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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 228 53642 Office: TEXAS SERVICE CENTER Date: APR 05 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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, Texas Service Center, and certified to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn, and the case remanded for further action and consideration.

The petitioner engages in the business of importing fertilizer from Korea, and raising crops, fruits, and vegetables. It desires to employ the beneficiary as a soil and fertilizer specialist for ten months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need. The DOL also determined that the petitioner had not established the existence of a bonafide job offer.

On notice of certification, the petitioner did not submit any additional evidence. Therefore, the record is considered complete.

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 a one-time occurrence and the temporary need is unpredictable.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Perform chemical analysis on micro-organism content of soil to determine microbial reactions and chemical and mineralogical relationship to plant growth; study the responses of various soil types to fertilizers, tillage practices, and crop rotation; classify soils according to standard types; and make an experiment on Sr-Microsoil fertilizer developed by Kimhae Pig Breeding Farming Association Ltd., Korea, to grow crops, fruits, and vegetables more productively.

The record of proceeding contains the DOL's final determination notification, dated July 15, 2003. The DOL determined that a certification could not be made because the employer had not established a temporary need for the beneficiary and the existence of a bonafide job opportunity. When contacted by the certifying officer, the person answering the telephone stated that Gold Supply is a beauty supply business and that the employer also owned another business.

In a letter, dated August 12, 2003, the petitioner explained that the certifying officer misunderstood and thought that its other company, which engages in beauty supply, was petitioning for the soil and fertilizer specialist. The petitioner states that Gold Supply, which engages in raising crops, fruits, and vegetables, filed the application for temporary labor certification. The petitioner also indicates that its attorney was unable to speak to the officer to make a change.

Upon review, the explanation given by the petitioner is plausible, however, insufficient without additional documentary evidence to substantiate who is the actual employer, and that the job opportunity is valid. Therefore, this case must be remanded so that the director can make a determination as to whether a bonafide job opportunity exists, and that the need is a one-time occurrence and temporary. The director should allow the petitioner time to submit additional evidence in support of the petition, and may also request any additional evidence deemed warranted. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action and consideration consistent with the above decision and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.