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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

FILE: SRC 02 073 51295

OFFICE: TEXAS SERVICE CENTER

DATE: AUG 03 2002

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

Public Copy

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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, 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 shall be affirmed.

The petitioner employs 35 persons. It seeks to employ an additional 35 individuals as laborers. The director denied the petitioner because it was not accompanied by a temporary labor certification from the Department of Labor.

The certifying officer declined to issue a labor certification because he determined that the petitioner had not established that its need for the beneficiaries' services is temporary. The certifying officer stated:

[REDACTED] employs [REDACTED] on a year round basis and is attempting to circumvent the H-2B program requirements by breaking the need for such workers into two H-2B applications based on two different seasonal needs during the same year. During the 2001 calendar year, this office issued the employer two H-2B labor certifications for 35 workers each for the periods: (1) January 5, 2001 thru April 30, 2001; and (2) January 27-October, 30, 2001 based on a seasonal need. The current application for 35 aliens is for the period, November 15, 2001 through April 30, 2002 based on a seasonal need. These applications collectively establish that the employer has tied two seasonal needs into a year which constitutes permanent employment. These job opportunities are deemed to be for permanent employment and must be advertised and offered to U.S. workers on that basis. The employer may want to consider filing an application for permanent labor certification.

Counsel has not submitted a brief or evidence in response to the notice of certification.

8 C.F.R. 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made. 8 C.F.R. 214.2(h)(6)(iv)(E) states that a petition not accompanied by a temporary labor certification must be accompanied by countervailing evidence from the petitioner that addresses the reasons why the Secretary of Labor could not grant a labor certification.

Matter of Artee Corporation, 18 I&N Dec. 366 (Comm. 1982), 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 for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties that is controlling.

The petitioner is engaged in the field of custom landscaping. It has a continuing need for laborers and has not adequately explained a qualifying need for an additional 35 workers.

After review of the evidence contained in the record, the decision of the director is found to be correct.

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 decision of the director is affirmed.