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

U.S. Citizenship and Immigration Services

D4

[redacted]

FILE: LIN 05 042 51884 Office: NEBRASKA SERVICE CENTER Date: MAR 28 2005

IN RE: Petitioner: [redacted]
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:

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

The petitioner engages in the construction, remodeling and maintenance of golf courses. It desires to employ the beneficiaries as groundskeepers 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 countervailing evidence provided had not overcome the concerns addressed in the Department of Labor's decision and denied the petition.

On appeal, the petitioner submits a written explanation and evidence as to its need for temporary workers for consideration.

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:

> Duties include but are not limited to maintain grounds using hand or power tools or equipment. Workers typically perform a variety of tasks, which may include any combination of the following: sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation, irrigation systems installation and concrete work for cart path

> installation. Hours are irregular and work may begin early mornings before daylight or late well past dark. Must pass drug screening test.

In its final determination notice, the DOL states that a certification could not be issued because the employer had not justified the need for an early start date.

In its rebuttal letter, dated December 13, 2004, the petitioner explains that they decided to apply earlier to give their workers time to adjust to the new work environment and attend training meetings and classes on how to work, maintain and use the equipment safely. The petitioner states that they need the workers to be up to speed in about one month so they are ready for when the season picks up.

The petitioner has provided an adequate explanation and sufficient countervailing evidence to overcome the concerns addressed in the DOL's decision. The petitioner's Employer's Quarterly Federal Tax Returns (Form 941) show the employer's increase in staffing and the seasonality of the petitioner's business. The terms and conditions of employment set forth by the petitioner are found to be appropriate for the temporary positions offered. Moreover, sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed and that the need for groundskeepers is seasonal and temporary.

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 sustained. The petition is approved.