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U.S. Citizenship and Immigration Services

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FILE: EAC 06 037 51161 Office: VERMONT SERVICE CENTER Date: APR 05 2006

IN RE: Petitioner:
Beneficiary: [redacted]

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 Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a general construction company that engages in the building and designing of commercial buildings and residential houses. Counsel also states that the petitioner engages in the business of landscape and ground maintenance. It desires to extend its authorization to employ the beneficiary as a construction carpenter for six months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established a temporary need for the beneficiary's services.

On appeal, counsel states that the petitioner's need for workers is temporary and there were no workers available to do the job. Counsel also states that a brief and/or evidence will be submitted to the AAO within 30 days. To date, no brief and/or evidence have been submitted. 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 peakload and that the temporary need recurs annually. Counsel also states that the petitioner's need meets the criteria for a "seasonal" need as the job opportunities to perform landscaping could only be performed during the spring, summer and fall.

To establish that the nature of the need is "peakload," the petitioner must demonstrate that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are 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:

- Carpenters construct, erect, install and repair structures made of wood and metal, wood and metal products, and wood or metal subs following local building codes.
- Mark cutting and assembly lines on material.
- Cut and shape materials to prescribed measurement using hand and power tools.
- Assemble, fasten and install materials.
- Lay floors and build stairs.
- Erect roof and form work of concrete.

The job description does not mention that the beneficiary will be performing duties that involve landscaping or ground maintenance although counsel states it is a part of the petitioner's business.

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.

Counsel explains in her letter dated November 15, 2005 that the petitioner previously petitioned for temporary workers for the months of April 2005 to November 2005. The record of proceeding contains an approval notice for eight temporary workers to perform services for the petitioning entity from June 15, 2005 through October 31, 2005. Counsel continues by stating that the project these workers were supposed to complete is halfway finished. In order to complete this project, counsel contends that the petitioner needs to extend its authorization to employ the beneficiary from November 2005 to May 2006.

The U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states in pertinent part: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project . . ." Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business.

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload in the construction business. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or has different specialty skills than the workers currently employed by the company. The petitioner has not provided evidence of its permanent staff and the construction contract showing a clear termination date.

Moreover, the services to be performed by the beneficiary are ongoing and the petitioner's need to have an additional worker to perform these services has not been shown to be a seasonal need. The petitioner has not submitted any contractual and/or financial evidence to demonstrate that its business activity has formed a

pattern where its needs for construction workers are traditionally tied to a season of the year and will recur next year at the same time. Simply 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)).

Furthermore, the petitioner states in its letter, dated October 25, 2005, that ". . .TLH Construction Company has a major staffing shortages [sic] because of the nature and operation of the business and seasonal needs of the workers. We simply can't recruit enough workers to meet our needs." If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Absent evidence of the petitioner's "peakload" or "seasonal" situation to justify its need for the beneficiary's services, this petition cannot be approved.

As always, 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. The petition is denied.