

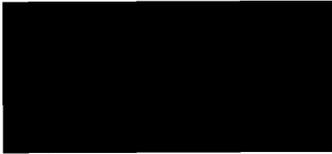


U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

JAN 10 2001

File: SRC 00 109 53379 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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

prevent clearly demonstrated
invasion of personal privacy

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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner engages in tree growing. It seeks to employ the beneficiaries for a period of ten months as laborers. In that role they would stake trees as well as load and unload trees and planting materials. Additionally, they would haul and spread materials such as soil and mulch. The Department of Labor (DOL) denied temporary labor certification in this matter because the petitioner had not established a temporary need for the workers. In addition, the DOL determined that the petitioner's agricultural work is not eligible for certification under the H-2B nonagricultural temporary labor certification program. The director concurred and denied the petition accordingly.

On certification, the petitioner indicates the firm employs permanent staff on a year-round basis and has a need for temporary labor for their peak business months. The petitioner indicates that this type of petition has been approved for the firm in other regions in the past.

The petitioner argues that this petition should be approved in view of the approval of other petitions in the past. This Service is not required to approve applications or petitions where eligibility has not been demonstrated. 8 C.F.R. 103.3(c).

Pursuant to 8 C.F.R. 214(h)(1)(ii)(D), the H-2B classification under which the petitioner applied is reserved for the employment of aliens who are coming temporarily to the United States to perform nonagricultural work. In this case, the petition may not be approved because the beneficiaries will be performing agricultural work and are not eligible for the classification sought.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), 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, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified 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. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

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 must 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).

For the nature of the petitioner's need to be a 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.

The petitioner states that its need for additional laborers is due to the weather and the growing cycle for trees. The petitioner further states that it is conducive for landscape construction and installation companies to plant trees in the early spring and early fall because this insures the highest success rates. The petitioner explains that from December to the early part of April is the best time for trees to be harvested because they are dormant at that time. The petitioner further explains that the best time to plant or transplant tree is from spring to fall.

The Petition for a Nonimmigrant Worker (Form I-129) indicates that the dates of intended employment for the beneficiaries are from January 1, 2000 until October 1, 2000. Taking into account the above explanation of the cycle for tree planting and harvesting, the petitioner has not provided sufficient evidence as to why January 1 until October 1 would constitute a peakload period for the firm. Additionally, the petitioner has not shown that the nature of its need for laborers is temporary in nature.

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 sustained that burden. This decision is without prejudice to the filing of an application for the six workers under the H-2A temporary agricultural worker program with the appropriate supporting documents and filing fee.

ORDER: The decision of the director is affirmed. The visa petition is denied.