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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: [Redacted] Office: VERMONT SERVICE CENTER Date: **AUG 04 2010**

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 petitioner is a seasonal job contracting company, and it seeks to employ the beneficiaries as 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, 2009 until July 31, 2010. The Department of Labor (DOL) determined that the petitioner submitted sufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor.

On November 3, 2009, the director denied the petition concluding that the petitioner had not established a temporary need for the beneficiaries' services.

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) *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 seasonal.

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 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 seasonal need. In the letter of support, dated September 12, 2009, the petitioner stated that its "purpose is to provide our clients with the highest quality hospitality personnel." The petitioner also explained its temporary need for the alien's services as follows:

The need for additional workers on a seasonal basis is dependent and critical to the overall operation of our company. To meet the expectations of our clients, we must be able to provide exceptional service. Our company can only ensure we meet our contractual obligations to our clients and conduct our normal course of business by providing exceptional service. This can only be accomplished with proper staffing with well-trained associated. Recent recruiting activities/efforts have been unable to meet our demands.

In response to the director's request for evidence, the petitioner submitted copies of the payroll journal for housekeepers at the client site, [REDACTED] in Bossier City, Louisiana. The payroll journals are for the years of 2007 through 2009. In reviewing the journal records, the petitioner did not submit any documentation for August or September of each year because they claim that no workers were employed in those two months.

The petitioner also submitted a chart for the workers located at the client site for 2007, 2008, and the months of January through September of 2009. The petitioner also included the projected temporary workers from October through November of 2009 and all of 2010. According to the charts, the client only employs temporary workers and does not employ any workers in August and September.

The petitioner submitted a letter from [REDACTED] the client site, that stated that “the twenty-five workers being requested from [the petitioner] will be employed as housekeepers at [REDACTED] located at [REDACTED] Bossier City, LA [REDACTED]. The petitioner also submitted a labor service agreement with [REDACTED]. The agreement states that the petitioner will provide staff to [REDACTED] starting October 1, 2009 until July 31, 2010. The agreement also stated that the petitioner will “maintain a consistent level of 25” employees.

As noted above, the petitioner submitted a copy of the client’s payroll journals for housekeepers from 2007 through 2009. In addition, the petitioner did not submit a copy of the payroll journal for each August and September because it claims that no temporary workers were employed by the client in those two months. This is not sufficient evidence to corroborate that claim. The petitioner did not explain why the client site does not need any workers for August and September. In addition, it is not clear why the payroll journals for August and September were not submitted indicating that zero workers were employed in those two months. 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)).

Furthermore, the petitioner in this matter is the contracting company, and not the client site, [REDACTED]. Thus, the AAO must determine the seasonal need of the petitioner and not the client site. The petitioner did not provide any evidence to establish its own seasonal need from October 1, 2009 until July 30, 2010. In this instance, 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. 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. 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.

Furthermore, the petitioner does not provide evidence to demonstrate that it will not continue to receive contracts that would require extra work throughout the entire year. Thus, it is possible that the petitioner will continue to receive contracts for the entire year for housekeepers. Thus, 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.

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 is a company that provides personnel to the hospitality industry. Thus, the petitioner's need for hospitality personnel to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

As always, 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.