



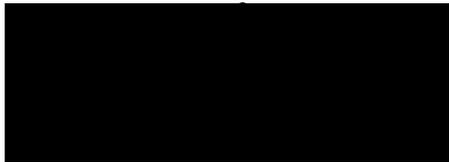
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U.S. Department of Justice

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 02 254 51219 Office: Texas Service Center

Date: OCT 23 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: [Redacted]

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, and certified to the Associate Commissioner for Examinations for review. The decision of the director will be withdrawn and the matter remanded to her for further action and consideration.

The petitioner operates a thoroughbred horse ranch. It desires to employ the beneficiaries as thoroughbred race horse grooms for nine 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 that the petitioner had advertised the job opportunities and as a result concurred with the Department of Labor's certifying officer's opinion that stated he was unable to make a determination that a sufficient supply of qualified U.S. workers were not available for the job opportunities.

On certification, counsel submitted sufficient countervailing evidence to overcome the concerns addressed in the director's decision. Therefore, the objections of the director have now been satisfied. However, 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 a seasonal need.

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:

Cares for thoroughbred race horses to protect their health and improve their appearance. Waters horses and measures, mixes and apportions feed and feed supplements. Washes, brushes, trims, bandages, pick hooves and curries horses' coats to clean and improve their appearance. Inspects animals for disease, illness, and injury and treats animals according to instructions. Cleans horses' quarters and replenishes bedding. Handles and exercises horses as necessary. Unloads and stores feed and supplies. May whitewash stables, using brush. May clean saddles and bridles. Saddle animals. Maintains barn area in a neat orderly condition.

Upon review, the duties are shown to be ongoing. The petitioner has a permanent need for workers to care for its thoroughbred race horses, which is the specific nature of the petitioner's business. The services to be rendered cannot be classified as seasonal work as it is not 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 thoroughbred race horse grooms is temporary in nature.

Since the aforementioned issue was not discussed in the director's decision, the case will be remanded so that the director may address this matter. The petitioner should be given an opportunity to submit any additional evidence that the director deems necessary. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

**ORDER:** The director's decision of September 6, 2002 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.