identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B4

FILE: WAC 09 190 51330 Office: CALIFORNIA SERVICE CENTER Date: MAY 28 2010

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be denied, noting that the matter is moot due to the passage of time.

The petitioner is engaged in reforestation and seeks to employ the beneficiaries as forestry and conservation workers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for the period from June 15, 2009 until November 15, 2009. The Department of Labor (DOL) certified a temporary labor certification on behalf of the petitioner for 247 workers for the employment dates of June 15, 2009 until November 15, 2009.

On July 27, 2009, the director denied the petition because the petitioner incorrectly filed one petition for multiple beneficiaries who will be working in different locations.

The issue discussed by the director is whether the petitioner may file one petition for multiple beneficiaries who will be working in different locations. As noted by the petitioner, it now seeks to employ 187 beneficiaries who will work in several different locations.

The regulations at 8 C.F.R. § 214.2(h)(2)(ii) states:

> *Multiple beneficiaries.* More than one beneficiary may be included in an H–1C, H–2A, H–2B, or H–3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time, and in the same location[.] H–2A and H–2B petitions for workers from countries not designated in accordance with paragraph (h)(6)(i)(E) of this section should be filed separately.

In the instant petition, the petitioner stated that the beneficiaries will be located in four states. The petitioner submitted an itinerary of addresses and dates of employment for each location.

The DOL published the "Special Guidelines for Processing H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations," which creates special guidelines as part of the H-2B labor certification process for employers who desire to employ tree planters and related reforestation occupations in the United States. In order to file a labor certification for tree planters or related reforestation occupations, an employer is permitted to file one petition for beneficiaries that will work in locations covering multiple State Workforce Agencies (SWAs) if the petitioner provides certain documentation. In addition, in situations where the worksite locations cover multiple SWAs, the states listed in the itinerary must be contiguous or located within close geographic proximity to one another. Thus, DOL has created a special rule to define a work location for tree planters and reforestation occupations. United States Citizenship and Immigration Services (USCIS) will give deference to DOL's definition of work location for

the specific job for tree planters or reforestation occupations. [1] In the instant case, the petitioner provided all the necessary documentation in order to obtain a labor certification and USCIS will give deference to DOL's definition of location in this matter and thus, the beneficiaries will be working in the same location and AAO will withdraw the director's decision.

However, the petition will be denied because the petitioner did not provide sufficient evidence to establish a temporary need for the beneficiaries' services.

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 regulation at 8 C.F.R. § 214.2(h) provides, in part:

(6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*:

> (i) Petition. (A) H–2B nonagricultural temporary worker. An H–2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.
>
> (ii) *Temporary services or labor*:
>
> (A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.
>
> (B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.

---

[1] USCIS will review DOL's definition of location in order to determine if a petitioner can file one petition for multiple beneficiaries pursuant to 8 C.F.R. § 214.2(h)(2)(ii). USCIS will determine if the work location affects the services provided by the beneficiaries. If the services change at each location, USCIS will need to determine if the beneficiaries are in fact in the same location.

> The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.
>
> *(1) One-time occurrence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.
>
> (*2*) *Seasonal need.* The petitioner must establish 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.
>
> (*3*) *Peakload need.* The petitioner must establish 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.
>
> (*4*) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states 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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

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 petitioner indicates in its statement of temporary need that the employment is seasonal.

To establish that the nature of the need is "seasonal," the petitioner must establish 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*).

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.

The regulations require that a petition for an H-2B petition must be accompanied by a statement describing in detail the temporary situation or conditions which make it necessary to bring the alien to the United States and whether the need is a one-time occurrence, seasonal, peakload, or intermittent. If the need is seasonal, peakload, or intermittent, the statement shall indicate whether the situation or conditions are expected to be recurrent. 8 C.F.R. § 214.2 (h)(6)(vi)(D).

The petitioner did not submit a statement of need with the petition. In reviewing a copy of the temporary labor certification filed with DOL, the petitioner stated its temporary need as "the nature of forestry services demands that trees can only be planted in their dormant state during the spring and early summer. Spray work and vegetation control can only be done while there is live foliage. Both activities are and will remain seasonal. Our contracts, therefore, create a high seasonal demand for our services during that period of time." However, the petitioner has not carefully documented the seasonal situation through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner did not submit one single contract for work during the intended dates of employment. Consequently, the petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. If the petitioner is experiencing a severe and permanent labor shortage, it can be alleviated through the issuance of immigrant visas. Absent evidence of the petitioner's "seasonal" situation to justify its need for the beneficiaries' services, this petition cannot be approved. 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)).

Further, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for forestry and conservation workers to perform the duties described on the Form ETA 750, which is the nature of the petitioner's business, will always exist.

The evidence submitted by the petitioner does not support its claim of a seasonal need for forestry and conservation workers within the meaning of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*). Thus, the petitioner will be denied on this basis.

It is noted that the petitioner requested the beneficiary's services from June 15, 2009 until November 15, 2009. Therefore, the period of requested employment has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The decision of the director is withdrawn and the appeal is dismissed.