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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 02 018 50630 Office: Texas Service Center Date: SEP 12 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, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed in part.

The petitioner is an agent that provides seasonal polo grooms to players at the Palm Beach Polo Club located in Wellington, Florida. It desires to employ the beneficiaries as stable attendants for five 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 petitioner's job offer includes an unduly restrictive 7 day work week. The director also determined that the petitioner's need does not meet one of the definitions (one-time occurrence, a seasonal need, a peakload need, or an intermittent need) given under 8 C.F.R. 214.2(h)(6)(ii).

On appeal, counsel submitted additional evidence to overcome the director's concerns regarding the restrictive work week. 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 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 a seasonal need, 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:

The workers will be responsible for the complete health maintenance of 6-13 thoroughbred horses. They will care for and maintain control of high-spirited thoroughbreds; provide proper nutrition; tend to minor injuries and illness and keep the horses sound and in good health. They may need to lift heavy stable equipment. They will organize and maintain a horse fitness program to make and maintain the horses in top physical condition by trotting, galloping, and cantering the horses twice daily. They will provide assistance for the polo player at practice games and tournaments which includes placing the necessary tack on the horse between each chukker (periods of play). They will need to bathe and wrap the horses after each match.

The chief executive officer, Marina Field, states in her letter dated July 16, 2001 that:

Total Polo will act as an agent on behalf of the polo players and the polo grooms...In this case, the polo grooms and players will utilize the services provided by Total Polo to obtain the work and workers they need...Total Polo, acting as an agent, will connect the polo players with the polo grooms for the polo season from November through April only....

The petitioner has not been shown to be the actual employer. It appears that the petitioner is acting as an employment contractor to satisfy its commitment with the Palm Beach Polo Club to provide polo grooms/stable attendants to the players. To do this, the petitioner will require a permanent cadre of employees available to fill the positions on a continuing basis.

In this instance, it is the petitioner's business to supply workers. The petitioner has not been shown to have any permanent employees. Consequently, the petitioner has a permanent need to have workers available to perform the requisite labor or services at other work sites. 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 decision of director is affirmed in part.
The petition is denied.