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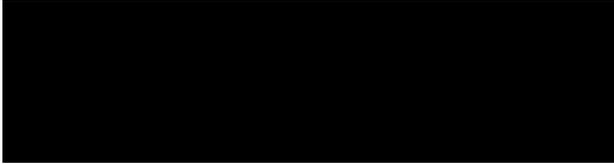
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U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536

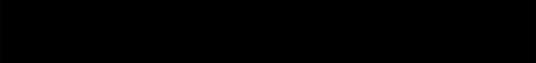
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**U.S. Citizenship  
and Immigration  
Services**



FILE: SRC 03 032 51119 Office: TEXAS SERVICE CENTER Date: **FEB 24 2004**

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: Self-represented

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

The nonimmigrant visa petition was approved by the Director, Texas Service Center, and certified to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn, and the petition will be denied.

The petitioner engages in the landscaping business. It desires to employ the beneficiaries as landscape transplanters for four and one-half months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner has not established a temporary need. The director determined that the petitioner's need for temporary workers had been substantiated and approved the petition.

On notice of certification, the petitioner did not submit any additional evidence. Therefore, the record is considered complete.

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 petition indicates that the employment is seasonal and the temporary need recurs annually.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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 nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Moves soil, equipment and material, digs holes, and related duties to assist landscape gardener in landscaping grounds by transplanting trees and plants: digs holes for plants and trees using pick and shovel. Places plants and trees in holes, and adds dirt (soil) to fill holes. Attaches wires from planted trees to stakes to support trees. Waters plants and trees using hose.

In its decision, the DOL determined that the petitioner had not provided sufficient documentation to establish a temporary need for such workers during 11/01/02 thru 3/31/03 based on a seasonal need. The DOL determined that the same type of workers would be needed after the dormant season to perform the other landscape services that the employer provides to its customers. The DOL also determined that the job offer is for permanent employment.

The agent for the petitioner indicates in his letter, that for this particular company, this job is and always has been a temporary seasonal peakload job for the winter months. The agent states that the company does not have a permanent year-round job for winter transplanting laborers. The agent goes on to state that the employer's need is only for the winter months, as transplanting cannot be performed during the warm months.

The ETA-750 indicates that the beneficiaries will work at various locations within a 40-mile radius of an office that is located in St. Lucie, Florida. The petitioner has not shown that its need for transplanting laborers in this area of the United States is a seasonal need and temporary.

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.

**ORDER:** The director's decision is withdrawn. The petition is denied.