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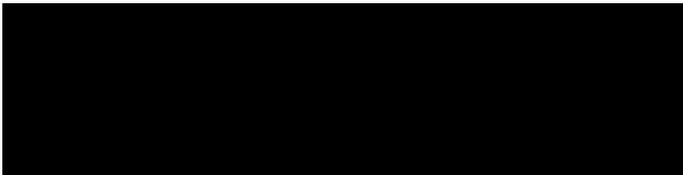
FILE: LIN 04 094 53374 Office: NEBRASKA SERVICE CENTER Date: JUN 14 2005

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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in the landscape services business. It filed this H-2B petition in order to employ the beneficiaries as landscape laborers for the period March 1, 2004 to December 31, 2004. The certifying officer of the Department of Labor (DOL) declined to issue a labor certification, and the director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the objections stated in the DOL notification of why a temporary labor certification cannot be made.

On appeal, counsel submits a letter and documentary exhibits.

On the application for temporary labor certification the petitioner described the proposed employment as follows:

Trimming; mowing; gardening; landscaping; install[ing] and maintain[ing] landscape; planting trees, shrubs and perennials; weeding; and seeding.

The governing statute, 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

In conformity with this statute, the pertinent part of the regulation at 8 C.F.R. § 214.2(h)(6)(i) limits H-2B nonagricultural temporary workers to those aliens who are "coming temporarily to the United States to perform temporary services or labor" but "not displacing United States workers capable of performing such services or labor." If the petitioner receives a notice from the Department of Labor (DOL) that certification cannot be made, a petition containing countervailing evidence may be filed with the director, as the petitioner has done here. The countervailing evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. 8 C.F.R. § 214.2(h)(6)(iv)(D).

The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation in the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence. 8 C.F.R. § 214.2(h)(6)(iv)(E).

According to his notice of determination, the DOL certifying officer declined to issue a temporary labor certification because he found that the petitioner's requirement of six months' work experience in landscaping is one which "preclude[s] consideration of U.S. workers or which otherwise prevent[s] their effective recruitment"

by being "unduly restrictive." In particular, the certifying officer stated that the petitioner's experience requirement exceeded the DOL specific vocational preparation (SVP) time for landscape laborers by five months.

On appeal, by a letter dated April 7, 2004, and allied documentary exhibits (A through F), counsel contends that the petitioner's requirement of six months' experience is reasonable, necessary, and not unduly restrictive. Counsel asserts that the labor involved in the type and quality of services provided by the petitioner is "much more involved than what the US DOL allows for their very general category of 'Landscape Laborer.'" Counsel also notes the results of the petitioner's newspaper advertisements, suggests that DOL's decision not to issue a temporary labor certification is inconsistent with the earlier processing of the application for the certification, and maintains that the evidence of record establishes that the petition should be approved.

Based upon its review of the entire record of proceeding, including all the evidence presented by the petitioner and by counsel in support of the petition, the AAO has determined that the director's decision was correct. The petitioner has not established that its requirement for six months' work experience is not unduly restrictive, as stated by the DOL certifying officer, or, in the terminology of 8 C.F.R. § 214.2(h)(6)(iv)(D), that the experience requirement is a term or condition of employment that is consistent with the nature of the occupation, activity, and industry in the United States.

The AAO notes in particular that the record lacks documentary evidence to substantiate the petitioner's claim that its work cannot be performed without six months' experience, and that its work is more demanding than the landscape laborer upon which the DOL's SVP of 30 days was based. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Also, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Neither the job descriptions, annotated photographs, business brochure, nor any other evidence of record establishes a need for six month's work experience.

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 met that burden.

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