



U.S. Citizenship
and Immigration
Services

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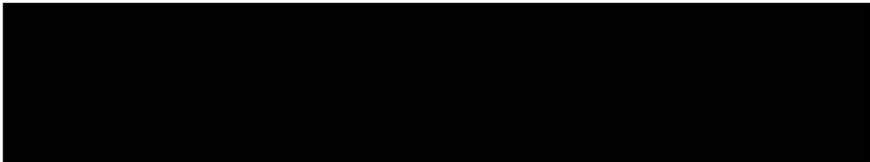


FILE: WAC 08 253 50805 Office: CALIFORNIA SERVICE CENTER Date: **DEC 01 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied, although the matter is moot due to the passage of time.

The petitioner is engaged in spa operations and services, and it wishes to extend the employment of the beneficiaries as spa therapist/masseuses pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for the period from October 1, 2008 until October 1, 2009. The Guam Department of Labor certified a temporary labor certification on behalf of the petitioner for four spa therapists for the employment dates of October 1, 2008 until October 1, 2009. The director determined that the petitioner had not established a temporary need for the beneficiaries' services.

On appeal, counsel for the petitioner states that the "massive military buildup and tourist industry have led to a chronic labor shortage for many businesses in Guam." Counsel further states that the labor shortage has "resulted in a peak-load need, while otherwise permanent, is a temporary event of short duration boosted by the temporary military buildup and the competition of permanent workers from other higher-paying occupations."

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:

(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 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.

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 petitioner indicates in its statement of temporary need that the employment is peakload.

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).

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.

Upon filing the instant petition, the petitioner indicated that its need is peakload. On the Form I-129, the petitioner explained its temporary need for the alien’s services as follows:

[The petitioner] is engaged in the business of spa operations and services on Guam. Our company is experiencing and expects more demand for our services. The temporary employment of the workers would enable the company to hire and train local U.S. workers for this position and meet the demand for our services

The petitioner submitted four “tour operator agreements,” between the petitioner and companies that will provide customers to the petitioner for its spa services. The agreements were signed in 2007, with two agreements expiring after one year.

The petitioner also submitted several articles discussing Guam as the home of Anderson Air Force Base and several U.S. Navy bases and how that will affect Guam.

On November 21, 2008, the director sent a request for further information. The director requested, in part, additional evidence to establish the temporary and peakload need for the temporary workers.

In a response letter, dated November 26, 2008, counsel for the petitioner stated the following:

As stated in the previously submitted Statement of Temporary Need for Workers, Petitioner has a peakload need for the H-2B workers based upon large number of contracts from international hotels and tour agencies seeking spa services for their clients. . . . Petitioner has aggressively recruited local workers; however, the demand is much higher than local workers are able to handle. Petitioner has implemented training programs to train more local workers and expects that this short-term need can be satisfied by qualified local workers. The need for the H-2B workers is temporary, as you will find that most of the contracts with tour agencies and hotels run for 12 months only. Petitioner will reevaluate its need for foreign workers when the contracts end.

The petitioner has not documented the peakload situation through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

As noted by the director, the petitioner currently employs one full-time spa therapist. The other spa therapists employed by the petitioner are the H-2B beneficiaries. Since the petitioner is engaged in providing spa services, and it only employs one full-time employee as a spa therapist, the petitioner has not established that the beneficiaries' services will be temporary in nature. The fact that the petitioner needs spa therapists in order to continue its business operations clearly shows that the need is not temporary but rather a need for the employees all year round. In addition, the petitioner contends that its peakload need is due to the labor shortage in Guam; however, there is no evidence that the labor shortage is temporary.

Upon filing the instant petition, the petitioner indicated that its need is peakload. The petitioner did not submit any evidence of a peakload demand such as additional contracts for work during the requested employment dates of October 2008 through October 2009 or charts indicating an increase of income during the peakload need. As noted by the petitioner, several of the contracts between the petitioner and the hotels and tour operators are only valid for one year and will

expire prior to the requested end employment date of October 2009. In addition, on appeal, the petitioner states that the demand for spa services will expand with the new military base, thus, the petitioner's need for workers is due to its growth as a business rather than a peakload need. The petitioner did not establish that its business activity has formed a pattern where its need for temporary workers is for a certain time period. Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Further, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for spa therapists to perform the duties described on the Form ETA 750, which is the nature of the petitioner's business, will always exist.

The evidence submitted by the petitioner does not support its claim of a peakload need for spa therapists within the meaning of 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

It is noted that the petitioner requested the beneficiary's services from October 1, 2008 until October 1, 2009. Therefore, 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied although the matter is moot due to the passage of time.