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Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



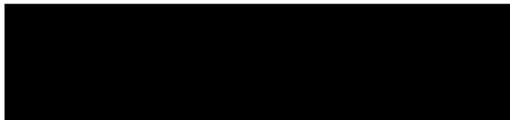
U.S. Citizenship
and Immigration
Services

D4



FILE: WAC 09 220 51594 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2010

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).

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and certified to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4. The decision of the director will be affirmed, and the petition will be denied.

The petitioner is in the retail business and seeks to employ the beneficiaries as cosmetics sales associates 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, 2009 until January 1, 2010. The Department of Labor (DOL) certified a temporary labor certification on behalf of the petitioner for 66 salespersons for the employment dates of October 1, 2009 until January 1, 2010.

On October 16, 2009, the director sent a notice of certification discussing the following grounds for denial: (1) whether the petitioner has demonstrated that there exists a reasonable and credible offer of employment; (2) whether the petitioner has established that its need for the beneficiaries' temporary nonagricultural services or labor is peakload in nature; and (3) whether the petitioner may file one petition for multiple beneficiaries who will be working in different locations.

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) *Petition.* (A) H-2B nonagricultural temporary worker. An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform 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.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The

employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load 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.

In addition, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states the following:

The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a favorable labor certification determination as required by paragraph (h)(6)(iv) or (h)(6)(v) of this section.

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.

In the notice of certification, the director determined that the petitioner did not establish that there exists a reasonable and credible offer of employment. As noted by the director, the certified temporary labor certification and the Form I-129 indicated that the petitioner would employ 66 beneficiaries to fill positions in seven locations; however, in response to the director’s request for evidence, the petitioner attempted to amend the petition and requested 36 beneficiaries who will only work in six locations. The director also questioned if the petitioner has a need for 36 employees for its business operations.

In reviewing the record, the AAO agrees with the director. As noted by the director, the certified temporary labor certification and the Form I-129, requested 66 beneficiaries to work in seven locations. Once the director sent a request for evidence (RFE) asking for further information of the work locations, it was only then that the beneficiary changed the number of employees and work locations. In the petitioner’s response letter, dated September 30, 2009, the petitioner stated that “although this current petition was filed for a total of 66 workers, our negotiations with few malls fell through. . . .” The contracts submitted by the petitioner between itself and the leasing locations in several malls were all signed months before the current petition was filed, and the petitioner never explained why it did not adjust the number of beneficiaries and locations when it initially filed the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the

petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

As noted by the petitioner in response to the RFE, it will place the beneficiaries in six different locations. In response to the RFE, the petitioner submitted copies of retail space lease agreements between several malls and the petitioner. However, the petitioner submitted only five signed contracts for lease space from September 2009 until January 2010. Although, the petitioner also submitted a copy of a contract for the sixth mall location, it was not signed or completed. A letter is attached to the blank contract from the lessor which states that the "attached [contract] does not constitute an offer or promise to lease, and is subject to approval by Landlord and Landlord lenders." Thus, the contract for the sixth mall location is not completed and the petitioner did not provide evidence that it obtained that location to place the beneficiaries there as an employment site. In the response to the RFE, the petitioner stated that it sent back the executed lease to the mall but the petitioner did not provide a copy of the signed lease agreement. 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)).

In addition, the petitioner stated that it will employ 36 individuals to work in 6 kiosks in different mall locations. The company now plans to utilize 6 beneficiaries in each location, and each location will have two shifts per day, and three beneficiaries will work in each shift. The petitioner submitted an outline of the two shifts for Monday through Sunday. According to the itinerary, it appears that there will be a one hour overlap in shifts from Monday to Saturday, and a two hour overlap of shifts on Sunday. Thus, for one hour on Monday through Saturday, and two hours on Sunday, there will be six individuals working at each mall kiosk. Given that the kiosks are small stands located in the hallways of the mall, it is not clear what work will be available for six individuals when the shifts overlap. Moreover, the petitioner explained in its response to the RFE, that it currently employs 8 full-time employees and four of these employees work at a mall location. Thus, it appears the mall kiosk would have anywhere from 4 to 7 individuals working at the same time in a space that is approximately 25 to 60 square feet. Furthermore, this estimate is based on the reduced number of workers now requested by the petitioner. Otherwise, based on the workforce originally intended by the petitioner, the number of employees at each kiosk at any given time would be much higher. In all, these assertions by the petitioner regarding its required workforce are simply not credible, and it cannot be found that a reasonable and credible offer of employment exists. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582 at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The director also found that the petitioner has not carefully 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 the additional personnel needed to fill the peakload positions will be engaged in different duties or have different specialty skills than the workers currently employed by the company. Consequently, 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 and permanent 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.

In a letter, dated August 4, 2009, the petitioner stated that it is a specialty retailer that operates on a year round basis but experiences a peakload demand during the fall/winter months due in large part to the holiday shopping season. The petitioner also stated that "in order to overcome any potential competition and shortage in its product line, the company has secured its inventory in advance for these months."

In the petitioner's response to the RFE, it submitted a summary of sales tax paid by the petitioner during 2008. The petitioner noted that the "chart shows that there is a significant increase in the sales tax during October to December compared to January to September." The petitioner did not submit official documents of sales taxes paid but instead provided a summary prepared by the petitioner. It is also unclear where the petitioner conducts its retail business from February until September since all the lease agreements are from October through January. In addition, the petitioner submitted several business documents such as a business license, stock certificates, paystubs of Employer's Payment of Ohio Tax Withheld, and payroll summary of [REDACTED]. The petitioner claims that it is affiliated with [REDACTED], but it is not clear why it provided business documentation for [REDACTED] rather than the petitioner. Finally, the petitioner submitted staffing charts for 2006 through 2008. For each year, the petitioner claims to have hired more individuals during the months of October through January. However, as mentioned above, it is not clear where the petitioner has retail stores during February through September when all the lease agreements submitted by the petitioner are only for October through January. 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)).

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 cosmetic sales associates 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 cosmetic sales associates within the meaning of 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The final issue discussed by the director is whether the petitioner may file one petition for multiple beneficiaries who will be working in different locations. As noted by the petitioner, it now seeks to employ 36 beneficiaries who will work in six different locations.

The regulations at 8 C.F.R. § 214.2(h)(2)(i)(2) states:

A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

In the instant petition, the petitioner stated that the beneficiaries will be located in six different locations. The petitioner submitted a list of the six different locations through Ohio. Given that the beneficiaries will not all work at the same location, the petitioner may not file for all of these beneficiaries on the same Form I-129. For this additional reason, the petition must be denied.

It is noted that the petitioner requested the beneficiary's services from October 1, 2009 until January 1, 2010. 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. Upon review of the evidence contained in the record, the decision of the director is found to be correct.

ORDER: The decision of the director is affirmed.