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U.S. Citizenship
and Immigration
Services

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FILE: SRC 04 043 50504 Office: TEXAS SERVICE CENTER Date: FEB 15 2005

IN RE: Petitioner:
Beneficiaries



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

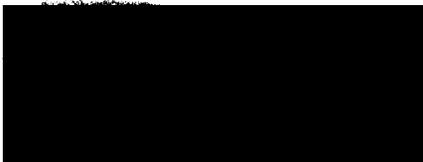
SELF-REPRESENTED

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

cc:



DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas 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 employ the beneficiaries as forestry workers (tree planters) for eight 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 petitioner had not established that its need for the beneficiaries' services is temporary.

On appeal, the petitioner states that tree planting is traditionally tied to a specific season of the year that occurs during the same time frame each year. The petitioner states that it has complied with all the federal regulations in petitioning for workers under the H-2B guidelines.

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 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:

Plant tree seedlings by hand; carries seedlings in pouches, digs holes using mattock or dibble, places seedlings in holes and packs soil around plant. Carries bagged seedlings from truck to planting area. May clear, pile and burn brush and debris to prepare tract for planting. May load

seedlings on trucks for transporting to work site. May collect seed cones. May spray or inject trees, brush and weeds with herbicides.

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.

In this case, the DOL determined that a certification could not be made because the employer had not established a temporary need for the beneficiaries. The DOL states in its decision that the petitioner employs tree planters and forestry workers on a year round basis. The DOL states that a review of the applications filed by the petitioner over the past three years indicates overlapping requests for such workers. The DOL does not make a distinction between forestry workers and tree planters, and therefore, the petitioner cannot establish that another temporary need exists during the same calendar year. Planting trees is one of the varieties of tasks performed by a forestry worker.

Therefore, the petitioner has been shown to have a permanent need for workers to perform forestry services, which is the specific nature of the petitioner's business. The services to be rendered have been shown to be ongoing and the petitioner's need to have additional workers to perform these services cannot be classified as 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 not met that burden.

ORDER: The appeal is dismissed.