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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: **JUL 21 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 matter 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 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.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation, dated February 16, 2010; (2) the director's NOIR, dated August 4, 2010; (3) the petitioner's response to the NOIR; (4) the director's December 16, 2010 notice of revocation; and, (5) the Form I-1290B, filed on January 18, 2011. The AAO reviewed the record in its entirety before issuing its decision.

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 [REDACTED]. 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 [REDACTED]; 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 [REDACTED] 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], Administrative Supervisor 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 the whether the beneficiaries’ services is 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.

In a response letter, dated September 3, 2010, the petitioner stated that it “contracted with [redacted] Group to locate seasonal housekeepers,” and that the petitioner “experiences a peak load need for housekeeping staff which corresponds with spring break, summer vacation season, conference and events, fall break and the holiday season.” In response to the director’s claim that unlawful fees were paid by two beneficiaries, the petitioner stated that it was “unaware that any fees have been paid by the beneficiaries to [redacted].” The petitioner also stated that it never received any payment from any individuals or entity as a condition of the H-2B employment and that “[redacted] has failed to respond to [the petitioner’s] repeated demands to know which beneficiaries had made payments and when the alleged payments were made.” The petitioner also stated that it reimbursed the two beneficiaries. The petitioner submitted an affidavit from the petitioner’s Human Resources Manager stating that the petitioner “did not require our H-2B applicants to reimburse us for any fees in connection with the visa nor did we expect [redacted] to require payment from our applicants in return for their employment with [the petitioner]. The petitioner also submitted evidence that two of the beneficiaries were reimbursed \$900.00 by the petitioner through a MoneyGram that had a message, “[redacted] paid fee refund.”

In addition, the petitioner submitted sworn testimony from 12 beneficiaries confirming that the beneficiary did not pay a job placement fee or other compensation to the petitioner, excluding reasonable travel expenses, government visa fees or a housing deposit.”

In regards to the director’s claim that the petitioner’s participant agreement required the beneficiary to pay for expenses to return home upon termination was not permissible in the regulations, the petitioner stated in its response letter that it has “amended its contract to more closely mirror the regulations as well as the factual situations,” in which the petitioner is responsible for the return travel of terminated employees.

In regards to the director’s concern that the petitioner has not established a temporary need for the services of the beneficiaries’ the petitioner submitted a chart of permanent and temporary workers located at the [redacted] in Myrtle Beach, South Carolina, for the years of 2006, 2007, 2008, and 2009. The petitioner also submitted a letter from [redacted], Director of Human Resources. The letter is on the petitioner’s letterhead; however, the author discusses resorts in the [redacted] and [redacted] area. The Form I-129 indicated that the

beneficiaries will be employed at a location in Myrtle Beach, South Carolina. The author appears to be the Human Resources Manager for the resort where the beneficiary will be employed, in this case, the [REDACTED]. The author also stated that the seasonal need for this resort runs from March through November. The petitioner submitted occupancy and revenue charts for the [REDACTED] Myrtle Beach for 2007, 2008 and 2009.

In the director's December 16, 2010 denial decision, the director noted that the petitioner did not submit sufficient evidence to overcome the concerns addressed in the NOIR. Specifically, the director noted that the sworn testimony signed by 12 beneficiaries indicate only that the beneficiaries did not pay any unlawful fees to the petitioner but did not discuss fees paid to the petitioner's agent, [REDACTED]. In addition, the director noted that the petitioner reimbursed two beneficiaries for the fees paid to [REDACTED] but the director also stated that it is "highly unlikely that [REDACTED] would charge only 2 of the beneficiaries a \$400 administrative fee," and not charge the same fee to the other beneficiaries. The director also noted that the petitioner failed to present evidence to support the claim that the petitioner did not know the administrative fees were being paid by the beneficiaries to [REDACTED].

Moreover, the director noted that the information provided by the petitioner does not document a temporary need for housekeepers.

Finally, the denial decision quotes from the petitioner's participant agreement between the petitioner and each beneficiary that states that the beneficiary will be responsible for his or her own travel expenses to return home if they are terminated. The petitioner submitted a new contract that eliminated that requirement; however, the new contract was drafted after the current petition was filed. The director noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

On appeal, the petitioner further stated that the petitioner was not aware of any fees provided to [REDACTED] from the beneficiaries'. Specifically, the petitioner stated the following on appeal regarding the claimed payments to [REDACTED].

Therefore, the petitioner performed its own internal investigation upon receipt of the Notice of Intent to Revoke and found out who the two beneficiaries in question were. Petitioner further learned that no payments were made by any of the beneficiaries, including the two in question. At the time of the investigation, the two beneficiaries in question informed the Petitioner that during their interview at the US Consulate, they were put in a lot a pressure by the officer to reveal more information. Due to the intense pressure both the beneficiaries became nervous which resulted in giving false information that the beneficiaries gave without even thinking factually.

On appeal, the petitioner also responded to the director's concern that if two beneficiaries were required to pay an administrative fee to [REDACTED], it is very possible that all of the beneficiaries from the Philippines did the same. On appeal, the petitioner states that "not all 65 beneficiaries were hired through [REDACTED]," and instead many of the beneficiaries were recruited directly by the petitioner.

Upon review of the record, the petitioner did not provide sufficient evidence to overcome the director's concerns in the NOIR regarding the payment of administrative fees by the beneficiaries to [REDACTED]. The petitioner did not provide a contract between the petitioner and [REDACTED] outlining the process and procedure to be followed by [REDACTED]. In addition, on appeal, the petitioner states that not all of the beneficiaries were recruited by [REDACTED] Group but the petitioner failed to present any evidence in support of that assertion. As noted by the director in the NOIR, the petitioner submitted sworn testimony from the beneficiaries stating that they did not pay any fees to the petitioner; however, the sworn testimony does not discuss the petitioner's agent, [REDACTED], at all and thus, the sworn testimony is incomplete. 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)).

Moreover, the director denied the petition concluding that the petitioner did not establish a temporary need for the beneficiaries' services. On appeal, the petitioner states that the need for temporary services is "consistently tied up to summer and spring seasons, as the occupancy demand accelerates during these months of increased tourism." The petitioner also states that it "regularly employs permanent housekeepers to provide housekeeping services to hotels in Myrtle Beach, SC and other geographical locations that are managed by the petitioner," and the petitioner "only needs additional housekeepers during the peak load period."

The petitioner in this matter is the contracting company, and not the client site in Myrtle Beach, South Carolina. Thus, the AAO must determine the peakload need of the petitioner and not the client site.

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, 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 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 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.

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 [REDACTED] in Myrtle Beach, South Carolina. 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 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 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.