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Citizenship and Immigration Services

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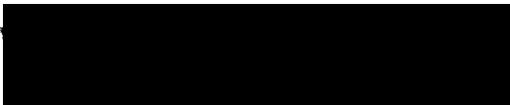
ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 Eye Street, N.W.  
Washington, DC 20536



FILE: WAC 03 173 51499 OFFICE: CALIFORNIA SERVICE CENTER DATE:

DEC 05 2003

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

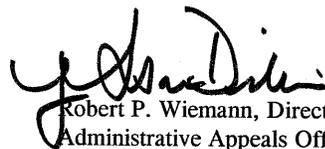
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California landscape maintenance company that desires to employ six unnamed beneficiaries as landscape laborers from May 11, 2003 to November 3, 2003. The certifying officer of the Department of Labor (DOL) issued a labor certification that established that no qualified workers were available for the position, and that the alien's employment would not adversely affect the wages and working conditions of similarly employed U.S. workers. The director then determined that the petitioner's needs for the beneficiaries' services were not seasonal, and, therefore, the position was not temporary.

On appeal, the petitioner resubmits materials sent in response to the director's request for further evidence, including graphs that indicate monthly levels of staffing of temporary workers and business activity. The petitioner also submits copies of nine DOL approved certifications and nine Citizenship and Immigration Services (CIS) H-2B petition approvals.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), 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 . . . .

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. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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 indicates on the Form I-129 that the employment is a seasonal need that recurs annually. To establish that the nature of the petitioner's need is 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. 8 C.F.R. § 214.2 (h)(6)(ii)(B)(2).

The non-technical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads, in part: "Lawn-mowing, planting shrubs, trimming hedges. Small amount of new lawn installed. Rake leaves. During fall. Position is for laborer. This is an entry[-]level position. No experience required."

Although the original petition identified the petitioner as a landscape construction company, the letterhead on the cover letter that accompanied the I-129 petition indicated that the petitioner was the O & J Golf Course Construction Company. The petitioner stated that its business is located at 6,500 feet in Moreno Valley, California, and when the snow melted, it needed more labor in the landscape industry. The petitioner stated that the weather in the area in which it operated produced snowfall from mid to late November until mid to late March with an accumulation of over ten feet of snow.

The petitioner also stated that its need for seasonal services was traditionally tied to the warm weather season of the year, which is very predictable. The petitioner stated its need for temporary workers was from April through November on an annual basis. The petitioner submitted no further information on the work performed by any permanent workers, any clarification on whether it was a golf course construction company or a landscape construction company, or any further description of where its landscaping services were performed during the period of time it indicated had the highest need for temporary help.

On June 1, 2003, the director requested further evidence to establish the temporary need for the beneficiaries' services. In particular, he requested an explanation if the petitioner's need was tied to a season in the year by an event or pattern and if it was a recurring need every year. The director also requested a duplicate of the H-2B petition and all supporting documentation as well as duplicate copies of any further documentation submitted.

In response, the petitioner submitted a staffing chart for O & J Landscape Construction that showed the number of temporary workers by month for the years 2001 and 2002. This chart indicated that no temporary workers were employed in the months of December, January, February, and March. A second chart for O & J Landscape

Construction indicated that the petitioner had low invoices in the months of January, February, March, and December of 2001, and low invoices in the months of January, February, and December of 2002. The petitioner cited to a DOL memorandum, GAL No. 1-95 Item II, *Standards for Determining The Temporary Nature of a Job Offer Under the H-2B Classification*. This memorandum stated that, in some situations, the employer's need might create a temporary job opportunity in an employment situation that may otherwise be permanent in nature.

On June 28, 2003, the director determined that petitioner had not established that its need for the beneficiaries' services was seasonal. The director noted that southern California's need for lawn care and general landscaping services is a year-round condition. The director also noted that both the environmental and economic conditions in southern California, that include continual growth and real estate development, established that the nature of the gardening industry is that of perpetual activity and labor.

On appeal, the petitioner asserts that the Department of Labor has already certified that it had a temporary seasonal and peak load need for the beneficiaries' services. The petitioner also asserts that the charts it submitted established that the need for temporary workers did not exist for the months of December through March. The petitioner resubmits its staffing and invoice charts. It also submits copies of nine DOL certifications for landscape laborers, and nine CIS approvals of the same petitions. An employment agent in Bay City, Texas, submitted all the DOL certification documents and subsequent I-129 petitions. The temporary employees on these petitions are identified as laborer, landscape. The petitioners for these DOL certifications are from states such as Nevada, Florida, Georgia, Louisiana, and Texas. The petitioner identifies the approved petitioners as being from other warm weather states that have had their I-129 petitions approved. The petitioner also submits a U.S. Department of Agriculture Plant Hardiness Zone Map taken off of the Internet.

With regard to the petitioner's assertion that the DOL already established the temporary nature of the petitioner's need for services, pursuant to 8 C.F.R. § 214.2(h)(6)(iii)(A), the purpose of the DOL certification is to advise the Service Center director on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers. CIS maintains the authority to accept or not accept the DOL certification or lack of certification statement, and also maintains the ultimate authority in ascertaining whether the petitioner's need for the beneficiaries' services is temporary.

It should also be noted that the petitioner asserts that Citizenship and Immigration Services (CIS) has already determined

that the petitioner's need is temporary since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the various Service Centers in the nine previously approved I-797s. In the absence of all of the corroborating evidence contained in these records of proceeding, the documents submitted by the petitioner are not sufficient to enable the AAO to determine whether the other H-2B petitions were approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petitions would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), cert denied, 485 U.S. 1008 (1988).

Upon a review of the record of the instant petition, the petition fails on several grounds. First, the record is not clear as to what permanent employees are presently employed by the petitioner. Although the original petition indicates that the petitioner has five employees, no further evidence is submitted as to what work is performed by the permanent employees, or whether any permanent employee performs any landscaping work. Without such information, the petitioner cannot establish whether the period of time when temporary workers are not needed, namely, December through March, is not the vacation period for the permanent employees, pursuant to 8 C.F.R. § 214.2 (h)(6)(ii)(B)(2).

Furthermore, the petitioner has provided no conclusive documentary evidence that the warm weather season for Moreno Valley is nine months long. The U.S. Department of Agriculture Plant Hardiness Map submitted by the petitioner provides no information as to why there would be increased demands for landscaping services on a seasonal basis in Moreno Valley. The map provides average minimal temperatures for very broadly indicated zones throughout the United States. In addition, the chart has no seasonal breakdown for the particular area in which the petitioner operates that would suggest that any particular

landscaping season exists in Moreno Valley from April to November.

Based upon such documentary evidence, it appears the petitioner's need for landscape laborers covers nine months of the year; however, there is no persuasive evidence in the record that establishes a nine-month warm weather season for Moreno Valley. In addition, it is unclear whether there are any other workers, in addition to the petitioned temporary workers, who perform landscaping services during the stated period of time that the petitioner seeks temporary help. Without more persuasive evidence, the petitioner has not established that the need for the landscaping services to be performed is a seasonal need and, therefore, temporary in nature. For these reasons, the director's decision will not be disturbed.

Beyond the decision of the director, the petitioner has not provided sufficient evidence to establish an emergent situation with regard to petitioning for unnamed multiple beneficiaries. Although 8 C.F.R. 214.2(h)(2)(ii) provides that non-agricultural petitions must include the names of beneficiaries at the time of filing, under the H-2B classification, exceptions to this requirement may be granted in emergent situations at the discretion of the director.<sup>1</sup> However the petitioner is required to provide evidence describing the business reason why the beneficiaries are unnamed. In the instant petition, the petitioner merely states: "I can not yet provide names due to an emergent situation, where I am not 100% sure that all of the aliens I originally spoke with will be able to work for our company during the period of the need." This statement is not sufficient to establish the business reasons why the beneficiaries are unnamed.

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 met that burden.

**ORDER:** The appeal is dismissed. The petition is denied.

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<sup>1</sup> Memorandum from Thomas Cook, Acting Assistant Commissioner, INS Office of Programs, Clarification of Memo Dated July 5, 2001 Regarding Certain H-2B Adjudication Issues, HQ 70/6.2.9 (June 11, 2002) page 1.