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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

MAR - 8 2001

File: SRC 00 161 54570 Office: Texas Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

Identification data deleted to prevent disclosure of protected information.

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 approved by the Director, Texas Service Center, and certified to the Associate Commissioner for Examinations for review. The director's decision will be withdrawn and the petition will be denied.

The petitioner seeks to employ the 25 unnamed beneficiaries as landscape laborers for a period of seven months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that a temporary need had been established and approved the petition. The director certified his decision to the Associate Commissioner for Examinations for review.

No additional evidence was submitted on certification.

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).

The regulation at 8 C.F.R. 214.2(h)(6)(ii)((B)(3) states 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 regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(2) states for the nature of the petitioner's need to be a 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.

It is noted that in this case, the record shows that the proposed employer employs only two persons while the firm had a gross annual income of \$800 million when the petition was filed. The petitioner states that its need for additional workers from May through December 2000, is due to the fact that the landscaping work is performed during the spring and fall months. The petitioner does not explain why it is requesting additional employees during clearly summer and early winter months when the landscaping work is performed during the spring and fall. Also, no evidence has been submitted in support of these assertions. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner has not submitted evidence to establish that its need for the services or labor is short-term, or is tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner has not shown that the nature of its need for landscaping workers is temporary in nature.

Further, the DOL determined that a temporary labor certification could not be made because the foreign nationals would be provided with housing and transportation that was not offered to United States workers.

As part of its I-129 petition filing, the petitioner states that the same housing and transportation arrangements would be extended to U.S. workers. However, no mention of this benefit was made in the newspaper advertisements which were posted to test the labor market by the petitioner. It is found that the petitioner has not overcome the DOL's reasons for not issuing a temporary labor certification, as required by 8 C.F.R. 214.2(h)(6)(iv)(E).

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 director's decision of May 15, 2000 is withdrawn. The nonimmigrant visa petition is denied.

