

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



*M*

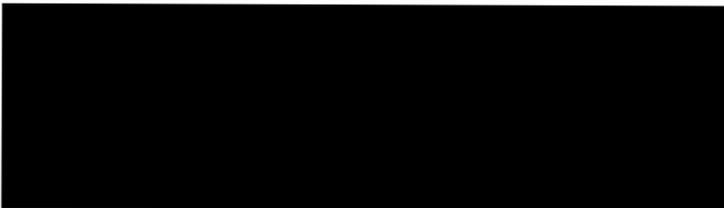
FILE: LIN 06 099 51656 Office: NEBRASKA SERVICE CENTER Date: **OCT 20 2006**

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:

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**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 engages in the business of landscaping and snow removal. It desires to extend its authorization to employ the beneficiaries as landscapers pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for seven months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could be made. The director disagreed with the DOL and determined that the petitioner had not established that the need for the beneficiaries' services is temporary.

On appeal, counsel states that the nature of the previous visas issued to the beneficiaries, and the present application are different. Counsel explains that the previous visas were for snow removers and this petition is for landscapers.

Upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to deny the petition. As discussed below, the AAO agrees with the finding of the DOL and will withdraw the decision of the director and sustain this 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 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) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing 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.* 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:

(2) *Seasonal need.* The petitioner must establish that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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 are 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 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.

The petitioner seeks approval of the proffered position as a seasonal need.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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 are 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 petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Mowing, trimming, planting, watering, fertilizing, digging and raking.

The petition was filed on February 16, 2006 to classify the beneficiaries as H-2B nonimmigrant landscapers. The same beneficiaries are currently present in the United States under H-2B classification as snow removers for the petitioner. Counsel explains that the petitioner has more than 100 accounts which entail the removal of snow in the winter and landscaping in the summer. The director states that the additional time period in the instant petition would overlap the period allotted in the petitioner's previously approved petition and extends the beneficiaries' employment to over one year. Therefore, the director concluded that the petitioner's need for the beneficiaries' services is not temporary but instead an ongoing and structural part of the petitioner's business operation.

The fact that the beneficiaries named in this petition were working for the petitioner under H-2B classification as snow removers does not negate the petitioner's current need for the beneficiaries' temporary services as landscapers. The petitioner has demonstrated that his current need is a substantially different need from the one the beneficiaries previously held. His current need arises from his need for landscapers for the summer season. The petitioner has been shown to have two distinct needs for the beneficiaries' services that should not be considered as a continuation of the previous duties or positions held. The petitioner has submitted sufficient countervailing evidence to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed and that the need for landscapers is a seasonal need and temporary.

LIN 06 099 51656

Page 4

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.