



DH

U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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



File: [Redacted] Office: Texas Service Center Date: 18 NOV 2002

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: [Redacted]

*identifying data deleted to
prevent an 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, and certified to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner engages in the forestry business. It desires to employ the beneficiaries as forestry workers for ten months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the evidence submitted by the petitioner did not overcome the points of the Department of Labor's denial of the certification.

Upon review, the director indicated in her decision that the DOL denied the certification for:

1. Inability by the State Workforce Agency (SWA) to contact the employer for referrals.
2. Incorrect telephone number of the ETA 750 and job order.
3. Failure by the employer to timely contact the workers reported as hired.
4. The questionable report of recruitment.

The DOL also determined that it was unable to certify that there are not sufficient U.S. workers who are able, willing, qualified and available for the job opportunities requested in the application.

The record contains a letter from the president of the International Labor Management Corporation, a prior approval notice from the Service, a prior approved ETA 750A temporary certification, a copy of the advertisement of the position for three consecutive days, May 24-May 26, 2002, in the Sun Journal, and a referral list. Upon review, the petitioner has submitted insufficient countervailing evidence to overcome the concerns addressed by the DOL, which were reiterated in the director's decision. For this reason, the petition may not be approved. The petition may not be approved for another reason beyond the decision of the director.

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 petition indicates that the employment is seasonal and the temporary need recurs annually.

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

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

Workers will spray or inject trees, brush and weeds with herbicides using hand powered sprayer or tree injectors tool. Cuts out deceased, weak, or undesirable trees and prunes limbs of young trees to deter knot growth using handsaw, powersaw and pruning tools. Worker will maintain and paint boundaries locating a tract for the landowner, and painting trees at specified intervals around the perimeter of the tract. Plant pine seedlings to reforest timberland. Digs planting hole at predetermined spaced intervals using mattock like tool or dibble. Places seedling in a hole and packs soil around plant using foot or planting tool. Removes seedlings

from field trays, pulls, sorts, lifts and packs seedlings.

Upon review, the duties are shown to be ongoing. The petitioner has a permanent need for workers to perform forestry services, which is the specific nature of the petitioner's business. The services to be rendered cannot be classified as seasonal work as the petitioner has not shown the services or labor to be traditionally tied to a season of the year by an event or pattern. Consequently, the petitioner has not established that the nature of its need for forestry workers 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. Here, the petitioner has not met that burden.

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