

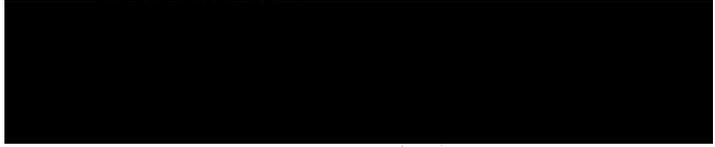
DATA

U.S. Department of Homeland Security

Citizenship and Immigration Services

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



FILE: WAC 02 192 53020

Office: California Service Center

Date: **OCT 29 2003**

IN RE: Petitioner:
Beneficiaries



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:



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 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 found not to be readily approvable by the Director, California Service Center. Therefore, the director properly served the petitioner with notice of his intent to deny the visa petition and his reasons therefore, and the director ultimately denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the business of landscape maintenance. It desires to employ the beneficiaries as landscape laborers for eight 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 petitioner had not submitted sufficient countervailing evidence to overcome the objections of the DOL.

On appeal, counsel states that the job is definitely temporary and the employer does not have an ongoing need for the occupation.

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. Counsel for the petitioner also states that the company has a peakload temporary seasonal need for labor that cannot be found in the United States.

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 regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) states that for the nature of the petitioner's need to be a peakload need, the petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

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

Worker maintains grounds performing any combination of the following tasks while working under close supervision. Cuts lawns using hand and power mowers. Trim and edges lawns and flowerbeds using clippers, weed cutters and edging tools. Cleanup and weeding, planting, spreading mulch, and using wheelbarrows and shovels. Water lawns using hoses and sprinklers. Rakes and blows leaves.

In the DOL's denial of certification, it explains that the certification could not be issued because the employer provided conflicting information regarding its seasonal need. The DOL's decision states that the employer's letter, dated June 4, 2001, indicates that the need for temporary workers is from July 25th through December 31st each recurring year. The time of year in which temporary workers are not needed is from January 1st through July 24th. The decision goes on to state that the employer's current application, received March 13, 2002, indicates that the temporary need is from March 1st through October 31st each recurring year. The specific period of time during each year in which the services are not needed is November 1st through February 28th. Therefore, DOL determined that the employer does not have a seasonal need for temporary workers, and that the petitioned job is considered permanent, as is the employer's need.

Counsel explains in his letter, dated June 18, 2002, that, in accordance with the General Administration Letter (GAL) No. 1-95, the application cannot be filed any later than 60 days before the labor certification is needed. The employer filed with the State Employment Security Agency (SESA) on April 30th and could not apply for any date earlier than July 1st due to the not later than 60-day requirement. Counsel states that the employer was just asking for the remaining portion of the 2001 seasonal need on that application.

Upon review, counsel does not explain why the employer needed the remaining portion of the 2001 season if no work is performed from November through December. The two applications together establish the petitioner's need for the beneficiaries' services to be ten months. Therefore, the petitioner is only operating two months without having to supplement its permanent staff. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Therefore, the petitioner has not overcome the objections of the DOL.

The petition cannot be approved for another reason beyond the director's decision. The regulation at 8 C.F.R. § 214.2(h)(2)(iii) states in pertinent part:

Named beneficiaries. Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Bureau's Headquarter. . . .

The petitioner states that he cannot provide names because he is not 100 percent sure that all of the aliens will be able to work during the period of need. However, the petitioner has not presented an emergent situation or clearly described its business reasons as to why the beneficiaries are unnamed. The petitioner has not presented an emergent situation that would allow the director to waive the names of the temporary nonagricultural workers at the time of filing. For this additional reason, the petition may not be approved.

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 appeal is dismissed.