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U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 153 54602 Office: NEBRASKA SERVICE CENTER

Date: JAN 05 2009

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.

La Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn although the petition is now moot.

The petitioner engages in landscape maintenance. It seeks to employ the beneficiaries as landscape laborers for nine months. The Department of Labor determined that a temporary certification by the Secretary of Labor could be made. The director determined that the petitioner had not established a temporary need for the beneficiary's services. The director also determined that the petitioner did not submit evidence that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand, nor that the temporary additions to staff will not become a part of the petitioner's regular operations. Further, the director determined that the petitioner did not specify the period of time during each year that it does not need the services or labor.

On appeal, the petitioner states that it has two different seasonal needs, and therefore, the need is temporary.

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 must 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).

In its decision, the director determined that the petitioner did not submit evidence that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand, nor that the temporary additions to staff will not become a part of the petitioner's regular operations. However, this reference by the director refers to when the petitioner's need for the services or labor is a peakload need. 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:

Work under close supervision performing.....

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

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 can be justified.

The petitioner's need does not include the winter season. In a letter, dated August 21, 2003, the petitioner states that the specific period of time during each year that it does not need the labor or services is December 1, 2004 through February 28, 2005. The duties or services to be performed by the beneficiaries pertain strictly to landscaping. Although the petitioner may have filed overlapping petitions, there is no statute or regulation that limits a petitioner to one temporary need, if the petitioner can establish that another temporary need exists during the same calendar year. In this case, the petitioner has established a distinct seasonal need for the beneficiaries' services and the services have been shown to be temporary.

The regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) states that, if a petition is approved after the date the petitioner indicates that the service will begin, the approved petition and approval notice should show a validity period commencing with the date of approval and ending with the date requested by the petitioner.

The petition should have been approved for the requested time period. To remand this case to the director would have no practical effect because the period of requested employment has passed. Therefore, the petition must be denied.

ORDER: The petition is denied because the matter is moot due to the passage of time.