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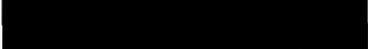
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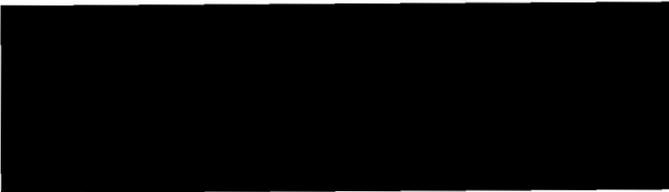
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FILE: LIN 06 045 51379 Office: NEBRASKA SERVICE CENTER Date: **AUG 30 2006**

IN RE: Petitioner:   
Beneficiaries: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(a) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a)

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. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner is a hog and corn farm. It seeks to employ the beneficiary as a livestock farmworker for nine and one half months pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(a). The Department of Labor (DOL) issued a temporary labor certification for the requested time period. The director did not agree with the DOL, ruling that the beneficiary had already been working for the petitioner in H-2A status, that the record did not establish the seasonal or temporary nature of the requested employment, and that the requested extension of stay would extend the beneficiary's period in H-2A status to over 17 months, straining the definition of seasonal or temporary employment in 8 C.F.R. § 214.2(h)(5)(iv)(A).

On appeal the petitioner asserts that the nature of the farmwork to be performed in the requested extension period is different from that performed in the initial period of H-2A classification, which makes the beneficiary eligible for an extension under 8 C.F.R. § 214.2(h)(5)(viii)(C).

Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(a), defines an H-2A 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 agricultural labor or services . . . of a temporary or seasonal nature . . . .

The regulation at 8 C.F.R. § 214.2(h)(5)(iv)(A) defines the eligibility requirements of temporary and seasonal employment as follows:

An H-2A petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

The regulation at 8 C.F.R. § 214.2(h)(5)(viii)(C) specifies the limits on an individual's stay in the United States in H-2A status:

An alien's stay as an H-2A is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H-2A status for a total of three years may not again be granted H-2A status, or other nonimmigrant status based on agricultural activities, until such time as he or she remains outside the United States for an uninterrupted period of six months . . . .

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states that 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 record indicates that the petitioner filed its initial application for alien employment certification in January 2005, seeking to employ the beneficiary and several other South African nationals in jobs entitled "farmworker/grain" for a ten-month period from February 19 to December 13, 2005. The application described the job as a "[c]ombination of duties, preparation of fields for planting. Haul manure to spread on corn fields. Plant, cultivate and harvest grain crops such as corn. Haul corn to mill." In an addendum to the application the petitioner explained the nature of its need for temporary agricultural labor in greater detail:

We have a 2,000 acre corn farm, with a 50,000 hog operation. We purchased a different farm and need extra help with the fieldwork, which involves our corn planting, corn cultivation and harvesting of our corn crop. With the wet fall we had, it means we have lots of manure that ha[s] to be spread on the corn field before planting. With the larger corn crop we have lots of extra corn we need to mill and bag. We need extra seasonal help from [the] beginning [of] February, 2005 to December, 2005 to help us through this busy time.

The DOL certified the application on January 20, 2005. The petitioner thereafter filed H-2A petitions on behalf of five South African nationals, including one on behalf of the beneficiary on April 20, 2005, which was approved by the service center on April 26, 2005 with a validity period of April 25 to December 13, 2005 (LIN 05 151 53202). The record shows that the beneficiary arrived in the United States on May 25, 2005, shortly after the issuance of his H-2A visa.

The petitioner filed a new application for alien employment certification on November 7, 2005, seeking to employ eight workers in jobs entitled "farmworker/livestock" for a nine and one-half month period from December 22, 2005 to October 9, 2005. The application, which described the job as "a combination of duties: Receiving new breeding stock, do vaccinations, detecting estrus cycles, record keeping, artificial insemination; feeding and cleaning," was certified by the DOL on November 22, 2005. The petitioner then filed an H-2A petition on behalf of six unnamed South Africans and individual H-2A petitions for the beneficiary and another South African farmworker, both of whom were already in the United States in H-2A status. The service center approved the petition for the six unnamed South Africans and the other South African who was already in the United States for the requested employment periods of December 22, 2005 to October 9, 2005. With respect to the beneficiary, however, the service center issued a request for evidence (RFE) in the current petition requesting the submission of additional evidence of the petitioner's seasonal or temporary need for agricultural labor. In response to the RFE the petitioner's agent submitted copies of two documents which were apparently submitted to DOL in support of the alien employment certification application. One was a statement from the farm owner, explaining his need for temporary labor:

J-Six is a farrow to finish, family-based, swine facility in North Central Kansas, U.S.A.

We are expanding our sow herd. We currently have 2,700 sows and are expecting to be at 3,500 sows by next year. We are in need of employees to help us with the receiving and shipping of new breeding stock, weekly vaccinations, detecting estrus cycles in mature gilts, record keeping, artificial insemination, feeding and cleaning.

This is a one-time occurrence that will take approximately 10 months starting in December 2005.

There is a new highly engineered pork processing plant going up about 60 miles from us and it has made it very hard to find good, mature, motivated people in the agriculture field for seasonal employment within our company.

The other document was a letter dated November 3, 2005 from a doctor of veterinary medicine, [REDACTED] who works at Abilene Animal Hospital, P.A.. and serves as the petitioner's veterinary consultant. [REDACTED] wrote that "J-Six Farms is beginning an expanded breeding project, which will be a 10-month, seasonal project. Skilled help is sought for this project."

The director found the documentation submitted in response to the RFE insufficient to establish that the petitioner's need for agricultural labor in connection with the expansion of its hog stock was seasonal or temporary in nature. The director noted the inconsistent descriptions by the petitioner and [REDACTED] of the nature of the petitioner's labor need – designating it as seasonal in some documents and as temporary in others. The director also noted the petitioner's identification of the basis for H-2A classification in the instant petition as the "continuation of previously approved employment without change," and concluded that this would extend the beneficiary's period of H-2A employment to over 17 months, undermining the petitioner's claim that the employment was either "seasonal" or "temporary" as defined in 8 C.F.R. § 214.2(h)(5)(iv)(A).

On appeal counsel asserts that the director erred in denying the extension petition because the nature of the employment sought in the instant petition is different from the employment performed pursuant to the initial petition. The job performed by the beneficiary under the initial petition was called "farmworker/grain" and focused on the planting, cultivation, and harvesting of corn on a new tract of land. The job at issue in the extension petition is called "farmworker/livestock" and focuses on different tasks associated with increasing the farm's sow herd by 800, including receiving new breeding stock and performing tests and procedures on the livestock. Counsel points out that the service center approved the petitioner's other two H-2A petitions for "farmworker/livestock" labor, including an extension petition on behalf of another South African who, like the beneficiary, had already worked for the petitioner in a "farmworker/grain" position.

Based on the evidence of record, the AAO determines that the petitioner has established its need for additional agricultural workers from December 2005 to October 2006 to facilitate the farm's increase of its sow herd by 800, that the labor is temporary in nature as defined in 8 C.F.R. § 214.2(h)(5)(iv)(A), and that this employment is different from that performed by the beneficiary under the initial H-2A petition.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden. Accordingly, the AAO will sustain the appeal and approve the petition.

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