

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

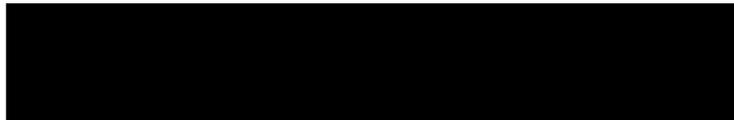
PUBLIC COPY

D3



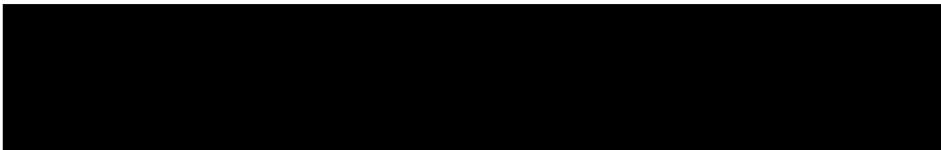
FILE: WAC 07 139 50419 Office: CALIFORNIA SERVICE CENTER Date: **JAN 31 2008**

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 of the service center, and it is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed although the petition is now moot.

The petitioner describes its business as "showing of Show Jumper horses," and it desires to employ the named alien as a temporary show-horse groom for the period January 29, 2007 to October 25, 2007. It filed this petition to obtain classification of the named alien as an H-2B temporary nonagricultural worker in accordance with 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), and its implementing regulations at 8 C.F.R. § 214.2(h)(6).

The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the documentation provided by the petitioner did not satisfy the H-2B peakload criterion. The director subsequently denied the petition on two grounds, namely: (1) failure to establish that the petitioner's show-horse groom position qualifies as an H-2B temporary need; and (2) the absence of "any evidence that U.S. workers are not available at the prevailing wage."

Counsel asserts that the record of proceeding does not support the first ground of the director's decision, as the evidence meets "the seasonal/peakload requirements for the H-2B petition." With regard to the second ground of the decision – the lack of evidence about the unavailability of U.S. workers – counsel states:

[E]vidence was submitted that there were NO U.S. workers available after very expensive and extensive recruitment efforts. Also [as] this was NEVER a reason given by the Department of Labor in their decision, I do not know why the USCIS would include that in their decision to deny.

The AAO first notes that this petition is moot, in that the period for which the show-horse groom was sought (January 29, 2007 to October 25, 2007) has passed. As discussed below, the AAO finds that the petitioner has established that the proposed job meets the H-2B seasonal temporary-need criterion, but also finds that the record as presently constituted still lacks the evidence of the unavailability of U.S. workers that was noted by the director.

The regulation at 8 C.F.R. § 214.2(h)(6), *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*, provides, in part:

(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:

(1) *One-time occurrence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(2) *Seasonal need.* The petitioner must establish 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.

(3) *Peakload need.* The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

(4) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the

occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

Based upon the totality of the evidence, including the matters submitted on appeal, the AAO is persuaded to agree with counsel that the evidence of record establishes that the particular type of horse groomer specified in the petition is needed for the horse show season only, and for work that includes duties particularly tailored to that season. Accordingly, the petitioner has established that the asserted need is seasonal within the meaning of 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

However, as the record of proceedings is presently constituted, there remains that lack of evidence of the unavailability of U.S. workers that formed the second ground of the director's denial. Thus, the petitioner has not satisfied the requirement at 8 C.F.R. § 214.2(h)(6)(iv)(D) for evidence that "must show that qualified workers in the United States are not available." The AAO will not remand the petition to the director to issue a request for this evidence, as the petition is now moot. Because the period of requested employment has passed, remanding this case to the director would have no practical effect. As the record of proceeding remains insufficient for approval of the petition, the petition must be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The petition is denied because the matter is moot due to the passage of time.