identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

JUN 21 2004

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 210 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the service center that processed your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status as a group 2 special agricultural worker was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because it was determined the applicant's employment consisted of landscaping duties, which do not constitute qualifying agricultural employment.

On appeal, the applicant asserted that his work for Rodriguez Landscaping consisted of working with sod which, according to the applicant, conforms to qualifying agricultural employment.

Although a Notice of Entry of Appearance as Attorney or Representative (Form G-28) has been submitted, the individual is not authorized under 8 C.F.R. § 292.1 or § 292.2 to represent the applicant. Therefore, this decision will be furnished to the applicant only.

An applicant must have engaged in qualifying agricultural employment, which has been defined as "seasonal agricultural services," for at least 90 man-days during the twelve-month period ending May 1, 1986, pursuant to 8 C.F.R. § 210.1 (h).

Section 210(h) of the Act, 8 U.S.C. 1160, defines "seasonal agricultural services" as the performance of *field work* related to the planting, cultural practices, cultivating, growing, and harvesting of fruits and vegetables of every kind *and other perishable commodities*, as defined in regulations by the Secretary of Agriculture.

According to 7 C.F.R. § 1d.7, "other perishable commodities" means those commodities which do not meet the definition of fruits or vegetables, that are produced as a result of seasonal field work, and have critical and unpredictable labor demands. "Horticultural specialties," or nursery products as defined in 7 C.F.R. § 1d.6 are included as other perishable commodities due to their reliance on seasonal and labor intensive field work.

"Field work" means any employment performed on agricultural lands for the purpose of planting, cultural practices, cultivating, growing, harvesting, drying, processing, or packing any fruits, vegetables, or other perishable commodities. 7 C.F.R. § 1d.4.

"Agricultural lands" means any land, cave, or structure, except packinghouses or canneries, used for the purpose of performing field work. 7 C.F.R. § 1d.2.

Clearly, nurseries are agricultural land because they are used for the purpose of performing field work in perishable commodities, namely horticultural specialties. Thus, it is possible for an alien who engaged in field work activities as defined above with horticultural specialties in a nursery to qualify for temporary residence, as he was engaged in field work on agricultural land. On the other hand, an alien who worked with horticultural specialties as a *landscaper* on commercial and residential properties would not qualify because such properties are not agricultural land, as they are not used for the purpose of performing field work. While the *purpose* of a nursery is the production of horticultural specialties, the same cannot be said of yards and other properties on which landscaping takes place.

The applicant, on his Form I-700 application, claimed to have performed nursery work with juvenile trees, plants and shrubs for L. Rodriguez Landscaping at Garcia's Nursery in Denver, Colorado, as follows:

- Over 90 man-days from May 1983 to May 1984;
- Over 90 man-days from May 1984 to May 1985; and
- Over 90 man-days from May 1985 to May 1986.

In support of his claim, the applicant submitted an I-705 affidavit and separate employment letter, both signed by [redacted] of L. Rodriguez Landscaping.

The applicant's employment from May 1983 to May 1985 is non-qualifying, as it occurred prior to the group 2 twelve-month eligibility period ending May 1, 1986. The applicant also submitted an employment letter from [redacted] of Richlawn Turf Farms, Inc., indicating the applicant was employed at that concern from May 1980 to November 1982. However, this employment is similarly non-qualifying as it occurred outside the twelve-month eligibility period.

Subsequently, the applicant submitted an employment affidavit from [redacted] of Colorado Turf, Inc.. In her affidavit, Ms. [redacted] stated that, from March 15, 1985 to November 15, 1985, the applicant performed seasonal planting, maintenance and harvesting of sod at her establishment under the supervision of a subcontractor. However, the affiant does not identify the name of the subcontractor. Nor does she specify how may man-days the applicant performed during this period. Furthermore, as the affiant, Ms. [redacted] did not herself supervise the applicant or oversee his work, she cannot be said to have had direct, specific knowledge of the applicant's employment. Without this information, the affidavit from Ms. [redacted] is of little or no value.

On June 29, 1989, the district director concluded the applicant had performed only landscaping duties, and denied the application. The district director, in his decision, also indicated that the owner of [redacted] Nursery, Mr. [redacted] had informed officers of the Immigration and Naturalization Service or the Service (now, Citizenship and Immigration Services or CIS) that her nursery operation was primarily engaged in providing landscaping services. Mrs. [redacted] further stated that they would only have used workers from L. [redacted] Landscaping to supplement their own landscaping staff and that no workers provided by L. [redacted] would have worked as many as 90 man-days. *Landscaping,* as noted previously in this decisional order, is generally performed on commercial and residential properties and does not constitute qualifying agricultural employment as such properties are not agricultural land and are not used for the purpose of performing field work.

On appeal, the applicant disputed the information provided by the owner of Garcia's Nursery, and reaffirmed his claim to have in excess of 90 man-days for that concern during the period in question. In addition, the applicant asserted that his work for [redacted] Landscaping consisted of working with sod, and that employment with sod conforms to qualifying agricultural field work. In support of this assertion, the applicant submitted a photocopy of Service Legalization Wire CO-1588-C dated October 4, 1988. This

communication references a September 26, 1988 ruling from the Northern District Court of Illinois ordering the Service to permit those aliens claiming to have engaged in field work with sod during the qualifying period to file skeletal I-700 applications. Contrary to the applicant's assertion on appeal, this wire does not set forth any determination on whether or not employment with sod actually conforms to qualifying agricultural field work.

Sod is defined in Webster's II New Riverside University Dictionary as "an area of grass-covered surface soil held together by matted roots." Since the inception of the SAW program, the Department of Agriculture has consistently viewed employment with sod to be non-qualifying, since such commodity does not equate to a fruit, vegetable or other qualifying *perishable* commodity, as specified in 7 C.F.R § 1d.7. Moreover, subsequent to the Service's issuance of Legalization Wire CO-1588-C, the U.S. Court of Appeals for the Seventh Circuit on December 18, 1991 decided the case of *Morales v. Yeutter*, 952 F.2d.954 (7th Cir. 1991), also known as the ***sod litigation case***, in which it found in favor of the Department of Agriculture's ruling that sod *not* be included in the definition of "other perishable commodities." Thus, an applicant *cannot* qualify as a special agricultural worker based on a claim to have worked with sod.

The applicant's employment during the eligibility period consisted of work for L. Rodriguez Landscaping. While the applicant indicated his work was performed for Garcia's Nursery, there is no clear indication that the applicant engaged in qualifying nursery duties. Rather, based on information provided by the owner of Garcia's Nursery, it is concluded the applicant performed landscaping duties on commercial and residential properties belonging to clients of the nursery. As stated above, such commercial and residential properties are not "agricultural land," as they are not used *for the purpose of* raising perishable commodities. As such properties are not agricultural land, it cannot be held that the landscaping duties performed on them constitute "field work."

The applicant has, therefore, failed to establish the performance of at least 90 man-days of qualifying agricultural employment during the twelve-month eligibility period ending May 1, 1986.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.