

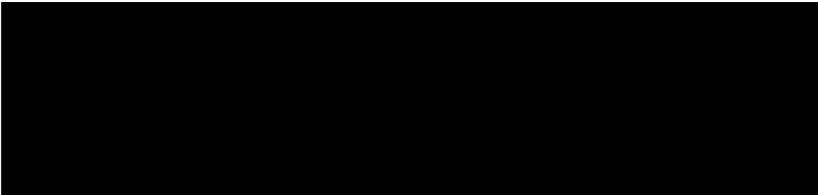
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FILE: SRC 06 036 51389 Office: TEXAS SERVICE CENTER Date: **MAY 23 2006**

IN RE: Petitioner: [Redacted]  
Beneficiaries: [Redacted]

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

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

In order to employ the beneficiary as a farm machine operator/driver, the petitioner, a labor contractor, seeks classification of the beneficiary as an H-2A temporary agricultural worker in accordance with section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

According to the petitioner, it filed the petition as a labor contractor in order to provide laborers to a client, identified as a custom agricultural firm, for temporary and seasonal agricultural work to be conducted in Gilchrist County, Florida. The following information is related by the Petition for Non-Immigrant Worker (Form I-129) and the related application for temporary labor certification (ETA Form 750). The petitioner seeks the beneficiary's services for the period November 16, 2005 through March 2, 2006. The proffered position is farm machine operator in the town of Bell, in Gilchrist County, Florida. At part 3 of Section 2 of Supplement H to the Form I-129 the petitioner provided this explanation of the need for the beneficiary's services:

Alien laborers are needed to supplement domestic labor for harvesting corn silage, peanuts, beans, rye, and sorghum in Bell, Fl. Work is only available seasonally because of the nature of the intended job in the intended area of employment.

At section 13 of the ETA Form 750, the petitioner described the job to be performed as follows:

Workers will harvest corn silage, peanuts, beans, rye, and sorghum silage in crews under the direction of a field supervisor using harvesting machines. Workers may haul storm debris.

The application for temporary labor certification (ETA Form 750) related to the instant petition was approved on October 17, 2005 by the U.S. Department of Labor (DOL) for the beneficiary to work as a farm machine operator for the period November 16, 2005 through March 2, 2006 in Gilchrist County, Florida.

In line with the approved temporary labor certification, the petitioner's November 14, 2005 letter of support filed with the Form I-129 includes this statement:

The period of employment is from 11/16/2005 – 03/02/2006. This seasonal period of employment is dictated by the nature of the job to be performed as a Farm Machine Operator in Bell, [Gilchrist County,] Florida. [The petitioner] does not anticipate having other employment opportunities for this worker during the remainder of the year; therefore, the employer's need for the workers is temporary and seasonal.

The support letter states that, in past years, the client has needed farm machinery operators "from approximately early May through mid-November," but that the petition in question reflects an expansion of the client's operations to include peanut harvesting "that extended the period of employment to early March."

The director found two independent grounds for the denial: (1) failure to establish the H-2A nature of the job; and (2) failure to establish that the job actually exists. The final paragraph of the director's decision director states:

The petitioner has not established [that] the employment is temporary or seasonal in that it is tied to a certain time of year by an event or pattern. Also, the petitioner has not established the need for a farm machine operator during the requested approval period. The burden of proof in these proceedings rests solely with the petitioner. See § 291 of [the Act] (8 U.S.C. 1361). In this case, the petitioner has not sustained that burden. The petition cannot be approved, and is hereby denied.

On appeal, the petitioner contends that the director's decision is not supported by the record of proceeding. The petitioner's submissions on appeal include: (1) a May 5, 2006 letter from its president/CSO; (2) a February 10, 2006 e-mail, "Subject: Re: Questions on [the beneficiary]," apparently from the petitioner's client; and (3) copies of the materials that the petitioner submitted in response to the director's Notice of Intent to Deny (NOID).

Upon review of the entire record, the AAO finds that the director was correct to deny the petition on the ground that the evidence of record does not substantiate that the beneficiary will be employed as stated in the petition and the related ETA Form 750. Therefore, the appeal will be dismissed, and the petition will be denied.

The statutory and regulatory provisions most relevant to the adjudication of this appeal are listed below.

Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(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, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26 and agriculture as defined in section 203(f) of Title 29 of a temporary or seasonal nature[.]

The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(C) states:

An H-2A classification applies to an alien who is coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature.

The regulation at 8 C.F.R. § 214.2(h)(5)(i)(A) states:

*General.* An H-2A petition must be filed on Form I-129. The petition must be filed with a single valid temporary agricultural labor certification. However, if a certification is denied, domestic labor subsequently fails to appear at the worksite, and the Department of Labor denies an appeal under section 216(e)(2) of the Act, the written denial of appeal shall be considered a certification for this purpose if filed with evidence which establishes that qualified domestic

labor is unavailable. An H-2A petition may be filed by either the employer listed on the certification, the employer's agent or the association of United States agricultural producers named as a joint employer on the certification.

The regulation at 8 C.F.R. § 214.2(h)(5)(i)(D) states:

*Evidence.* An H-2A petitioner must show that the proposed employment qualifies as a basis for H-2A status, and that any named beneficiary qualifies for that employment. A petition will be automatically denied if filed without the certification evidence required in paragraph (h)(5)(i)(A) of this section and, for each named beneficiary, the initial evidence required in paragraph (h)(5)(v) of this section.

The regulation at 8 C.F.R. § 214.2(h)(5)(iii)(A) states:

*Eligibility requirements.* An H-2A petitioner must establish that each beneficiary will be employed in accordance with the terms and conditions of the certification, which includes that the principal duties to be performed are those on the certification, with other duties minor and incidental.

With respect to the effect of the labor certification process, 8 C.F.R. § 214.2(h)(5)(ii) states:

The temporary agricultural labor certification process determines whether employment is as an agricultural worker, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements. In petition proceedings a petitioner must establish that the employment and beneficiary meet the requirements of paragraph (h)(5) of this section. In a petition filed with a certification denial, the petitioner must also overcome the Department of Labor's findings regarding the availability of qualified domestic labor.

Regarding the temporary and seasonal characteristics of H-2A employment, 8 C.F.R. § 214.2(h)(5)(iv) provides:

(A) *Eligibility requirements.* 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.

(B) *Effect of Department of Labor findings.* In temporary agricultural labor certification proceedings the Department of Labor separately tests whether employment qualifies as temporary or seasonal. Its finding that employment qualifies is normally sufficient for the purpose of an H-2A petition. However, notwithstanding that finding, employment will be found not to be temporary or seasonal where an application for permanent labor certification

has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate. This can only be overcome by the petitioner's demonstration that there will be at least a six month interruption of employment in the United States after H-2A status ends. Also, eligibility will not be found, notwithstanding the issuance of a temporary agricultural labor certification, where there is substantial evidence that the employment is not temporary or seasonal.

The NOID extended the petitioner an opportunity to: (1) submit "clear evidence" that the need for the beneficiary is seasonal and recurrent; (2) address the apparent discrepancy between the petitioner's statement that it does not anticipate having other work for the beneficiary during the year and the petitioner's previous practice of filing multiple extension requests on the beneficiary's behalf; and (3) explain why the petitioner seeks to extend employment of the beneficiary into March, which is months later than his November end-of-employment dates in past years.

The petitioner responded to the NOID by letter dated February 15, 2006. There the petitioner asserted that the temporary and seasonal nature of the proposed work was established by the temporary labor certification issued by the Department of Labor (DOL). To support the recurrent annual nature of the proffered work, the petitioner provided summary outlines of (1) the temporary labor certifications and H-2A petitions that it filed for farm machine operators for the client's 2005-2006 season, and (2) the client's previous temporary labor certifications in 2002, 2003, and 2004, which preceded the client's retaining the petitioner as its labor contractor. According to the petitioner's outline, the client had obtained the following temporary labor certifications for H-2A agricultural workers prior to engaging the petitioner's services:

- (1) For the period April 10, 2002 to November 15, 2002: to work with corn, sorghum, "and possibly rye grass" in Texas, Georgia, and Florida;
- (2) For the period February 25, 2003 to November 11, 2003: to work with corn, sorghum, "and possibly rye grass" in Texas, Georgia, and Florida;
- (3) For the period June 1, 2003 to November 15, 2003: to work with corn, sorghum, "and possibly rye grass" in Texas, Georgia, and Florida, and
- (4) For the period April 1, 2004 to November 15, 2004: noted as "the first year that the crew worked with peanuts," in Florida and Georgia.

The NOID reply letter asserts that it is evident that its client's "labor need varies from year to year depending on the crop, time of year, and locations that their [sic] crews are working in." The letter also includes this statement about the present petition:

In fact, [the client's] need for Farm Machine Operators [for the period covered by the present petition] from 11/06/05 until 03/02/06 during their [sic] normally slower period to meet obligations with the peanut crop and preparing for the rye harvests in February and March.

As earlier noted, the director based his denial on two independent findings, namely, that the petitioner failed to establish that (1) “the employment is temporary or seasonal in that it is tied to a certain time of year or by an event or pattern”; and (2) “the need for a farm machine operator during the requested approval period.”

On appeal the petitioner describes itself as a “farm labor contractor which provides employees to perform agricultural services to farmers and agricultural service firms throughout the United States” in situations where “sufficient legal domestic labor is not available.” The petitioner identifies a particular firm as its client and states that the client is “a Florida employer which performs custom agricultural services.” In explanation as to why this additional extension period was being requested for the beneficiary, the petitioner refers to the information in its letter of response to the NOID to the effect that the client needed the beneficiary’s services due to its peanut and rye needs. The petitioner contends that the director erred in denying the petition in that the evidence of record establishes (1) that the proposed work is temporary and seasonal, and (2) that the beneficiary will be actually employed in harvesting two of the crops identified on the Form ETA 750 during the employment period specified on the form.

The AAO finds that the evidence of record does not support the director’s first finding, to the effect that the record does not establish that the proposed job is temporary and seasonal. The evidentiary basis for this finding is not clearly articulated in the decision, but it appears to be based upon the director’s observation that “due to the highly publicized frequency of storms occurring in Florida, hauling storm debris is not a seasonal occurrence.”

The AAO finds that the job description language of the Form ETA 750 identified removal of storm debris as only a minor and contingent aspect of the proposed work. Also, the record does not contain sufficient facts to support the director’s observation about Florida storms, and the observation is not of a commonly known fact that does not require verification. Furthermore, the Form ETA 750 descriptions of the proposed work conform with the requirements at 8 C.F.R. § 214.2(h)(5)(iv)(A) that the employment be (1) “seasonal,” that 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 requir[ing] labor levels far above those necessary for ongoing operations”; and (2) “temporary,” in that the employer's need to fill the position with a temporary worker will . . . last no longer than one year.” It is also noted that 8 C.F.R. § 214.2(h)(5)(iv)(B) provides that DOL’s approval of an H-2A temporary labor certification is normally sufficient for establishing the temporary and seasonal nature of a position.

However, as discussed below, the evidence of record does support denial on the second ground of the director’s decision, that is, failure to establish that the beneficiary would be employed as stated in the Forms ETA 750 and I-129.

As stated at 8 C.F.R. § 214.2(h)(5)(i)(D), an H-2A petitioner “must show that the proposed employment qualifies as a basis for H-2A status.” In accordance with 8 C.F.R. § 214.2(h)(5)(iii)(A), an H-2A petitioner “must establish that each beneficiary will be employed in accordance with the terms and conditions of the certification, which includes that the principal duties to be performed are those on the certification, with other duties minor and incidental.” Accordingly, in light of the Form ETA 750 in this proceeding it is incumbent on the petitioner to establish that the beneficiary would operate farm machinery to “harvest corn silage,

peanuts, beans, rye, and sorghum silage in crews under the direction of a field supervisor using harvesting machines” in Gilchrist County, Florida.

The following section of the director’s decision expresses his basis for concluding that the record does not establish that the beneficiary would be employed in harvesting *peanuts* during the petitioned period of November 6 to March 2:

The petitioner responded [to the NOID] by stating that the beneficiary would be engaged to operate machinery between the dates of 11/16/2005 and 03/02/2006 to meet the obligations with the peanut crop and preparing for the rye harvests in February and March. However, according to The University of Florida extension service (<http://edis.ifas.ufl.edu.PI044>), peanut seeds are planted in the spring, beginning about mid-March in north-central Florida and April 1 in north Florida . . . . Planting continues through May, and some years into June if dry weather persists. *Id.* Accordingly, the planting season for peanuts in Gilchrist County, Florida will still be in the future upon the expiration of the petitioner’s requested approval dates. While corn is grown in Gilchrist County, Florida, *Id.*, the petitioner does not indicate that the beneficiary will be involved in the preparation, planting or harvesting of corn in Gilchrist County, Florida.

As indicated by this excerpt, the director first considered the need for farm machine operators for peanut crop work in Gilchrist, Florida. He found that work on the peanut crop during the petitioned period, November 6 to March 3, would be inconsistent with the peanut planting season that the University of Florida (UF) extension service identified as running from about mid-March or April 1 through May (and sometimes June). However, the director evidently analyzed the proposed work as if it were involved with planting, not harvesting.

The petitioner does not dispute the accuracy of the UF information cited by the director, but it argues that the director’s observations about the planting season are irrelevant, as the petition and the Form ETA 750 identified the proposed work as harvesting, not planting. The petitioner prevails on this point. The information provided in the director’s decision about peanut planting is not probative. It does not address peanut harvesting or provide facts sufficient for a reliable extrapolation about when peanuts are harvested in Gilchrist County, Florida.

However, it is noted that the e-mail submitted on appeal indicates that the petitioner’s client neither anticipated a need for nor requested farm machine operators for harvesting peanuts beyond November. The pertinent part of the e-mail states:

For 2005 you should have all the dates we asked for and the crop information. We had originally wanted the crews by April (we did not get anyone due to paperwork delays) and they were originally requested from then until November 15<sup>th</sup>. We asked for the extension as the previous year [2004] our Peanut Harvesting lasted until the end of November and then our lease planting obligations have picked up with the new crop (peanuts), so we had more work for our other workers to do during our normal slow periods from December to February like planting and getting everything (equipment, etc.) ready for the Rye harvest in February and March. [The

beneficiary] was agreeable with staying as he is single and had no family issues like some of the other crew members from the past years have had. . . .

The AAO finds that this paragraph is sufficient to establish that the petitioner would be employed in the harvesting of peanuts through, but not beyond, November 2005. Consequently, to merit approval of the petition, the evidence of record must also establish that the beneficiary would be operating machinery for the harvesting of the other crops cited on the Forms I-129 and ETA 750 - corn silage, beans, rye, and sorghum silage – from December 1, 2005 to March 2, 2006. The evidence does not succeed.

The director noted that *corn* is grown in Gilchrist County, but that the petitioner does not indicate that the beneficiary will be involved in the preparation, planting, or harvesting of corn there. This observation is supported by the petitioner's statement in its letter of reply to the NOID that the client's need for farm machine operators is "to meet obligations with the peanut crop and preparing for the rye harvests in February and March."

With regard to the remaining crops, the director states:

According to [www.usda.gov](http://www.usda.gov), there were no beans, rye or sorghum planted or harvested in Gilchrist County, Florida in 2004. The petitioner does state that the needed labor also includes Dooley County, Florida. However, the certification letter from the [DOL] Employment and Training Administration clearly states that such certification only includes Gilchrist County, Florida, with no mention of Dooley County, Florida. . . .

The statement in the letter of reply to the NOID that the beneficiary would only be involved with peanuts and rye – a statement that is reiterated on appeal – conclusively establishes that the beneficiary would not be employed in the harvesting of *beans or sorghum silage*.

The information that the director cites from the U.S. Department of Agriculture Internet site is evidence that, contrary to the petitioner's representations on the Forms I-129 and ETA 750, the beneficiary would not be employed in the harvesting of *rye* either. The AAO finds that the petitioner has not overcome this evidence, although it had the opportunity to do so on appeal. The e-mail from the petitioner's client (Exhibit 1 on appeal), in its comments about "the Rye Harvest in February and March" and preparations for that harvest, indicates that the beneficiary would be involved in rye harvesting, albeit for only the February and March part of the petitioned period. However, neither the client's e-mail nor any other evidence of record rebuts the following statement in the director's decision, to the effect that there would be no rye for the beneficiary to harvest in Gilchrist County, Florida, the work location on the Forms ETA 750 and I-129:

According to [www.usda.gov](http://www.usda.gov), there were no beans, rye or sorghum planed in Gilchrist County, Florida in 2004. The petitioner does state that the needed labor also includes Dooley County, Florida. However, the certification letter from the Department of Labor Employment and Training Administration clearly states that such certification only includes Gilchrist County, Florida with no mention of Dooley County, Florida.

As the record indicates that the petitioner's client is involved in planting and harvesting throughout Texas, Georgia, and Florida, and as the client's e-mail does not specify a location for rye harvesting, the petitioner has not overcome the director's statement of evidence that the beneficiary would not be employed in harvesting rye in Gilchrist County, Florida, the location that the petitioner specified on the Forms ETA 750 and I-129. The director's statement of evidence was made a part of the record, but the petitioner did not avail itself of the opportunity to rebut it on appeal.

Even if the evidence of record substantiated that the beneficiary would be employed in rye harvesting in Gilchrist County during the petitioned period - and it does not - the director's decision to deny the petition would be correct. The evidence of record indicates that rye-harvesting would be limited to February and March of the entire petitioned period of November 16, 2005 to March 2, 2006. Even if the asserted February and March 2006 rye-harvesting period were combined with the substantiated peanut-harvesting period of November 2005, the petitioner still would not have established that in the December 2005 and January 2006 portion of the petitioned period the beneficiary would be working in accordance with the job descriptions on the Forms ETA 750 and I-129. Thus, the petitioner has not established that the beneficiary "will be employed in accordance with the terms and conditions of the certification, which includes that the principal duties to be performed are those on the certification, with other duties minor and incidental," as required by 8 C.F.R. § 214.2(h)(5)(iii)(A).

The AAO also finds that the record contains no corroborating evidence that the petitioner's client engages in storm debris removal and that the beneficiary would be employed in this activity from December 2005 to January 2006, that is, during the time that the client's e-mail refers to as "our normal slow periods from December to February." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO finds, then, that the evidence is sufficient to establish only that the beneficiary would be employed as a farm machine operator in peanut harvesting in Gilchrist County in November 2005. Because the petitioner has not established that the beneficiary would be employed as a harvest machine operator during rest of the petitioned December 2005 to March 2006 period, the appeal will be dismissed, and the petition will be denied. The petitioner has not established that the beneficiary "will be employed in accordance with the terms and conditions of the certification, which includes that the principal duties to be performed are those on the certification, with other duties minor and incidental," as required by 8 C.F.R. § 214.2(h)(5)(iii)(A).

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 not met that burden.

**ORDER:** The appeal is dismissed. The petition is denied.