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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

File: SRC 02 108 55393

Office: Texas Service Center

Date: MAR 14 2002

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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 his decision to the Associate Commissioner for Examinations for review. The director's decision will be affirmed.

The petitioner is a landscape maintenance contracting firm which seeks to employ the beneficiaries as landscape laborers for a period of ten months. The director denied the petition 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:

We have reviewed the employer's case file and supporting documentation and find that the employer failed to substantiate a temporary, peak load or seasonal need. The basis for denial is as follows: On January 22, 2001, employer was certified for 15 groundskeepers, industrial/commercial workers for the period of February 1, 2001 to December 20, 2001 On September 28, 2001 employer was certified for 5 laborer, landscape workers for the period of November 1, 2001 to March 15, 2002 On October 19, 2001, employer submitted a third application for consideration Employer has requested the work period to be from February 15, 2002 to December 15, 2002. Employer presents the argument that the State Workforce Agency (SWA) inappropriately assigned the Dictionary of Occupational Titles code of landscape laborer to case #06336228 rather than the code for groundskeepers by "crosswalking." To "crosswalk" to a code simply means that the state agency performed the necessary steps to obtain the appropriate prevailing wage for that particular "industry"

It is the opinion of this office that since the duties included in the November to March certification, in reality, are included in the February to December work periods, that the employer has presented an overlapping work period. When an employer has overlapping work periods comprising a period meeting, or exceeding one year, the job is no longer considered temporary or seasonal in nature.

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)(A) states that a petition not accompanied by

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 argued that the petitioner does have a temporary need and that the work periods are layered rather than overlapping. The director determined that the petitioner had not demonstrated that its need is temporary.

The petitioner is a landscape maintenance firm. It has required the services of groundskeepers and landscape laborers in the past and will require such services in the future. The petitioner has not provided a sufficient distinction between "overlapping" and "layered." Accordingly, it is concluded that the petitioner has not established that its need is temporary.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The director's order is affirmed.