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U.S. Citizenship
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FILE: LIN 05 248 50665 Office: NEBRASKA SERVICE CENTER Date: NOV 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 Acting Director, Nebraska 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 reforestation. It desires to extend its authorization to employ the beneficiaries as forestry workers for nine months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could be made. The acting director determined that the petitioner had not established a temporary need for the beneficiaries' services.

On appeal, the petitioner states that its seasonal need changes dates annually due to bids, contracts and weather. The petitioner also states that the extensions are crucial to the disaster areas due to Hurricane Katrina and the necessity of immediacy for trained crews in debris removal and chainsaw work.

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 in pertinent part:

Temporary Laborer

Wage: IN \$8.70 OT \$13.05; OH \$8.50 OT \$12.75

Workers will plant seedling trees to reforest timberlands working in various and adverse weather and terrain conditions. Worker will dig holes for seedlings and pack soil with planting tool. Worker will ensure maintenance of the seedling by spraying and cleaning surrounding vegetation. Required to move or transport up to 50lbs.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

The petitioner's representative states on appeal that the temporary and seasonal needs for companies like ██████████ change from year to year. The petitioner's representative also states that timelines and dates of need are affected annually by weather conditions, bids, contracts and acts of nature. The above cited regulation states in pertinent part that "the employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change. . . ." The petitioner's representative states that the petitioner's downtime will be mid December 2005 through the end of February 2006. The petitioner has not stated that this is the same period of time [December through the end of February] each year that temporary workers are not needed. Therefore, the petitioner has not established that the need for the beneficiaries' services is seasonal and temporary.

The acting director's decision states that Citizenship and Immigration Service's (CIS) records reflect that the petitioner had a prior petition, with receipt number LIN-05-016-51049, that was approved for 130 temporary workers from December 3, 2004 until August 31, 2005. In the current petition, the petitioner desires to extend its authorization to employ 46 of these workers in the United States from March 14, 2005 until December 15, 2005, which would overlap the period allotted in the petitioner's previously approved petition. The AAO notes that the petitioner has made a distinction between its need to have the beneficiaries perform duties for the time period December 3, 2004 until August 31, 2005, and the time period from March 14, 2005 until December 15, 2005. For the latter period, the petitioner is requesting an extension of the beneficiaries' temporary stay because of Hurricane Katrina and the petitioner's involvement in debris removal. The petitioner states that the United States Forest Service contacted ██████████ to provide all its available trained chainsaw operators for debris removal from Jackson to Biloxi, Mississippi. However, the temporary labor certification was certified for the beneficiaries to only perform services or labor in Indiana, Illinois and Ohio. The labor certification would have to list the State of Mississippi in order for the workers to perform services or labor there. While this situation may categorize the petitioner's need as a "one-time occurrence", the regulations require a labor certification for all areas of employment.

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 not met that burden.

ORDER: The appeal is dismissed.