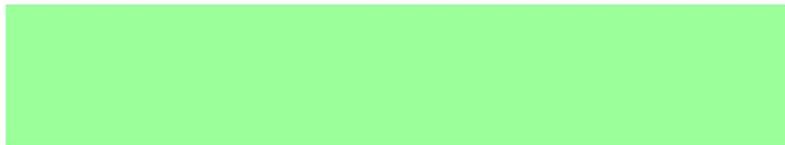


(b)(6)

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

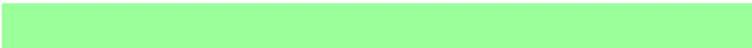


U.S. Citizenship  
and Immigration  
Services



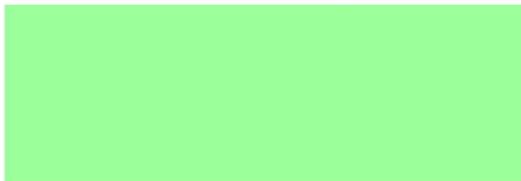
DATE: **AUG 12 2013**

OFFICE: CALIFORNIA 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:

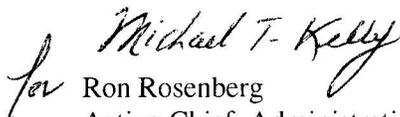


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a restaurant and food services company<sup>1</sup> established in 2004. In order to employ the beneficiaries in what it designates as “Cook, Specialty” positions<sup>2</sup> from October 1, 2012 until September 30, 2013, the petitioner seeks to classify them as temporary nonagricultural workers pursuant to 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).

The director denied the petition, concluding that the petitioner failed to establish a temporary need for the services of the beneficiary based upon a one-time occurrence.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the RFE; (4) the director’s decision denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director’s ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

#### *Applicable Law and Interpretations*

Section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker, in pertinent part, as follows:

[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)(6) states, in pertinent part, the following:

*Petition for alien to perform temporary nonagricultural services or labor (H-2B)—*

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<sup>1</sup> On the Form GDOL-750, Application for Temporary Alien Labor Certification, submitted by the petitioner in support of the petition, the Guam Department of Labor assigned a North American Industry Classification System (NAICS) Code of 72, “Accommodation and Food Services.” U.S. Dep’t of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, “72 Accommodation and Food Services,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Jul. 29, 2013).

<sup>2</sup> The Form GDOL-750 was certified for the O\*NET Code 35-2014, and the associated Occupational Classification of “Specialty Cook.”

(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 accordance with the precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), the test for determining whether an alien is coming "temporarily" to the United States in order to "perform temporary services or labor" is whether the petitioner's need for the beneficiary's services is temporary. Accordingly, pursuant to *Matter of Artee* it is the nature of the petitioner's need rather than the nature of the duties that controls.

#### *Discussion*

The petitioner filed the instant petition on September 27, 2012 and stated on the Form I-129 that its need for the services of the beneficiaries is a temporary one, based upon one-time occurrence. In order to establish that the nature of its claimed temporary need is a one-time occurrence pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), the petitioner must demonstrate either: (1) 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 (2) 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. *Id.*

At the outset, the AAO finds that, aside from and in addition to the other material deficiencies in this petition which preclude its approval, the appeal must be dismissed and the petition denied on the independent basis that the petitioner has failed to establish when its professed need for H-2B temporary workers will end.

As a precondition for approval of any type of H-2B petition, the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) requires that petitioner "establish that the need for the employee will end in the near, definable future." The main paragraph of that regulation reads as follows:

*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.

This overarching requirement for an H-2B petitioner to establish that the need for the temporary employee(s) will end in the near definable future compels the petitioner here to establish at what definable point the asserted need for the temporary employees will end. The petitioner, however, has not met this burden. While recognizing that up to three years of need may be approvable under the one-time-occurrence H-2B category, the plain reading of the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) still requires the petitioner to establish the duration of the need, that is, at what definable point that need would end within the requested period of H-2B temporary employment.

In its undated "Statement of Temporary Need for Workers," the petitioner described itself and its claimed temporary need for the services of the beneficiaries as follows:

Our company is in the business of restaurant operations, food concession and services on Guam.

The nature of our temporary need is that of one-time need, with an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers. Our company recently underwent a \$190,000.00 renovation and expansion of our Filipino restaurant business . . . . Additionally, our concession stand at the [REDACTED] has also outperformed its expectation with the increasing number of tourists arriving in Guam rebounding dramatically from the Japan earthquake and tsunami and the increased [sic] of other Asian tourists. Therefore, a one-time need arises for Specialty Cooks who can make authentic Filipino food resulting from our expansion of business and the increase of tourists in Guam.

According to the petitioner, the eight beneficiaries of this petition have been in the United States in H-2B status as follows:

- [REDACTED] : since March 14, 2010;
- [REDACTED] since May 2, 2010;
- [REDACTED] since May 21, 2010;
- [REDACTED] since December 2, 2010;
- [REDACTED] since December 11, 2010;
- [REDACTED] since December 11, 2010;
- [REDACTED] since December 11, 2010; and
- [REDACTED] since December 22, 2010;

As evidence of its temporary need for the services for the beneficiaries, the petitioner submitted, *inter alia*, copies of its lease and concession agreements; photographs of the renovation of its business premises; a letter outlining the costs incurred during the renovation of its business premises; a financial projection worksheet prepared for 2012; floorplans; and copies of newspaper articles.

In her October 9, 2012 RFE the director notified the petitioner that the record of proceeding did not establish that its claimed need for the continued services of the beneficiaries satisfies the requirements set forth above. With regard to the specific issue of its claimed temporary need for the services for the beneficiaries as a result of a one-time occurrence, the petitioner resubmitted copies of these documents.

In her January 23, 2013 decision denying the petition, the director found that the petitioner had failed to satisfy either alternative criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) for establishing that the nature of its claimed temporary need is a one-time occurrence. After noting that two H-2B petitions filed by the petitioner for the positions held by the beneficiaries of this petition have already been granted, the director stated the following:

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 cooks to perform the duties described on [on the temporary labor certification], which is the nature of the petitioner's business, will always exist. The petitioner has not established that the cooks are only needed for a limited period of time or contract having a clear termination date.

On appeal, counsel submits a brief letter and copies of previously-submitted documents.

In his March 18, 2013 letter counsel first argues, with regard to the prior approvals granted to the beneficiaries, that up to three years of H-2B status may be granted in the case of a one-time event. Counsel then argues that the evidence of record establishes that the petitioner has expanded its business, and that the instant petition is necessary to satisfy a temporary, but significant, need for additional workers.

Upon review, the AAO agrees with the director's determination that the petitioner has failed to establish that the nature of its need for the services of the beneficiary is based upon a one-time occurrence under either of the two alternative criteria described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

Again, the petitioner's "Statement of Temporary Need for Workers (One Time Occurrence)" asserts the factual grounds for the petition as follows:

Our company is engaged in the business of restaurant operations, food concession and services on Guam.

The nature of our temporary need is that of a one-time need, with an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers. Our company recently underwent a

\$190,000 renovation and expansion of our Filipino restaurant business. Renovation and expansion photos are attached for your reference. Additionally, our concession stand at the [REDACTED] has also outperformed its expectation with the increasing number of tourists arriving in Guam rebounding dramatically from the Japan earthquake and tsunami and the increased (sic) of other Asian tourists. Therefore, a one-time need arises for Specialty Cooks who can make authentic Filipino food resulting from our expansion of business and the increase of tourists in Guam.

The first alternative criterion set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) for establishing that its need for the services of the beneficiaries is a temporary one based upon a one-time occurrence requires the petitioner to establish both: (1) that it has not employed workers to perform the services or labor in the past; and (2) that it will not need workers to perform the services or labor in the future.

The petitioner has satisfied neither of these prongs of the first alternative criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The petitioner has not established that it has not employed specialty cooks in the past; to the contrary, in addition to its concession that it has employed the beneficiaries in this capacity since 2010, the petitioner indicates that it employs other specialty cooks as well. Nor has the petitioner established that it will not need specialty cooks in the future. Again, the evidence of record suggests the opposite: if the petitioner will not need specialty cooks after September 30, 2013 (the final day of the beneficiaries' period of requested employment), it is unclear how it will remain in business past that date.

Accordingly, the petitioner has not satisfied the first alternative criterion set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

The second alternative criterion set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) for establishing that its need for the services of the beneficiaries is a temporary one based upon a one-time occurrence requires the petitioner to establish 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.

In this case, the petitioner has not identified a "temporary event of short duration [that] has created the need for a temporary worker." Based upon the totality of the evidence in this record of proceeding, it appears that both the petitioner's physical expansion of its restaurant premises (and the associated increase in its operations there) and also the asserted increase in its airport business can be attributed to the asserted increase in its customer base. However, the AAO finds no persuasive evidence that that increase qualifies as a "temporary event of short duration" within the meaning of that phrase at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). In this regard, the AAO notes that, while the petitioner references its restaurant renovation, expansion of its business premises, and increase in airport business throughout the petition, the petitioner fails to explain or establish that those asserted reasons for its need are not actually attributable to the increase of tourists which the petitioner references but to which it ascribes no definable end so as to qualify as "a temporary event of short duration."

Accordingly, the petitioner has not satisfied the second alternative criterion set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

Further, as already discussed, the petitioner has not, in the words of 8 C.F.R. § 214.2(h)(6)(ii)(B), established “that the need for the employee[s] will end in the near, definable future.”<sup>3</sup>

Finally, counsel is correct that 8 C.F.R. § 214.2(h)(6)(ii)(B) permits USCIS to grant H-2B approval for a period of up to three years “in the case of a one-time event.” However, the fact that the regulation *permits* USCIS to grant H-2B approval for a period of up to three years does not mean that three years are to be granted as a matter of right, particularly in light of the fact that the plain language of 8 C.F.R. § 214.2(h)(6)(ii)(B) specifically states: (1) that “[g]enerally, that period of time will be limited to one year or less; and (2) that in the case of a one-time event the period of time “could [(as opposed to “shall”)] last up to 3 years.”

For all of these reasons, the petitioner has failed to establish either: (1) that it has not previously employed workers to perform the duties proposed for the beneficiary in the past and that it will not need workers to perform them in the future; or (2) that it has an employment situation that is otherwise permanent, but that a temporary event of short duration has created the need for a temporary worker. *See* 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). Further, the petitioner has failed to establish that “the need for the employee[s] will end in the near, definable future,” as required by the main paragraph at 8 C.F.R. § 214.2(h)(6)(ii)(B). Consequently, the petitioner has failed to demonstrate that its need for the services of the beneficiaries is a temporary one, based upon a one-time occurrence, in accordance with the pertinent provisions at 8 C.F.R. § 214.2(h)(6)(ii)(B).

Because, as discussed above, the petitioner has failed to satisfy the requirements for establishing an H-2B one-time-occurrence temporary need in accordance with the provisions at 8 C.F.R. § 214.2(h)(6)(ii)(B), the appeal will be dismissed and the petition will be denied.

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition is denied.

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<sup>3</sup> As noted above, the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) states the following:

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.