



U.S. Citizenship
and Immigration
Services

PHOTOCOPY

Identify the...
prevent the...
invasion of...
D3

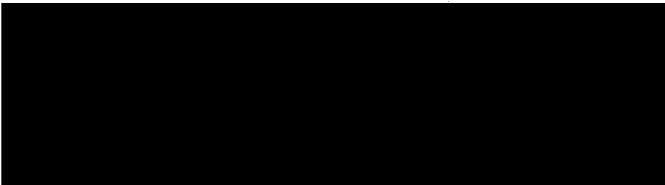


FILE: EAC 05 048 50927 Office: VERMONT SERVICE CENTER Date: APR 20 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont 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 is the owner of the residential property in this petition. He desires to employ the beneficiary as his head groundskeeper for nine 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 petitioner had not provided any evidence that would overcome the concerns addressed in the Department of Labor's decision and denied the petition.

On appeal, counsel states that the director erroneously cited the statutory provision governing H-1B petitions. Counsel also states that compelling countervailing evidence was presented to establish the emergent need for the requested time period and to address the sole reason for the denial of the certification by DOL.

In its decision, the director inadvertently cited the H-1B regulations. The petition indicates that the requested nonimmigrant classification is H-2B. This case will be reviewed to determine eligibility under the H-2B classification.

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:

Maintain extensive flower gardens, trees, hedges and attend to horticultural needs of large estate.

In its final determination notice, the DOL states that a certification could not be issued because the employer traditionally received H-2B certifications for the position of gardener from April thru the end of October. The DOL states that the employer expanded the period of employment without justification.

In his rebuttal letter, the petitioner states that he has one head groundskeeper who is responsible for the landscape and maintenance of the grounds at his residence. He explains that Cummin Associates, Inc designed his elaborate gardens. He states that the time period is needed to enable the preparation of the gardens, extensive planting of new beds and pruning of hydrangeas and other deferred garden projects.

The petitioner's statement is substantiated by a letter from the petitioner's landscape architect. In the letter, he explains that he was responsible for the design of the gardens that will be in full bloom from June through October. The gardens are highly complex and consist of diverse species such as flowering shrubs and perennials together with a wide variety of annuals and container plantings. The petitioner's landscape architect explains that there will be additional beds and other additional items this year, so preparatory work will need to begin in February.

The petitioner has provided an adequate explanation to overcome the concerns addressed in the DOL's decision. The Notice of Action Forms I-797B for the petitioner's prior H-2B approvals demonstrates that there has been a range of different periods of employment where the beneficiary has worked for the petitioner. Moreover, sufficient countervailing evidence has been submitted 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 a head groundskeeper 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.