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U.S. Department of Homeland Security

U.S. Citizenship and Immigration Service

Administrative Appeals Office (AAO)

20 Massachusetts Ave., N.W., MS 2090

Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: DEC 13 2013

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

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,

*for Michael T. Kelly*  
Ron Rosenberg  
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 spa, massage, and body care services company with “10+” employees established in 2003. In order to employ the beneficiaries in what it designates as “massage and body care therapist/masseuse” positions<sup>1</sup> from May 1, 2013 until April 30, 2014, 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.

## I. Law and Interpretation

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)—*

(i) *Petition.*

(A) *H-2B nonagricultural temporary worker.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United

<sup>1</sup> The Form GDOL 750, Application for Temporary Alien Labor Certification, submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 31-9011, and the associated Occupational Classification of “Massage Therapists.”

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 *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm'r 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.

## II. Pertinent Facts and Procedural History

The petitioner filed the instant petition on April 25, 2013. In its undated statement of need, the petitioner described itself and its need for the services of the beneficiaries as follows:

[REDACTED] is an incorporated company on [REDACTED] [REDACTED] currently operates resort spas in [REDACTED] Indonesia. [REDACTED] has a lease agreement and contract with the [REDACTED] to operate a resort spa in Guam at the resort . . . The types of services offered in [REDACTED] are unique and specialized massage and body care services using techniques and materials from the island of [REDACTED]. The company continues to experience a demand for our services. The continued temporary employment of the beneficiaries would enable the company to hire and train local U.S. workers in our unique and specialized services and to meet the continuing demand of our services. There is [sic] insufficient local workers available in this field.

The petitioner proposed the following duties for the beneficiaries at section 13 of the Form GDOL-750:

Massages customers and administers other body conditioning treatments for hygienic or remedial purposes. Provides employer's massage specialty services to include Swedish, Traditional Balinese, Shiatsu and reflexology techniques, in full body, head and foot massage regimens, traditional body scrub services, using required materials. Provides customers with various herbal and other bath services using herbal, milk and flower ingredients. Provides customers with aromatherapy treatments including vaporization, inhalant and direct application techniques, [and] prepares blends of aromatherapy oils. Trains workers. Greets customers in a hospitable manner and provides detailed explanation of various techniques and treatments used in treatments. Prepares bills [and] invoices for treatments and records same. Performs

preparation of work areas including disinfecting, sterilization, linen placement and removal, and other light cleaning associated with provision of treatment.

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

- [REDACTED] since July 17, 2012;
- [REDACTED] since July 24, 2012;
- [REDACTED] since July 24, 2012;
- [REDACTED] since July 24, 2012; and
- [REDACTED] since November 17, 2012.

The director issued an RFE on May 8, 2013, and requested additional evidence to establish that the nature of the petitioner's claimed temporary need is a one-time occurrence, and the petitioner submitted a timely response. In its July 12, 2013 letter, the petitioner argued as follows:

Compounding our problem in identifying and hiring workers is that [REDACTED] is currently experiencing an increase in tourism arrivals. Our business clientele is made up of 90%+ tourists and therefore our one time need is due to an increase in business.

Our company has recently entered into agreements with agents representing Russian and Korean tourists that are coming to [REDACTED]. These tourists are in addition to the existing tourists that we serve that originate in Japan. The Russian tourist arrivals have increased 208% (Year to Date) from April 2012 to April 2013. The Korean tourist arrivals have increased 40% for the same period of time. . . .

Our company has also been short listed by the [REDACTED] chain to expand our operations as the [REDACTED]. This will in effect double our need for workers as the expansion will be 100% above our current operation.

As evidence to support these claims, the petitioner submitted the following: (1) a June 19, 2013 letter from the [REDACTED] stating that the petitioner had tendered an offer to operate the unused spa facilities located on its facility; (2) a June 19, 2013 letter from [REDACTED] a tour operator, stating that it has entered into an agreement with the petitioner so that

[REDACTED] may offer the petitioner's services to its clients; (3); an agreement between the petitioner and [REDACTED] a tour operator, signed on July 11, 2013, which calls for [REDACTED] to offer the petitioner's services to its clients; and (4) a July 11, 2013 e-mail from the [REDACTED] regarding tourist arrivals to [REDACTED]

In her July 26, 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 a prior H-2B petition filed by the petitioner for the positions held by the beneficiaries of this petition had 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 spa masseuse[s] 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. The petitioner has not established that its need for the beneficiaries' services is one-time.

On appeal, counsel submits a brief argument made on Form I-290B, Notice of Appeal.

### III. Discussion

In order to establish that the nature of its need is a temporary one based upon a one-time occurrence pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), the petitioner must establish 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 that a temporary event of short duration has created the need for a temporary worker.

Upon review, it is found that the record of proceeding does not establish that the petitioner has a temporary need for the services of the beneficiaries 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).

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<sup>2</sup> This e-mail compared, *inter alia*, tourist arrivals to [REDACTED] in June 2013 to arrivals in June 2012, and provided the following information:

- That, overall, tourist arrivals had increased by 4.4%;
- That arrivals from Japan decreased by 3%;
- That arrivals from Korea increased by 34.8%;
- That arrivals from the People's Republic of China increased by 70%; and
- That arrivals from Russia increased by 22.9%.

**A. Preliminary Findings**

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 petition must be denied on the independent basis of the failure of the evidence of record to demonstrate when the petitioner's professed need for the temporary services of the beneficiaries 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." In pertinent part, that regulation states the following:

*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 employees will end in the near definable future compels the petitioner here to establish a definable point at which its asserted need for the temporary H-2B employees will end. The evidence of record, however, does not meet this burden. Although the AAO recognizes 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) nonetheless requires the petitioner to establish the duration of that need, that is, to demonstrate the definable point at which its stated need would end.

For this reason alone, the petition may not be approved. Having made this initial finding, the AAO turns next to the two alternative criteria of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) for establishing that the nature of the petitioner's claimed temporary need for the services of the beneficiaries is a one-time occurrence.

**B. The First Alternative Criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1)**

The first alternative criterion described 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 prong. The petitioner has not established that it has not employed massage and body care therapists/masseuses in the past; to the contrary, in addition to its concession that it has employed the beneficiaries in this capacity since 2012, the petitioner indicates that it employs other massage and body care therapists/masseuses as well. Nor has the petitioner established that it will not need massage and body care therapists/masseuses in the future. Again, the evidence of record suggests the opposite: if the petitioner will not need massage and body care

therapists/masseuses after April 30, 2014 (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)(I).

**C. The Second Alternative Criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(I)**

The second alternative criterion set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(I) 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.

The evidence submitted by the petitioner in response to the director's RFE is acknowledged. Even if the AAO were to consider this evidence sufficient to support the petitioner's assertions regarding the coming increase to its customer base, the AAO would nonetheless find that the evidence of record does not establish that this 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)(I). In this regard, the AAO notes that the petitioner ascribes no definable end to the asserted coming increase in its business such that its stated need would 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)(I).

**IV. Conclusion**

As the petitioner has failed to satisfy either of the two alternative criteria described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(I), it has failed to establish that its need for the services of the beneficiaries is a temporary one, based upon a one-time occurrence, as required by section 101(a)(15)(H)(ii)(b) of the Act and 8 C.F.R. § 214.2(h)(6)(i)(A).

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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.