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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

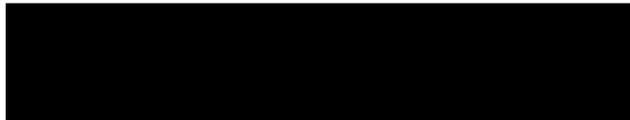
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FILE: EAC 07 189 51185 Office: VERMONT SERVICE CENTER Date: SEP 14 2007

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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The decision of the director will be withdrawn and the petition will be denied.

The petitioner operates a landscaping business. It desires to employ the beneficiaries as landscaper-groundkeepers from April 1, 2007 to November 30, 2007. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the advertisement used to recruit United States workers, which was placed in The News Leader on January 19, 20 and 21, 2007, failed to list the work location, the duration of employment, and the rate of pay. In addition, DOL determined that the recruitment report did not contain the name, address, telephone number and resumes (if submitted to the employer) of each U.S. worker who applied for the job, and that the employer failed to establish a seasonal need.

The director determined that sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the DOL employment policies have been observed, and that the need for the services to be performed is temporary.

On notice of certification, the petitioner did not present additional evidence for consideration. Therefore, the record is considered complete.

Based upon its review of all of the evidence in the record of proceeding, the AAO finds that the petitioner has overcome the grounds of labor certification denial that DOL identified as (1) insufficient evidence of an H-2B temporary need, and as (2) deficiencies in the petitioner's recruitment report. However, the petition may not be approved because the evidence of record fails to overcome the third ground for denial specified in DOL's Final Determination, namely, failure to follow DOL's advertisement requirements.

The regulation at 20 C.F. R. § 655.203 (*Assurances*) states in pertinent part:

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer that:

(d) The employer will cooperate with the employment service system in the active recruitment of United States workers until the foreign workers have departed for the employer's place of employment by[:]

....

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate

Further, at the time relevant to the present petition, the DOL's procedural requirements for processing temporary labor applications were specified in the DOL Employment and Training Administration's General Administration

Letter No. 1-95, *Procedures for H-2B Temporary Labor Certification Occupations* (November 10, 1994) (hereinafter, GAL 1-95). Part IV, paragraph D, of GAL 1-95 states:

The employer shall advertise the job opportunity after filing the application, in a newspaper of general circulation for 3 consecutive days or in a professional, trade or ethnic publication, whichever is most appropriate for the occupation and most likely to bring responses from U.S. workers. The advertisement shall:

1. Identify the employer's name and direct the applicant to report or send resumes to the SESA for referral to the employer;

....

3. Describe the job opportunity with particularity, including the duration of employment;

4. State the rate of pay, which shall not be below [the] prevailing wage for the population;

....

5. State the employer's minimum job requirements.

....

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(E) states:

Countervailing evidence. The countervailing evidence presented by the petitioner shall be writing and shall address availability of United States workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification.

The regulation at 8 C.F.R. § 214.2(h)(6)(vi)(B) requires that the countervailing evidence "rebut [the DOL] notice that certification cannot be made."

The documentation of record does not substantiate counsel's assertion that the petitioner has complied with the DOL advertising requirements for specifying duration of employment, and rate of pay. Counsel has submitted an undated advertisement with the required information, but neither counsel nor the petitioner has submitted documentation that establishes that this undated advertisement was published within the recruitment period preceding the DOL decision on the application for temporary labor certification.

The AAO has considered the undated advertisement that the petitioner has submitted with a Publishing Certificate and an Advertising Receipt pertaining to the publication of a Landscapers/Groundskeepers advertisement in The News Leader for January 19, 20, and 21 2007; and the AAO notes that this advertisement complies with the DOL requirements. However, the record does not establish that this undated advertisement was published prior to the DOL Final Determination. The record's copies of advertisements in The News Leader editions of January 19, 20,

and 21, 2007 – which are contained on tear sheets from the newspaper - appear to be the advertisements referenced by the aforementioned Certificate and Advertising Receipt. Published during the DOL-required recruiting period on the dates referenced by DOL in its Final Determination denying the temporary labor certification application, these tear-sheet copies substantiate DOL's determination that the petitioner's advertisement failed to include the duration of employment and the rate of pay. Accordingly, the evidence does not substantiate the assertions that the petitioner complied with the DOL advertisement requirements. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

The AAO finds that the petitioner has not overcome the DOL finding to the effect that the petitioner had not complied with DOL's requirements with regard to advertising a position during the recruitment period that precedes DOL's final decision on whether or not to issue a temporary labor certification. Consequently, the director's decision will be withdrawn, and the petition will be denied.

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 decision of the director dated July 25, 2007 is withdrawn. The nonimmigrant visa petition is denied.