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U.S. Citizenship
and Immigration
Services

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JUN 15 2005



FILE: LIN 04 224 51968 Office: NEBRASKA SERVICE CENTER Date:

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:



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 petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, because the evidence indicates that the petition should have been granted. The petition will be denied as moot, because the period of employment for which the petition was filed has elapsed.

The petitioner, a company that is engaged in pest control, lawn care, and holiday decorating, filed an H-2B petition in order to employ the beneficiaries as Christmas-season decorators, for the period October 1, 2004 to January 30, 2005. Filed with the petition was a temporary labor certification issued by the Department of Labor for that employment. As the basis of his decision to deny petition, the director stated findings that: (1) the proffered employment is both seasonal and peakload; (2) the petitioner has not established that its need for services or labor is peakload; (3) the petitioner has not established that the beneficiaries would be employed continuously and solely as decorators for the time period in question.

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. . . .

Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary. 8 C.F.R. § 214.2(h)(6)(ii)(A). 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).

At section 2 of the Form I-129 Supplement H, the petitioner checked the box that indicates that the employment is seasonal and recurrent annually.

At section 13 of Part A of the ETA 750 (Application for Alien Employment Certification), the petitioner described the proposed employment as follows:

Installation and removal of lights and decorations on buildings, halls, houses, and trees. String and connect electric wiring and lights. Hang decorations in [sic] working from ladders or elevated truck platforms. May construct framework to support displays, using woodworking

machines and handtools. Involves bending, stooping, lifting, and stretching on a frequent basis. Must be able to lift 75 pounds. This is an entry-level position. No experience [is] necessary.

Upon consideration of the entire record, including the brief and associated documents submitted on appeal, the AAO has determined that the petitioner satisfied the regulatory requirements at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) for classification of aliens as seasonal H-2B temporary nonimmigrant workers. The evidence of record demonstrates 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 has specified a period of time that is limited to and not inconsistent with the Christmas-decorating season. The record contains sufficient evidence to establish that the Christmas-decorating duties are distinct from the pest-control and lawn-care aspects of the petitioner's business, and that peakload is not the appropriate regulatory standard for the facts in this proceeding. The totality of the evidence sufficiently demonstrates that the beneficiaries would be employed as stated in the petition and the allied ETA 750. The petitioner met the burden of proof placed solely upon it by section 291 of the Act, 8 U.S.C. § 136.

As just discussed, the petition should have been approved. However, the regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) provides that, if a petition is approved after the date the petitioner indicated that the services would begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner. As the end-date of the period for which the aliens' services were specified in the petition has passed, approval of the petition at this time would be inconsistent with the regulation, and it would have no practical effect. Therefore, the petition will be denied as moot.

ORDER: The director's decision of September 3, 2004 is withdrawn. The petition is denied, because the matter is moot due to the passage of time.