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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



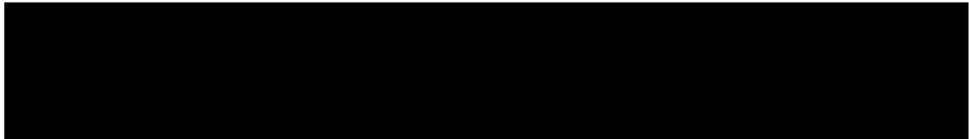
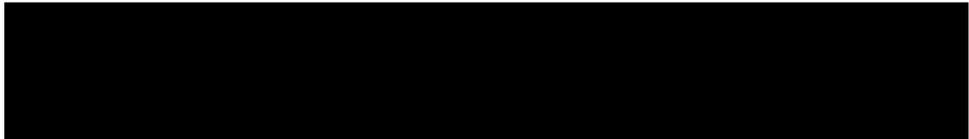
**U.S. Citizenship
and Immigration
Services**

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DATE: DEC 12 2011 OFFICE: VERMONT SERVICE CENTER FILE: 

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:

SELF-REPRESENTED

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 \$630. 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 director of the Vermont Service Center revoked the previously approved nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to revoke the petition. The matter is now before the AAO on a motion to reopen and/or motion to reconsider. The motion will be dismissed and the director's and the AAO's decision will be undisturbed.

The petitioner stated on the Form I-129 that it is engaged in "Hotel, IT, Construction Management and Development." 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 April 1, 2010 until December 15, 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 December 16, 2010, the director revoked the petition concluding that the petitioner did not submit sufficient evidence in rebuttal to the United States Citizenship and Immigration Services' ("USCIS") Notice of Intent to Revoke ("NOIR") and has not overcome the grounds for revocation.

In a decision dated July 21, 2011, the AAO affirmed the ground for dismissal. On August 19, 2011, the petitioner filed a Form I-290B and identified it as a Motion to Reopen or Reconsider.

On February 16, 2010, the petitioner filed the Form I-129 (Petition for Nonimmigrant Worker) to employ 65 named beneficiaries in the H-2B classification for the period from April 1, 2010 until December 15, 2010. The director approved the petition. On August 4, 2010, the director notified the petitioner of his intent to revoke approval of the H-2B petition. In the notice of intent to revoke, the director stated the reason for revocation as follows:

You indicated on your petition in section 2 of Supplement H that you use, or plan to use, the placement service MedicsHire Group LLC. During a visa interview, two of the beneficiaries from this petition confessed to a consular officer that they each paid a \$400.00 administrative/processing fee to [REDACTED] of MedicsHire Group LLC; that they were also required to pay a \$500.00 deposit to [REDACTED] for their housing rent/lease; and they were to pay a \$500.00 job placement fee to OLM International Job Placement Corporation, a local recruitment agency counterpart of MedicsHire Group LLC, after their H-2B visa was issued by the Embassy. The beneficiaries testified in the interview that the \$500.00 fee to OLM International Job Placement Corporation did not cover airfare, which they personally paid, and that they have personally paid for their medical examination fees and visas. In addition, USDOS provided USCIS with a letter to [REDACTED] written by [REDACTED] [REDACTED] of your company, stating that the beneficiaries "will be working in the housekeeping department of the hotel and performing cleaning activities," and that [REDACTED] should "advise them to mention the true reason of coming to US which is housekeeping and do not mention things like FRONT-DESK, FOOD & BEVERAGE etc."

The NOIR also stated that the evidence is not clear as to whether the beneficiaries' services are temporary since the participant agreement indicates that workers can arrange to come to the United States at any time of the year, and, furthermore, a "hotel management company has a year-round need for the services of housekeepers in its day-to-day management of hotels." In addition, the director noted that the petitioner's participant agreement requires the beneficiary to pay the expenses to return home if the individual is terminated even though this is not allowed under the current regulations.

On motion, the petitioner states that the contract between the petitioner and MedicsHire Group has a clause that states MedicsHire Group is prohibited from collecting a job placement fee or other compensation from an alien. The petitioner also states that "based on the petitioner's internal investigation no beneficiary paid any fee." The petitioner submits a list of beneficiaries that were hired through MedicsHire Group and those directly hired by the petitioner.

In addition, on motion, the petitioner contends that it is not a job contractor but instead a hotel management company that is "responsible for the overall operations of the hotels it owns, operates or manages, which includes supplementing its permanent staff during high demand due to seasonality." The petitioner also states that "just like any hotel owner or manager, the petitioner has to hire temporary workers during the seasonal and peak load need." The petitioner submits a letter from [REDACTED] from [REDACTED] that defines the difference between a contracting company and a management company. Moreover, the petitioner states that it has a contract with Sands Resorts that makes the petitioner responsible for the overall management of the resort, and this particular resort has a staff of permanent housekeepers and the need for additional housekeepers is on a temporary basis.

The petitioner's assertions do not satisfy the requirements of either a motion to reopen or a motion to reconsider.

The regulations at 8 C.F.R. 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered new under 8 C.F.R. 103.5(a)(2). The evidence submitted was previously available and could have been discovered or presented in the previous proceeding. The documentation presented on motion does not overcome the concerns addressed in the director's revocation and the AAO's dismissal of the appeal. 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)).

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

Furthermore, the contract submitted by the petitioner between the petitioner and MedicsHire Group LLC is not complete. The first page of the contract does not correspond with the next two pages of the contract. It appears that the documents are from two different contracts. In addition, the page that has the clause stating that MedicsHire Group LLC cannot obtain payment from the beneficiaries is on the last page of the document and is not signed by either the petitioner or MedicsHire Group LLC. Thus, there is no evidence that MedicsHire Group LLC received this contract or signed in agreement to this contract. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Moreover, the petitioner did not provide any new evidence to overcome the director's and AAO's concerns regarding the payment of administrative fees by the beneficiaries to MedicsHire Group. The petitioner did not provide a complete contract between the petitioner and MedicsHire Group outlining the process and procedure to be followed by MedicsHire Group. In addition, on motion, the petitioner provides a list of the beneficiaries recruited by MedicsHire Group and those recruited by the petitioner. However, the petitioner did not provide any evidence from the beneficiaries recruited by MedicsHire Group LLC indicating that they did not pay an administrative fee to MedicsHire Group. On motion, the petitioner states that based on an "internal investigation," no fee was paid to MedicsHire Group. The petitioner did not provide any documentation of this internal investigation in order to support this claim. 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 at 165.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

In addition, the motion does not satisfy the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel does not submit any document that would meet the requirements of a motion to reconsider. A review of the record and the adverse decision indicates that the director and the AAO properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition on the basis that the petitioner is a job contractor and not a hospitality

management company. However, the analysis of the director's and AAO's decision regarding the temporary need still applies to a management company.

To establish that the nature of the need is "seasonal," 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. 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 February 12, 2010, the petitioner stated that it is a "hotel management company that owns and operates several properties throughout the United States and provides superior management of premier hotel properties for owners and asset managers." On the Form I-129, the petitioner stated that the beneficiaries will work in Myrtle Beach, South Carolina. In response to the NOIR, the petitioner submitted staffing charts, occupancy data and revenue data for the Sands Resort in Myrtle Beach, South Carolina. The petitioner in this matter is the hospitality management company, and not the client site, Sands Resort. 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 April 1, 2010 until December 15, 2010. According to the petitioner, it provides personnel to hotels that are located in different areas of the United States that may all experience different temporary needs. 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 its 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. The petitioner may continue to receive contracts for the entire year for housekeepers since that is, in part, the nature of its business. Thus, the petitioner has not demonstrated that its need to supplement its clients' permanent staff 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'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.

Here, the submitted evidence does not satisfy the requirements of a motion to reopen or a motion to reconsider.

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. 8 CFR 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed and the previous decisions of the director and the AAO will not be disturbed.

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 motion is dismissed.