identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D4

[redacted]

FILE: EAC 09 190 51933 Office: VERMONT SERVICE CENTER Date: APR 06 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, Vermont Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is engaged in oyster shucking and it seeks to employ the beneficiaries as oyster shuckers 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 June 30, 2010. The Department of Labor (DOL) certified the petitioner's temporary labor certification for employment dates from September 1, 2009 until June 30, 2010.

The director denied the petition, holding that, since the employment start date required on the H-2B petition is different from the date of need stated on the approved temporary labor certification, the petitioner failed to meet the regulatory requirements pursuant to 8 C.F.R. § 214.2(h)(6)(iv)(D).

On appeal, the petitioner states that it requested a temporary labor certification from DOL with an employment start date of September 1, 2009, as that is the date its peak season begins. The petitioner further states that "[d]ue to the unavailability of these *originally requested* 98 workers, we then filed a I-129 petition with INS/BCIS, amending the start date to 10/01/2009, a date later than the date of need on the previously approved temporary labor certification which was 09/01/09." The petitioner also noted that it received a certified temporary labor certification valid from September to June, asserting thereby that the labor certification is valid for this entire period of time. Petitioner further stated that "[e]ven if our workers start to work later than September 1, and we add to our crew as they become available throughout this period of time, that does not invalidate our labor certification because 98 of the originally requested 98 workers requested for September 1 were unavailable either within or without the U.S."

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 Fed. Reg. 49109 (Dec. 19, 2008). 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 (USCIS) on June 26, 2009, after the date the new regulations came into effect; thus the revised regulations govern the current petition.

The rule prohibits H-2B petitioners from requesting an employment start date on the Form I-129, Petition for a Nonimmigrant Worker, that is different than the date of need listed on the approved temporary labor certification. To ease the initial difficulties in administering this provision, it took effect starting with the filing period for the first half of fiscal year (FY) 2010, which began on October 1, 2009. *Id.*

This final rule adopts the proposed requirement that an H-2B petition identify an employment start date that is the same as the date of employment need stated on the approved temporary labor certification. 73 Fed. Reg. at 78106; 8 C.F.R. § 214.2(h)(6)(iv)(D). As such, the final rule staes that "it would be procedurally impossible for a petitioner to file an H-2B petition any sooner than the earliest date upon which it is able to start recruiting for a nonagricultural position. Therefore,

this final rule modifies 8 CFR 214.2(h)(9)(i)(B) to provide that an employer may not file, and USCIS may not approve, an H-2B petition more than 120 days before the date of the employer's actual need for the beneficiary's temporary nonagricultural worker services, as identified on the temporary labor certification." 73 Fed. Reg. at 78106.

The petitioner stated on appeal that its peak season starts months into the first half of the numerical cap limitation and thus, it is impossible for them to receive visas when the cap has already been reached. The final rule recognized the concern of the employment start dates and the visa cap dates and stated in the final rule, "DHS recognizes the concerns of the commenter that requiring the petition start date to reflect that of the temporary labor certification may have the effect of disadvantaging certain filers whose employment start date begins more that four months after the beginning of the first or second half of the fiscal year." *See* 73 Fed. Reg. at 78111. However, DHS also noted that it is required to follow the regulations of determining that there are no U.S. workers available for the offered positions. As also stated in the final rule, "the only way DHS can satisfy itself that there has been a fair and accurate labor market test and that there is in fact a shortage of U.S. workers is by receiving a temporary labor certification from DOL verifying the employment period set forth in the petition, including the same employment date." *See* 73 FR 49109 at 781112. Furthermore, an appropriate labor market test must be conducted prior to the determination by the Secretary of Labor as to whether there are any U.S. workers available and capable of performing the temporary services or labor and whether the H-2B employment will adversely affect the wages and working conditions of U.S. workers. As the availability of temporary U.S. workers could change over short periods of time, the result of the labor market test could be different if the employment start date is changed after a labor certification is approved.

The regulations at 8 C.F.R. 214.2(h)(6)(iv)(D) states in part that "a petitioner filing an amended H2B petition due to the unavailability of originally requested workers may state an employment start date later than the date of need stated on the previously approved temporary labor certification accompanying the amended H-2B petition. On appeal, the petitioner alludes that the current petition is an amended petition and thus, it may have different employment dates on the Form I-129 from the certified temporary labor certification. However, the Form I-129 indicates that this is a petition for "new employment" and the petitioner did not indicate that this petition is an amended petition of a previously approved H-2B petition. As such, the AAO concludes that the director did not err in denying the petition on the basis that the employment start date did not match the date of need stated on the approved temporary labor certification.

Beyond the decision of the director, the petitioner has not sufficiently established a temporary need for the beneficiaries' services. As a general rule, 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. 8 C.F.R. § 214.2(h)(6)(ii)(B).

The petitioner seeks approval of the proffered position as seasonal. In support of this assertion, the petitioner submitted a statement of its temporary need, in which it explained the life cycle of an oyster and asserted that in "September these oysters reach high quality and demand."

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*).

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload need in oyster shucking. The petitioner has not carefully documented the seasonal 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 did not provide any information of the amount of oysters shucked for each month of the year to indicate a recurring seasonal time. Absent supporting documentation, 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. Simply 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 oyster shuckers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

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 appeal is dismissed. The petition is denied.