

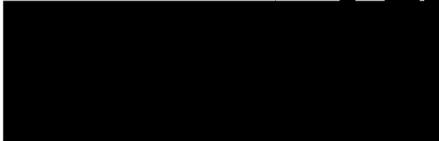


DH

U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

Public Copy



DEC 21 2001

File: SRC 01 011 50104 Office: TEXAS SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:



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)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Texas Service Center, and was certified to the Associate Commissioner for Examinations for review. The director's decision will be withdrawn and the petition will be remanded to the director for further action consistent with this decision.

The petitioner is a landscape maintenance company with 45 employees and an approximate gross annual income of \$144, 209. It seeks to employ the beneficiaries as laborers for a period of ten months. The director determined that the petitioner had not established that the offered positions were temporary in nature and that the petitioner had not submitted the required labor certification. The director denied the petition and certified the decision for review.

In response to the certification, the petitioner submits a statement in which he provides a description of the proposed duties of the beneficiaries and argues that the positions are temporary in nature.

The regulation at 8 C.F.R. 214.2(h)(6)(i) defines an H-2B nonagricultural temporary worker as:

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 conditions of United States workers.

The regulation at 8 C.F.R. 214.2(h)(6)(iv)(A) also provides that an H-2B petition for temporary employment in the United States shall be accompanied by a labor certification issued by the United States Department of Labor or a notice detailing the reasons why such certification cannot be made.

Further, the regulation at 8 C.F.R. 214.2(h)(6)(iv)(D) provides that if the petitioner receives a notice from the Secretary of Labor that the certification cannot be made, a petition containing countervailing evidence may be filed with the director.

The record in this matter contains a notice from the United States Department of Labor stating that a labor certification could not be issued because the positions appeared to be permanent in nature. The petitioner submitted countervailing evidence in the form of a written statement that addressed the issue of the temporary nature of the positions.

The director, however, did not review the countervailing evidence to determine if the petitioner had overcome the reasons why the

certification could not be issued by the Secretary of Labor. The director merely denied the petition finding that the petitioner had failed to submit the required certification. As such, the director's decision does not comport with current regulations and must be withdrawn.

This case will be remanded to the director for the entry of a new decision that discusses whether the countervailing evidence submitted by the petitioner overcomes the findings of the Secretary of Labor. If the director determines that the countervailing evidence fails to overcome the findings of the Secretary, the director shall certify his decision to the Associate Commissioner for review. The director may request any additional evidence deemed necessary to assist with the determination. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Associate Commissioner for review.