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FILE: EAC 05 052 52643 Office: VERMONT SERVICE CENTER Date: **AUG 10 2005**

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:

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

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and 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 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 provided any evidence that would overcome the concerns addressed in the Department of Labor's decision and denied the petition.

On appeal, the petitioner submitted an explanation regarding the objections made by the DOL.

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 shall 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 that 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:

Mow, cut, edge lawns, rake and blow leaves, haul mulch and topsoil. This is an entry-level position. Will train.

In its final determination notice, the DOL determined that based on the information, it did not appear that an employer actually exists and that a bonafide job opening currently exists to which United States workers can be referred. The DOL also determined that it did not appear that the employer could meet the salary requirements.

The regulations at 8 C.F.R. § 214.2(6)(iv) states in pertinent part:

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of United States workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification.

Upon review, the petitioner has provided an adequate explanation to overcome one of the concerns addressed in the DOL's decision. In its rebuttal letter the petitioner states that the petitioning entity, JCR Landscape Design and Construction, is a newly established company. The petitioner's statement is substantiated by documentation that shows the petitioning entity is a registered business located at the address listed on the petition. Therefore, the DOL's objection regarding the bonafides of the petitioner's business has been overcome. However, the petition cannot be approved for another reason.

The petitioner has not submitted any financial evidence to show it could meet the wage requirements as stated by the Secretary of Labor. The petition indicates that the petitioner currently employs seven employees. The petition indicates that the petitioner intends to hire 27 additional employees. Absent appropriate evidence, the petitioner has not established that it could meet the wage requirement specified on the temporary labor certification.

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 met that burden.

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