U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF L-M- CORP.

DATE: MAR. 27, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a ski and summer resort, seeks to employ the Beneficiaries as "temporary resort workers II" under the H-2B nonimmigrant classification for temporary nonagricultural services or labor. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The H-2B program allows a qualified U.S. employer to bring certain foreign nationals to the United States to fill temporary nonagricultural jobs. The Petitioner's service or labor need must be a one-time occurrence, seasonal, peak load, or intermittent.

The Director of the California Service Center denied the petition, concluding that the Petitioner established neither a seasonal nor a peakload need for the Beneficiaries' services.[1]

The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence and contends that the petition should be approved. Upon *de novo* review, we will dismiss the appeal.

## I. LAW

Section 101(a)(15)(H)(ii)(b) of the Act, defines an H-2B temporary worker, in pertinent part, as:

> [A]n 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)(i)(A) largely restates this statutory definition, but adds that employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The scope of employment within the H-2B category is addressed at 8 C.F.R. § 214.2(h)(6)(ii):

[1] The Petitioner selected "Seasonal" and "Recurrent annually," respectively, at Sections 2.1 and 2.2 of the H Classification Supplement of the Form I-129, Petition for a Nonimmigrant Worker.

(*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.

. . . .

(*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.

. . . .

## II. TEMPORARY NEED CLAIM

The Petitioner describes itself on appeal as follows:

> During the winter months, [the Petitioner] is a destination ski area where visitors come from all over the country to enjoy some of the best skiing in the Midwest on

> four interconnected mountains [redacted] During the summer months, it is a destination recreational area for summer tourists. In the summer, guests can ride the chairlift up the mountain and go down the alpine slide. The gondola that connects two peaks is open year-round where guests can take in the beautiful views [redacted] Guests enjoy a variety of services with its resort offerings, food services, and accommodations. Its winter business is primarily downhill skiing, cross-country skiing, and snowmobiling.

The Petitioner submitted a temporary labor certification (TLC) valid from October 1, 2017 until April 15, 2018. The TLC was certified for 12 beneficiaries[2] to work as "temporary resort workers II," which the Petitioner classified as "Maids and Housekeeping Cleaners" corresponding to the Standard Occupational Classification (SOC) code 37-2012. The Petitioner described the Beneficiaries' duties as follows:

> Assist with lift operations, including ensuring safe loading and unloading of guests on surface lifts and gondolas, run/stop/start lift, inspect and test lifts before opening, assist with shoveling and raking snow and ice on a regular basis to maintain loading ramps, complete daily logs, incident reports, and opening and closing procedures on appropriate reports; assist in cleaning rooms as directed to maximize guest satisfaction in accordance with Management Standards; respond to customer requests; clean and maintain public areas including front desk and hallways including deep cleanings, vacuuming dusting, mopping and washing windows; bag, tag and turn in any lost and found items; assist with front desk duties; assist with cashier duties; and assist in cleaning and organizing eating, service, and kitchen areas.

## III. ANALYSIS

Upon review, we conclude that the Petitioner did not consistently describe the nature of its need, which precludes the determination of whether the claimed need qualifies as an H-2B temporary need.

In a statement filed with the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner indicated that in prior years, it had requested housekeepers, lift operators, and resort workers separately for H-2B visas for different periods. However, the Petitioner asserted that it restructured its staffing model for this fiscal year upon review of its business needs. Specifically, the Petitioner stated that it decided to "combine the duties of the "Lift Operators and Housekeepers into one position," termed "temporary resort workers II," to perform "combined job duties including housekeeping and lift operations." The Petitioner indicated that these workers will "perform expanded job duties, including: housekeeping, front desk and cashier assistance, and lift operations."

[2] The Petitioner filed this H-2B petition on behalf of six unnamed beneficiaries. It filed a companion H-2B petition on behalf of six named beneficiaries.

Notably, the duties that relate to lift operation or front desk assistance are encompassed within different occupational categories: (1) "Amusement and Recreation Attendants" SOC code 39-3091 (which includes "ski lift operators"); and (2) "Hotel, Motel, and Resort Desk Clerks" SOC code 43-4081. The Petitioner initially did not state that the Beneficiaries would spend more time performing the duties of one occupational category or another when it filed the TLC and the H-2B petition.

However, in response to the Director's request for additional evidence (RFE), the Petitioner began downplaying the position's lift operation and front desk assistance duties. For example, the Petitioner emphasized that the Beneficiaries "are meant primarily to work as full-time housekeepers, with the option to provide limited assistance to the other areas of the resort when increased demand necessitates." In another letter, the Petitioner stated that the Beneficiaries "will primarily work as Housekeepers, but from time to time, they may be requested to work perform other tasks, including front desk, cashier, or lift operations." On appeal, the Petitioner states that the Beneficiaries will work primarily as housekeepers and will only assist the lift operators if necessary. The Petitioner also indicates that it requires the services of the Beneficiaries "to supplement [its] four year-round Housekeepers."

We conclude that the Petitioner did not consistently describe the nature of its need over the course of the petition's pendency. The temporary need, as described when the H-2B petition was initially filed and as described to the Department of Labor (DOL) in the TLC, encompassed housekeeping, front desk, and ski lift operator duties, and the Petitioner did not emphasize one occupational category as more significant than the other. However, in response to the Director's RFE and on appeal, the Petitioner indicated that the ski lift operator duties will be at most incidental and did not mention front desk duties.

This evolution in the Petitioner's description of the position extends beyond mere clarification. To the contrary, we conclude that it constitutes a material alteration of the nature of its need. Knowing whether the Petitioner's need is primarily housekeeping with incidental lift operation duties, or whether the need is a combination of housekeeping, lift operation, and front desk assistance is necessary in order to determine whether the Petitioner's need for the Beneficiaries' services qualifies as a seasonal or peakload one. Specifically, because the Petitioner indicated that it employs permanent housekeepers, its need would not qualify as a seasonal one if its need for the Beneficiaries' services is primarily housekeeping. Similarly, if the Petitioner's need is for a combination of housekeeping, lift operation, and front desk assistance duties, the need might not qualify as either seasonal or peakload.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Further, the Petitioner did not fully comply with 8 C.F.R. § 214.2(h)(6)(iii)(A), which requires the filing of a TLC as advice to the Director as to whether U.S. workers capable of performing the

temporary services or labor are available, and whether the H-2B workers' employment would adversely affect the wages and working conditions of similarly-employed U.S. workers. By not consistently describing its need, the Petitioner has not established its attestation to all the applicable terms, assurances, and obligations under receiving a TLC.

## IV. CONCLUSION

The Petitioner has not established the nature of its need, which precludes the determination of whether the Beneficiaries' services qualify as seasonal or peakload need.

**ORDER:** The appeal is dismissed.

Cite as *Matter of L-M- Corp.*, ID# 1204891 (AAO Mar. 27, 2018)