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U.S. Citizenship
and Immigration
Services

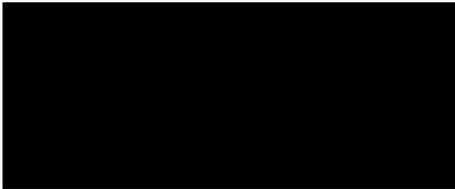


FILE: SRC 02 244 50109 Office: TEXAS SERVICE CENTER Date: FEB 24 2004

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

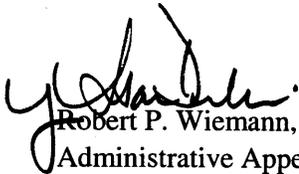
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:



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

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn, although the petition is now moot.

The petitioner engages in reforestation. It desires to employ the beneficiaries as forest products gatherers for ten 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 Department of Labor.

On notice of certification, neither counsel nor the petitioner presents any additional evidence.

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:

Gather pine needles and pinecones into piles. Pack straw into bales using a box baler, tie and stack bales. Workers will remove small debris putting them in small bales to maintain the quality of the product. May pick ripe pinecones from trees.

In its decision, the DOL determined that the employer had not established a temporary need. The DOL stated that the employer did not provide any explanation or documentation to establish its seasonal need and why this activity can only be performed during the specified period. The DOL decided that without appropriate documentation, the activity could be performed year round. Further, the DOL noticed that the original

application listed the temporary seasonal needs as June 1, 2002 thru February 28, 2003. The DOL stated that there is no explanation in the record regarding how a seasonal need can change from June 1, 2002 thru February 28, 2003 to August 15, 2002 thru June 16, 2003. The director concurred with the decision made by the DOL.

Upon review, the record does not support the director's decision. The petition indicates that the dates of intended employment are from August 15, 2002 until June 15, 2003. The petitioner explains in a letter that the workers are being hired to gather pinecones for seed. The petitioner states that pinecones have a short season, between August and November, when they can be picked for seed, before the pinecones open up all the way, and the seeds fall out. The workers will also gather pine straw, the annual needle drop of pine trees, for mulch. Although the needles fall throughout the year, the petitioner states that the heaviest shedding occurs in September, October and November. The petitioner also states that the pine needles are harvested up until mid-June before the straw starts to decompose. Neither the statute nor the regulations limits a petitioner to one temporary need, if the petitioner can establish that another temporary need exists during the same calendar year. The petitioner has shown that the need for the beneficiaries' services is a seasonal need and temporary.

In regards to DOL's concern about the different dates on the applications, the petitioner explains that it was done inadvertently; June 1, 2002 thru February 28, 2003 are the dates for planting tree seedlings. Accordingly, the petitioner has overcome the objections expressed in the DOL's decision.

The regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) states that if a petition is approved after the date the petitioner indicates that the service will begin, the approved petition and approval notice should show a validity period commencing with the date of approval and ending with the date requested by the petitioner.

The petition should have been approved for the requested time period. To sustain this appeal would have no practical effect because the period of requested employment has now elapsed. Therefore, the issue in this proceeding is moot.

ORDER: The director's August 27, 2002 decision is withdrawn, although the petition is now moot.