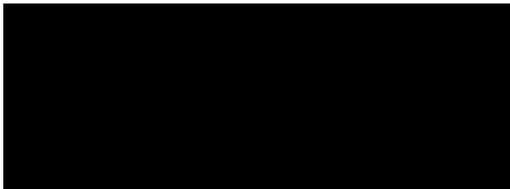




U.S. Citizenship
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Services

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FILE: LIN 04 178 52322 Office: NEBRASKA SERVICE CENTER Date: OCT 19 2005

IN RE: Petitioner: [Redacted]
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:

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.

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 appeal will be dismissed.

The petitioner engages in the business of reforestation. It desires to extend its authorization to employ the beneficiaries as forestry laborers for six months. The Department of Labor (DOL) 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 beneficiaries' services.

On appeal, the petitioner states that it is dependent on an adequate labor workforce for its Louisiana and Northwest contracts. The petitioner also states that in the reforestation industry, foreign workers under the H-2B program are its only hope for a labor workforce to fulfill its contracts.

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 in pertinent part:

Temporary Forestry Laborer

Stoop to plant seedlings to reforest timberlands, dig holes for seedlings, pack soil around seedling with planting tool, and ensure protective maintenance of seedling by spraying/clearing/ thinning surrounding vegetation. Required to move/transport up to 50lbs

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.

In his decision, the director states that Citizenship and Immigration Service's (CIS) records reflect that the petitioner had a prior petition, with receipt number SRC-04-029-50698, that was approved for 89 temporary workers from December 10, 2003 until August 13, 2004. The petitioner desires to extend its authorization to employ 45 of these workers in the United States from May 25, 2004 until December 1, 2004, which would overlap the period allotted in the petitioner's previously approved petition. The period of requested employment has passed. Nevertheless, the evidence contained in the record of proceeding does not establish the petitioner's need for the beneficiaries' services as temporary. The petitioner has not made a distinction between the duties performed in the prior petition, for the time period December 10, 2003 until August 13, 2004, and the current petition, for the time period May 25, 2004 until December 1, 2004. Therefore, the petitioner has been shown to have a permanent need for workers to perform forestry services year round. The petitioner has not established that another temporary need exists during the same calendar year.

On appeal, the petitioner states that it has annual seasonal contracts in both the Louisiana and Northwest regions as the workers move from one region to the other. The petitioner also states that while the contracts are finishing up in Louisiana, workers are transferring from the South to the Northwest in increments and some are returning home to return again when the Northwest season is at its peak in September. The petitioner explains that all the workers usually return home in mid-November and return after the Christmas holiday. The petitioner has not provided any contracts or other documentary evidence to show that two seasonal needs exist. 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)). Consequently, the AAO concludes that the services to be rendered by the beneficiaries are ongoing and the petitioner's need to have additional workers to perform these services cannot be classified as seasonal and temporary.

The petitioner explains that its sole livelihood is dependent on an adequate labor workforce to fit both its Louisiana contracts and its Northwest contracts. The petitioner also explains that in the reforestation industry, foreign workers under the H-2B program are its only hope for a labor workforce to fulfill its contracts. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

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.