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U.S. Department of Homeland Security

Citizenship and Immigration Services

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*DH*

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



File: SRC 03 134 53836 Office: TEXAS SERVICE CENTER Date:

**NOV 25 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

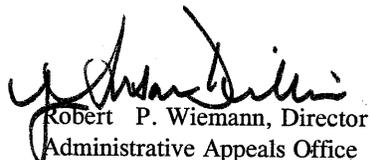
**INSTRUCTIONS:**

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 nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified the decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a Florida branch office of a New Jersey corporation that provides landscaping, mechanical maintenance and other services to other major U.S. companies. It desires to employ the beneficiaries as landscape laborers from March 1, 2003 to November 30, 2003. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made because the petitioner appeared to be a staffing agency, and based on a telephone conversation with the Jacksonville office, it appeared that some beneficiaries would work outside the Jacksonville area. The director determined that the petitioner had not established the temporary need for the workers. In addition, she concurred with the Department of Labor's reasoning in the matter.

On notice of certification, the petitioner states that it is not a staffing agency and submits a corporate brochure. It also resubmits materials, including an approved I797 approval for a similar petition submitted by its corporate office for 100 unnamed H-2B beneficiaries.

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 peak-load need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

In the instant petition, the petitioner provides no explanation of the temporary or seasonal nature of the employment. The I-129 petition simply states that the beneficiaries would be employed within a forty mile radius of Jacksonville, Florida, in Duval County. The petitioner provided no explanation of why landscaping or gardening work done in a moderate to semi-tropical climate would be viewed as a one-time occurrence, seasonal, temporary, or intermittent. Without more persuasive testimony, the petitioner has not established the criteria of 8 C.F.R. 214.2(h)(6)(ii)(B).

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. Here, the petitioner has not met that burden.

**ORDER:** The director's April 21, 2003 decision is affirmed. 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 2.