

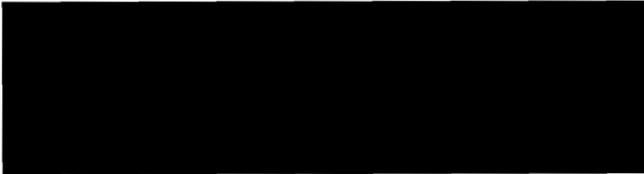
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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 08 196 50438 Office: VERMONT SERVICE CENTER Date: **SEP 16 2008**

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:

SELF-REPRESENTED

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*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was recommended to be approved by the Acting Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The decision of the acting director will be affirmed and the petition will be approved.

The petitioner operates a full service tree company located in Westbury, New York. It desires to employ the beneficiaries as tree surgeon helpers II 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), from October 1, 2008 to April 15, 2009. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner had previously applied for and received certification for six (6) landscaping and groundskeeping workers from March 1, 2008 through December 20, 2008. According to the DOL, the dates of need on the current and previous certification applications filed by the petitioner indicate that temporary workers have been needed continuously for the occupation landscaping and groundskeeping workers since March of 2008. The dates of intended employment on the current Application for Alien Employment Certification (Form ETA 750) are listed as September 15, 2008 through April 15, 2009. The DOL concluded that the petitioner's dates of need suggest a year-round, permanent need since the dates of these two applications overlap. The petitioner then filed the current petition containing countervailing evidence to overcome the DOL's decision.

The acting director determined that sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the employment policies of the DOL have been observed and that the need for the services to be performed is temporary. The acting director's decision recommending the approval of the petition is now before the AAO for review.

Upon review of the evidence contained in the record, the AAO finds that the temporary labor certifications were filed for two separate and distinct needs. The petitioner explains that the previous certification was issued for landscape laborers who were needed to perform such duties as lawn maintenance, weeding, shrub trimmings and cleanups. The current certification shows that the petitioner applied for tree surgeon helpers who are needed to hand or hoist tools to the tree surgeon, lower pruned limbs and trunks and load debris on the truck. The evidence contained in the record of proceeding substantiates the petitioner's specific period of seasonal need. Accordingly, the beneficiaries' services should not be considered as a continuation of the previous duties or positions held.

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 has established that the need for the beneficiaries' services is seasonal and temporary. The Vermont Service Center will issue the appropriate approval notice.

**ORDER:** The decision of the acting director is affirmed. The nonimmigrant visa petition is approved.