining room attendants that is traditionally tied to a season of the year or other recurring short-term period (as required for a seasonal H-2B need), nor a seasonal or short-term peak in the demand for dining room attendants that requires hire of temporary dining room attendants to supplement the petitioner's permanent dining room attendants' staff (as required for a peakload H-2B need).

In conclusion, the petitioner has not established a temporary need for the beneficiaries' services for a period of seven months. The petitioner has not demonstrated 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. The petitioner has not established 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 has been shown to have a year round need for the beneficiaries' services. The petitioner submits the local area unemployment statistics and, despite the extensive advertising it did for the

job fair, they had a very low turnout, indicating how difficult it is to hire workers in the local area. The fact that the petitioner is unable to locate and secure United States workers to perform the job does not justify the petitioner's request for temporary H-2B workers. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

It is noted that the petitioner requested the beneficiaries' services from April 1, 2007 until October 31, 2007. Therefore, the matter is moot as the period of requested employment has passed.

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. The petition is denied although the matter is moot due to passage of time.