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U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 05 054 50691 Office: TEXAS SERVICE CENTER Date: MAR 08 2005

IN RE: Petitioner:
Beneficiaries [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 approved by the Director, Texas Service Center, who certified her decision to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(*2*)(*ii*). The decision of the director will be withdrawn and the matter will be remanded to the director for further action and consideration.

The petitioner operates a construction business. It develops property on a contract basis. It desires to employ the beneficiaries as laborers for ten months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the employer submitted an insufficient Application for Alien Employment Certification (Form ETA 750). In its decision, the DOL stated that the form must be submitted front to back and two copies are required. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

Upon review, the AAO concurs with the director's decision. The record contains two copies of the Form ETA 750 and two copies of the DOL's Final Determination notice, dated December 8, 2004, that states the ETA 750 has not been certified. It appears that the petitioner has complied with the regulations as the ETA 750 was filed prior to the petition's filing date, December 17, 2004. However, the petition cannot be approved for another reason. The petitioner has not established that its need for the beneficiaries' services 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 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 that 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:

> Heavy lifting, manual labor, using shovels and picks, cleaning.

The petitioner explains in his letter that the workers are needed to perform manual labor such as framing houses, using wheelbarrows, heavy lifting, hand cleaning and removal of trash from the job site. The petitioner states that over the past few years it has experienced a shortage of laborers during it months of highest production requiring the company to subcontract. The petitioner also states that its requested additional workers in order to timely perform its contracts when the weather is most accommodating. The workers will work at different job sites; three sites are in Spring, Texas, and one site is in Tomball, Texas.

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, counsel on behalf of the petitioner states that the petitioner needs the services of the beneficiaries to fulfill its workload requirements. In a letter signed by the president and owner of the petitioning entity, he states that the beneficiaries will be performing manual labor (as stated in the nontechnical job description). The president states that it regularly employs full-time construction workers to fulfill its contracts. The petition indicates that the petitioner's current number of employees is five. The president also states that as a construction company, it has observed that the rain and cold interferes with production in mid November, December and early January. The president further states that the company needs to timely perform its contracts when the weather is most accommodating. However, the petitioner has not submitted any contracts that show that its workload has formed a pattern where its months of highest productions are traditionally tied to a season of the year and will recur next year on the same cycle. The petitioner has not provided evidence of its permanent staff and the new housing project contracts showing a clear termination date. Absent such evidence, the petitioner has not justified its temporary need for the beneficiaries' services.

Further, the petitioner states that it has experienced over the past few years a shortage of laborers during its months of highest production. This has required the company to subcontract. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Moreover, the beneficiaries will be performing services at other work sites. The petitioner needs to show that it remains the employer regardless of the work site.

Since these deficiencies were not mentioned in the director's decision, this case will be remanded in order to give the petitioner an opportunity to submit any additional information or evidence that the director deems necessary to adjudicate the matter at hand. The director may also request additional evidence that is pertinent to the adjudication of this case. 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 decision of the director dated February 16, 2005 is withdrawn. The matter is remanded to the director for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.