

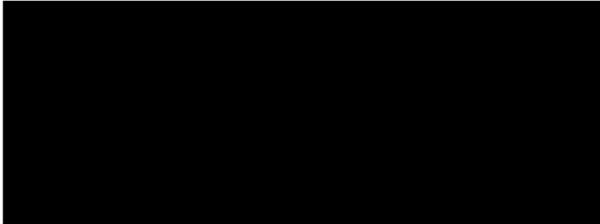
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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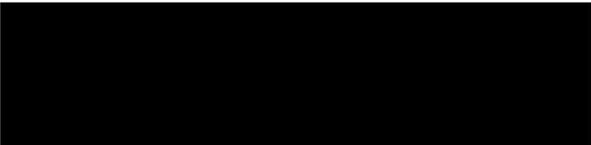


B4

FILE: WAC 09 099 50482 Office: CALIFORNIA SERVICE CENTER Date: **MAY 12 2010**

IN RE: Petitioner: 
 Beneficiaries: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(ii)(b) of the
 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

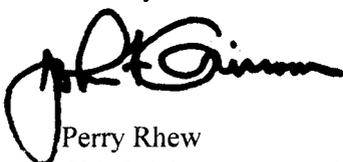
ON BEHALF OF PETITIONER:


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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, although the matter is moot due to the passage of time.

The petitioner is engaged in the sales and rental of scuba diving equipment and the provision of diving tours. The petitioner seeks to extend its employment of the beneficiaries as diving instructors, pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b) for the period of March 4, 2009 to March 4, 2010. The Guam Department of Labor certified the petitioner's temporary labor certification, valid from March 4, 2009 until March 4, 2010.

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 petitioner needs bilingual scuba diving instructors to assist with Japanese-speaking tourists. Counsel further states that the "business' peaks and valleys are triggered by such diverse global factors, which are unpredictable and totally beyond Petitioner's control." Counsel further states that "an approval [of a temporary labor certification from the department of labor] shows conclusively that this issue of the Employer's need for H2B workers has been thoroughly examined by a government office with a complete in-depth understanding of the local economy and business' needs."

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 attachment to the Form I-129, the petitioner stated that it is performing a "short-term contract to provide scuba diving services, to customers or a tour operator who caters to Japanese tourists." The petitioner also stated that its "customer base is 95% Japanese tourists visiting Guam, and therefore there is a foreign language requirement."

On April 8, 2009, the director requested further information regarding the petitioner's temporary need and evidence regarding the petitioner.

In its response, counsel for the petitioner submitted a letter dated May 4, 2009, and stated the beneficiaries teach the customers how to safely use the scuba equipment and they escort tourists on diving tours. Counsel further stated that "the permanent workforce is dedicated to the operation of the scuba diving shop, the maintenance of the diving equipment, and in providing diving services to island residents. The permanent workforce is not adversely affected by the employment of the Beneficiary's service to the Japanese tourists." In addition, counsel stated that it has a temporary need not to exceed one year to meet its short-term contractual obligations.

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 for diving instructors.

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. In fact, counsel for the petitioner asserts that its temporary need is not based on a documented need since "on a small tropical island whose economy depends almost entirely on Japanese tourists, the volume of visitor arrivals is not steady, dependable, or reliable." On appeal, counsel for the petitioner states that there is an "ebb and flow" of tourism that is affected by a "wide variety of factors." Thus, the petitioner is asserting that it is too difficult to document a peakload need in this case. 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)).

The petitioner submitted a statement indicating the peakload need of the company is based on a short-term contract of one year. 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 or an unusual demand. As noted above, counsel for the petitioner contends on appeal that the "petitioner's performance on this short-term contract depends directly on the vagaries of the Guam tourism industry, and this employer's need for subject alien workers is therefore subject to sharp variations." The petitioner does not explain if it has seen an uncharacteristic increase in its normal yearly workload. Absent supporting documentation, the petitioner has not shown that its need for the beneficiaries' services is tied to a trend or a particular event that recurs every year. Again, 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. at 165.

In addition, the U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states in pertinent part: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project" Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business.

Counsel for the petitioner also states that the petitioner requires divers that are bilingual and further contends that "the primary reasons U.S. workers are not utilized more extensively as Diving Instructors is the very real problem of having a language barrier create a misunderstanding that could jeopardize the lives of Japanese-speaking tourists." The petitioner claims that the beneficiaries are necessary because they speak Japanese, however, given that counsel claimed that 95% of the tourists in Guam are Japanese, the need for bilingual diving instructors will always be necessary for the petitioner's business operations. 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 Japanese-speaking diving instructors to perform the duties described on the temporary labor certification, which is the nature of the petitioner's business, will always exist.

In addition, on appeal, counsel for the petitioner stated that "an approval [of a temporary labor certification from the department of labor] shows conclusively that this issue of the Employer's need for H2B workers has been thoroughly examined by a government office with a complete in-depth understanding of the local economy and business' needs." The regulations at 8 C.F.R. § 214.2(h)(6)(iii) states that "the labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." Thus, the certified labor certification by DOL is solely "advice" as to whether U.S. workers are available to fill the temporary position and is not a determination of the petitioner's temporary and peakload need for additional workers.

It is also noted that the petitioner requested the beneficiary's services from March 4, 2009 to March 4, 2010. Therefore, the period of requested employment has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

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