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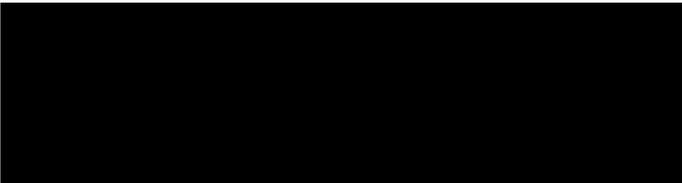
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE: EAC 04 033 54645 Office: VERMONT SERVICE CENTER Date: JUL 25 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [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:
[Redacted]

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 director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In order to employ the beneficiary as a stone mason for a period of ten months, the petitioner, a masonry firm, endeavors to classify the beneficiary as a temporary nonagricultural 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).

The director denied the petition, stating that the petitioner had failed to establish that its need for the beneficiary's services was temporary, stating the following:

The position of stone mason is traditionally one performed in the warmer summer months. If the work can be performed in the winter, the job could not qualify in the H[-]2B classification as it would be considered year round employment. However, if it could be demonstrated that the beneficiary is needed for a short term, one time project or contract then the job could qualify. In response to the request for additional evidence, you have submitted several contracts. None of the contracts is large or would indicate that stone masons are required to fill a shortage and complete the project. You have also stated that your 'season' covers the entire period from January through November. In other words, you do not have a particular contract or assignment for the beneficiary and he will be needed throughout the 11-month period being requested. Therefore, you have failed to establish that the position of stone mason in this case fits one of the four definitions listed above so it does not qualify in the H[-]2B classification.

On appeal, counsel contends that the director erred in denying the petition, stating the following:

Stone Masonry is a very specialized type of work that must be performed at very specific times of the year. Because of this, tremendous short-term employment needs are placed on the business. Due to the fact that the work is being performed in the Northeast, the petitioner is limited to working from mid to late January until early November, weather permitting. Additionally, because of the fact that the work is not done on a year-round basis, it is difficult to find Stone Masons, a dying profession as it is, who are willing to work on a part-time basis. Most Stone Masons only prefer to work on a full-time basis.

The statute at section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(ii)(b), defines an H-2B temporary worker as an alien:

[H]aving 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.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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).

While the petitioner may have a seasonal need for the services of the beneficiaries, the petitioner here has not met its burden of proof. No financial documentation such as tax or sales receipts are submitted. While the record does contain a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, this document covers the petitioner's economic activity for an entire year and does not reflect monthly variations that would allow the AAO to determine whether the petitioner's monthly changes in revenue reflect any seasonal variations.

Nor do the contracts submitted by the petitioner support the contention that its need is seasonal. Of the four contracts submitted, only one is of a duration that would support the petitioner's contention that its need is seasonal. The other three contracts are for periods of short duration only.

Finally, the AAO notes that there are inconsistencies in the record regarding the seasonal nature of the petitioner's need. On the Form I-129 and ETA-750, the period of need is listed as January 1 through November 1. This period of time is consistent with counsel's appellate brief. However, the petitioner's letter submitted on appeal states that the period of need is late February through late November: "[W]e only operate for that defined period and must completely shut down from the end of November to the end of February." One of the contracts states that if the weather permits, work on the project will begin in mid-January, if weather permits. Another contract states that if the weather permits, work on the project will begin on January 5, if weather permits. Another states that if the weather permits, work on the project will begin on January 12. A statement that work may resume in January, if the weather permits, is not consistent with the statement that the business is "completely shut down" during that time.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, it is unclear to the AAO why, if the work may be done in November, January, and February if the weather permits, why such work cannot also be done in December, if the weather permits. If there is a seasonal drop off in work during this time period, it has not been established by the petitioner.

Therefore, the petition must be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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