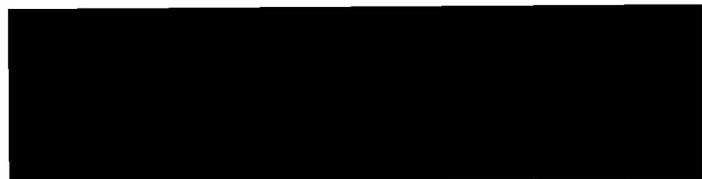


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FILE: SRC 06 121 53722 Office: TEXAS SERVICE CENTER

Date: JUL 19 2006

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: 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director, Texas Service Center. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a landscape maintenance business. It desires to employ the beneficiaries as landscape laborers for ten months pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b). The Department of Labor (DOL) determined that a temporary labor certification could not be issued. The director concurred with the DOL, ruling that the petitioner failed to establish that it had a temporary seasonal need for the beneficiaries' services since it appeared that the petitioner had a year-round need for landscape laborers.

On appeal the petitioner reiterates that it has a seasonal need for landscape laborers and that it cannot fill its temporary need on the U.S. labor market.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(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 regulation at 8 C.F.R. § 214.2(h) provides, in pertinent part, as follows:

(6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B):*

(i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

(ii) *Temporary services or labor:*

(A) *Definition.* 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.

(B) *Nature of petitioner's need.* 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:

(2) *Seasonal need.* The petitioner must establish 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.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states that 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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner seeks approval of the landscape laborer positions as a seasonal need from April 1, 2006 to January 31, 2007. To establish that the nature of its need is "seasonal," the petitioner must demonstrate that it has a recurring need for the temporary services of landscape laborers during specific seasons of the year that cannot be met by its permanent employees and is not a vacation period for them. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Worker maintains grounds performing any combination of the following tasks while working under close supervision. Cuts lawns using hand and power mowers. Trims and edges lawns and flower beds using clippers, weed cutters and edging tools. Cleanup and weeding, planting, spreading mulch, and using wheelbarrows and shovels. Waters lawns using hoses and sprinklers. Rakes and blows leaves. This is an entry level position. No previous experience required. Overtime potential.

The director found that the documentation submitted by the petitioner – including a self-generated list of its weekly payroll during the calendar years 2004 and 2005, as well as five contracts for services to be performed from April 1, 2006 to January 31, 2007 – failed to establish the petitioner's temporary need for landscape laborers because it is not objective and verifiable. The petitioner was requested to submit corroborating documentation in the form of employer quarterly reports (Form UCT-6) and employer quarterly federal tax returns (Form 941) for 2004 and 2005, the director noted, but did not do so. Instead, the petitioner indicated that it utilizes a payroll and staffing agency – Progressive Employer Services – which handles its payroll and tax reporting responsibilities. A list was provided of the petitioner's payroll and dates of payment during 2005, but the director found that it did not establish a payroll activity pattern with period(s) of fluctuation in specific months. The director concluded that the petitioner failed to establish that the proffered position represents temporary employment.

On appeal, the petitioner states that it has 30 permanent employees, but asserts that it also has a need for temporary workers to supplement its seasonal labor needs. Though some of its service contracts are year-round, the petitioner asserts that the bulk of its service contracts are for the ten-month period between

April 1<sup>st</sup> and January 31<sup>st</sup>, thus creating a recurring need for seasonal laborers. The petitioner cites previously submitted evidence – identified as its quarterly state employment tax liability reports for 2004 and 2005, its payroll invoices for 2005, and a graph of its payroll invoices for 2005 – as evidence of its seasonal need for landscape laborers. The petitioner also submits a letter from Progressive Employer Services, which handles the petitioner’s payroll and taxes, explaining the services it provides the petitioner. In accord with the director’s decision, the AAO determines that the petitioner has not established its eligibility for the requested benefit.

Though the petitioner asserts that it previously submitted its quarterly state employment tax liability reports for 2004 and 2005, no such documents are in the record. What the petitioner refers to as its graph of payroll invoices for 2005 is actually a list of week-by-week payments during the year. A list has been submitted for 2004 as well. None of the payroll figures are verified by corroborating documentation, however, and they do not correspond to any figures in the payroll invoice register for 2005 prepared by Progressive Employer Services for the petitioner. No payroll invoice register has been submitted for 2004. Though the payroll invoice register for 2005 and the petitioner’s listing of weekly payroll amounts in 2005 both record lower payments in the months of February and March, relative to the rest of the year, one year’s figures are not sufficient to demonstrate a years-long pattern of a higher need for labor in the other ten months of the year. Going on record without supporting documentation does not satisfy the petitioner’s burden of proof. *See 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)). The record includes copies of five landscape maintenance contracts which the petitioner indicates that it has with various companies, all of which state that they run from April 1, 2006 to January 31, 2007. None of the contracts provides the address of the client companies, however, and all five contracts are signed on behalf of the clients by the same individual, who does not identify her position with the companies. The petitioner has not explained why the same individual has signed these contracts on behalf of five different companies. Based on the foregoing analysis of the evidence, the AAO determines that the documentation of record is not sufficient to establish that the petitioner has a need for temporary landscape laborers from April 2006 through January 2007 to supplement its permanent staff.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director’s decision denying the petition.

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