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U.S. Department of Justice

Immigration and Naturalization Service

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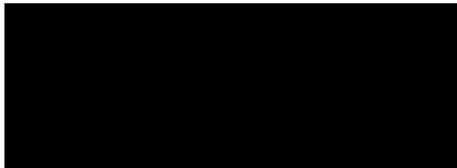


File: WAC 02 005 50656 Office: California Service Center Date: AUG 28 2002

IN RE: Petitioner: [Redacted]
Beneficiaries [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:



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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an agent that provides a variety of equine services to its clients. It desires to employ the beneficiaries as stable attendants for eleven and one-half months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the evidence submitted did not establish the petitioner's need for the beneficiaries' services is a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. The director also determined that the evidence did not establish that the petitioner has an actual need for the beneficiaries' services. The director decided that the beneficiaries did not qualify for the job offer as specified in the application for labor certification. The director also decided that the evidence did not establish that qualified workers in the United States were not available and that the terms and conditions of employment are consistent with the nature of the occupation. Finally, the director determined that the petitioner did not name all of the beneficiaries on the petition at the time of filing.

On appeal, counsel submitted additional evidence to overcome all but one of the concerns addressed in the director's decision. Therefore, the sole issue in this case is whether the petitioner's need for the beneficiaries' services is temporary in nature.

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), 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 petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. The petition indicates that the employment is a one-time occurrence and the temporary need is unpredictable.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish 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.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Assist the horse trainer in caring for and "making" young horses into valuable polo, show, or pleasure horses. Provide intensive care to make horses gentle, yet athletic. Must follow the instruction of the horse trainer, individually school each horse, exercise multiple horses, tack-up horses wrap legs, bathe horses and perform other grooming.

In this case, the petitioner has entered into a contract with Parada Stables, located in Mexico D.F., Mexico. Parada Stables has designated the petitioner as its agent with full authority to act on its behalf for the purpose of fulfilling the terms of the contract. The contract calls for the petitioner to locate for purchase 100 quality thoroughbred horses and locate and manage 85 stable attendants to care for, exercise and assist in the training of these horses. Parada Stables agrees to pay each stable attendant \$10.50 per hour and to pay 50% of the cost of care such as feed, stabling, tack, shoeing and veterinary care from November 15, 2001 through November 1, 2002 only. Parada Stables agrees to place said horses for private sale and/or auction in November 2002 as polo, show or pleasure horses. TBS will be paid 20% of the final purchase price of each horse.

Counsel states on appeal that:

The company is a new business established in August 2000. Since its inception, it has not had any employees. In the past, [REDACTED] Inc. [REDACTED] acted as an

agent for polo grooms, but did not act as the employer. In this instance, [REDACTED] is representing a foreign employer and again, is not the employer. Although [REDACTED] is not an employment agency, it occasionally acts in such a capacity when the business need arises.

Counsel concludes that the petitioner has provided sufficient information about its workers, and the petitioner's need for the workers is temporary. However, the petitioner is not the actual employer. The petitioner seeks the services of the beneficiaries to satisfy its contractual commitments with Parada Stables to provide horses and stable attendants to care for its horses. To do this, the petitioner will require a permanent cadre of employees available to fill the positions on a continuing basis. While an individual contract might be temporary in nature, the petitioner will always have a need for workers to fulfill its contracts.

In this instance, it is the petitioner's business to supply workers. In acting as an employment contractor, the petitioner has a permanent need to have workers available to perform labor or services. Consequently, the petitioner has not established that its need for the beneficiaries' labor or services is temporary.

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 appeal is dismissed.