



U.S. Citizenship
and Immigration
Services

D-2



FILE: LIN 04 095 52303 Office: NEBRASKA SERVICE CENTER Date: JUL 8 2004

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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PATRIOT ACT

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner operates a residential and resort facility. It desires to employ the beneficiaries as groundskeepers for seven months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the countervailing evidence provided had not overcome the concerns addressed in the Department of Labor's decision and denied the petition.

On appeal, counsel states that director's decision is contrary to law and the evidence herein. Additional evidence has been submitted with the appeal.

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 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. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. 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 petition indicates that the employment is seasonal and that the temporary need recurs annually.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

1. Maintains grounds and turf of golf course.
2. Trims, rakes and mows fairways, rough, greens, aprons, tees, around tees, fence lines, banks and hill sides.
3. Edges cart path.
4. Rakes and maintains sand bunkers.

5. Removes debris and cleans flower beds.
6. Maintains fuel and fluid levels for all types of equipment.

The petition also lists "Other Special Requirements" as:

1. Must be able to communicate in English.
2. Valid driver's license.
3. Working knowledge of and ability to utilize hand and power tools and equipment.
4. Ability to operate trucks, tractors and light motorized equipment.
5. Must be able to lift 50 lbs. and bend repeatedly.

In its final determination notice, the DOL states that a certification could not be issued because the employer is requiring the applicants to have valid driver's licenses. The DOL's decision also states that this requirement is not normal to the occupation of groundskeeper, and therefore, the requirement of a valid driver's license is unduly restrictive.

In its rebuttal letter, dated February 17, 2004, the petitioner explains that its property covers approximately 600 acres and has two separate maintenance facilities that are two miles apart. The petitioner states that in order to get around the property, its employees are required to drive on town and country roads, and a driver's license is required to drive on these roads.

The petitioner has provided sufficient countervailing evidence to overcome the concerns addressed in the DOL's decision. The terms and conditions of employment set forth by the petitioner are found to be appropriate for the temporary position offered. Further, the petitioner has shown that the need for groundskeepers is seasonal and temporary.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.