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U. S. Citizenship and Immigration Services
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U.S. Citizenship
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Services

D4

FILE: WAC 08 206 51636 Office: CALIFORNIA SERVICE CENTER Date: JUL 01 2009

IN RE: Petitioner:
Beneficiaries:

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).

John F. Grissom
Acting 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. The petition will be denied, although the matter is moot due to the passage of time.

The petitioner is a cleaning company, and it seeks to employ the beneficiaries as maid/housekeepers 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 April 30, 2009. The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor. The director determined that the countervailing evidence submitted by the petitioner was insufficient to overcome the DOL's decision.¹ The director determined that the petitioner had not established a temporary need for the beneficiaries' services, and the petitioner is not the actual employer. The director noted that the beneficiaries will not work directly for the petitioner, but instead will be placed in different locations with the petitioner's clients.

On appeal, the petitioner states that it does meet the criteria and that the beneficiaries qualify for this classification.

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

¹ The Department of Homeland Security (DHS) published the H-2B Nonagricultural Temporary Worker Final Rule in the Federal Register on December 19, 2008. The final rule became effective on January 18, 2009. See 73 FR 49109. This final rule amends DHS regulations regarding temporary nonagricultural workers, and their U.S. employers, within the H-2B nonimmigrant classification. The current Petition was filed with United States Citizenship and Immigration Services on July 21, 2008, prior to the date the new H-2B regulation came into effect. Under general rules of legal construction, a substantive, non-curative, adverse change in administrative rules is not to be applied retroactively unless the language of both the administrative rule and the statute authorizing the rule requires such a result. *Uzuegbu v. Caplinger*, 745 F.Supp. 1200, 1215 (E.D. La. 1990).

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 petition indicates 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).

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

Perform any combination of light cleaning duties to maintain private households or commercial establishments, such as hotels, restaurants, and hospitals, in a clean and orderly manner. Duties include making beds, replenishing linens, cleaning rooms and halls, and vacuuming.

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 a peakload need. In the letter of support, dated July 14, 2008, counsel for the petitioner stated the following:

If the U.S. Department of Labor had bothered to look at the Sales by Customer Detail report, it would have noted the same fluctuation in services shown by the payroll report, with the busiest times being the summer, fall, and winter months, with business dropping off significantly during the springtime.

* * *

Lastly, we contend that [the petitioner] therefore operates a seasonal business, busiest during the peakload tourist times, which in the Rocky Mountain Region of Colorado, occurs between November and April and again between June and September. October is reserved for deep cleaning, as requested by the signed contracts provided herein.

The petitioner submitted a chart of all the temporary and permanent employees for 2007 and 2006. The petitioner also submitted a sales summary for 2007. The petitioner submitted a document of the company overview that specifies its clients as residential (locals, vacation rentals and luxury second homes); business; and post-construction.

The petitioner submitted several service agreements. The service agreements do not indicate an end date for the contract. Most of the contracts just state the schedule of the cleaning as once a week or once a month or several times a week. The clients include businesses, hotels, resorts, and private residential owners. Each contract is for cleaners and some contracts list the job duties which are similar to the job duties described in the temporary labor certification application.

On appeal, counsel for the petitioner explained that the petitioner will be the actual employer of the beneficiaries as it "pays their salaries, gives them duties, directs their workload and product and generally will supervise each beneficiary." In addition, counsel for the petitioner states that the petitioner provided sufficient evidence to establish a seasonal need, including a payroll chart and a sales report that indicated the "busiest times being the summer, fall, and winter months, with business dropping off significantly during the springtime."

In this instance, the petitioner has not carefully documented the peakload need 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 the additional personnel needed to fill the peakload positions will be engaged in different duties or had different skills than the workers currently employed by the company. 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. The petitioner stated that it needs permanent workers. In addition, 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. 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)).

Upon filing the instant petition, the petitioner indicated that its need is a peakload need. The petitioner submitted a sales report for 2007, a sales graph for 2007, several contracts between the petitioner and clients for cleaning services, and, a staffing chart with the petitioner's permanent employees and temporary employees for 2006 and 2007. The chart indicated that the petitioner hired temporary employees for every single month listed on the chart except for the month of November in 2006 and the month of May in 2007. Each month displays changes in the number of permanent and temporary employees; however, the changes are not significant and do not evidence a peak or seasonal 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 and will recur next year at the same time. The documentation submitted by the petitioner does not demonstrate a recurrent seasonal need. The table of permanent employees and temporary employees do not show a season need but rather a need for temporary employers all year round. This is further evidenced by the petitioner's graph depicting its sales for each month from April 1, 2007 until September 1, 2007, which does not indicate a pattern of a peak need. It appears that the petitioner has higher sales in January through April, a drop in May and then it goes up again in June to August. In addition, on appeal, counsel for the petitioner stated that the busiest times are summer, fall and winter months. However, the petitioner requested the H-2B classification for October 1, 2008 until April 30, 2009, which is not consistent with the peak needs as stated by the petitioner. In addition, the contracts submitted by the petitioner did not state an end date, thus, it is possible that the cleaning services will be provided all year round. Thus, the petitioner has not shown that its need for the beneficiaries' services is tied to a seasonal trend or a particular event that recurs every year. 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 cleaning workers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist. It is possible that the petitioner will continue to receive contracts for the entire year. Consequently, the petitioner has not demonstrated that its need to supplement its clients' 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.

The director also noted that the beneficiaries will be employed as independent contractors and thus the petitioner is not the actual employer. The term "employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. The petitioner indicated that the beneficiaries will be working on client projects and will be assigned to various client worksites when contracts are executed. However, as discussed above, the petition may not be approved as the petitioner did not establish a temporary and peakload need for the beneficiaries.

It is noted that the petitioner requested the beneficiary's services from October 1, 2008 until April 30, 2009. Therefore, the period of requested employment has passed.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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