



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUN 25 2013** OFFICE: VERMONT SERVICE CENTER

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:

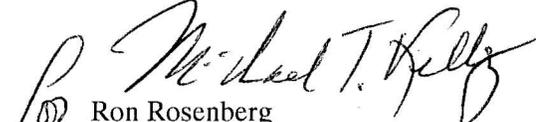
SELF-REPRESENTED

INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a landscaping company¹ established in 2002. In order to employ the beneficiaries in what it designates as landscape laborer positions² from April 1, 2012 until December 1, 2012,³ the petitioner seeks to classify them as temporary nonagricultural workers pursuant to 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).

The director denied the petition, concluding that the petitioner failed to establish a temporary need for the services of the beneficiaries based upon a seasonal need.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Applicable Law and Interpretations

Section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker, in pertinent part, as follows:

[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. . . .

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 56173, "Landscaping Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "56173 Landscaping Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Jun. 14, 2013).

² The ETA Form 9142, Application for Temporary Employment Certification, submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 37-3011 and the associated Occupational Classification of "Landscape and Groundskeeping Workers."

³ Although the petitioner stated on the Form I-129 that its claimed temporary, seasonal need for the services of the beneficiaries would end on December 1, 2012, it stated on the Form ETA Form 9142 that it would end on January 31, 2013, nearly two months later.

The regulation at 8 C.F.R. § 214.2(h)(6) states, in pertinent part, the following:

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. 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.

In accordance with the precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), the test for determining whether an alien is coming "temporarily" to the United States in order to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. Accordingly, pursuant to *Matter of Artee* it is the nature of the petitioner's need rather than the nature of the duties that controls.

Discussion

The petitioner stated on the Form I-129 that its need for the services of the beneficiaries is a temporary one, based upon a seasonal need. In order to establish that the nature of its need is a temporary one based upon a seasonal need pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(2), the petitioner must: (1) 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; and (2) specify the period(s) of time during each year in which it does not need the services or labor. USCIS does not consider the employment seasonal if the period during which the services or labor is not needed is unpredictable, subject to change, or is considered a vacation period for the petitioner's permanent employees. *Id.*

On the Form ETA Form 9142, Application for Temporary Employment Certification (hereinafter "TLC"), the petitioner stated that it required the services of the beneficiaries from April 1, 2012 until January 31, 2013 in the following capacity:

[The petitioner] is a landscape design/build company focusing on residential master planning and implementation in the [REDACTED] KY area. We are capable of designing, building[,] and managing a wide range of client specific projects. From new homes and construction to existing landscape revitalization, we are committed to quality and excellence from the design phase through to final completion of each project and beyond, with our land management

team. We currently employ 2 people and [have] projected gross annual revenue of \$230,000 a year.

Currently we do not have a full staff to handle the upsurge in the new contracts. Our company has made the effort to hire new U.S. Landscaping Laborers from the area of KY, but we have not had any success with our recruiting. In order to complete these orders [sic]. In this seasonal need we need 10 workers⁴ to complete our crew for every work location and contract to be finalized on the scheduled time-frame. Our current seasonal need is for a period of 10 months. The job opportunity is seasonal under the H-2B classification due to the fact that our company has received a large number of temporary contracts for our services for the same time period every year. We have several projects in the area of KY. These projects will be finalized by January of next year.

The U.S. Department of Labor (DOL) certified the TLC on February 27, 2012.

The petitioner filed the Form I-129 on March 28, 2012. Although the petitioner had stated on the TLC that its seasonal need for the services of the beneficiary would last from April 1, 2012 until January 31, 2013, it stated on the Form I-129 it only needed their services through December 1, 2012.

In its March 26, 2012 letter of support, the petitioner stated that the beneficiaries “will enable the company to maintain and meet the recent surge in demand for its services.” The petitioner claimed that “in the past we have been able to maintain a staff with little fluctuation but what our tax filings do not show is that all workers have quit and moved onto other jobs in 2011,” and that, consequently, it “is in a desperate situation to keep [the] business running.”

Although the petitioner had stated on the TLC that its seasonal need for the services of the beneficiary would extend from April 1, 2012 through January 31, 2013, in its March 26, 2012 letter it claimed that “our company’s business decreases in December, January, February, and March of each year,” and that “[o]ur company has a pattern and our Landscaping Services ‘shut down’ or do not employ Landscape Laborers at all in this part of the year.” The petitioner explained that although it provides snow removal services for several businesses during the winter months, it already has an employee who performs such work.

The petitioner submitted the following evidence when it filed the petition:

- Excerpted portions of its Kentucky Employer’s Quarterly Unemployment Tax Worksheets, which provided the following employment information:⁵

⁴ Although the TLC was certified for ten workers, the petitioner requested only five workers on the Form I-129.

⁵ The petitioner also submitted an internally-produced “Monthly Payroll Report” providing this information.

Month	Total Number of Employees
October 2009	3
November 2009	3
December 2009	3
January 2010	3
February 2010	3
March 2010	3
April 2010	6
May 2010	6
June 2010	6
July 2010	4
August 2010	4
September 2010	4
October 2010	3
November 2010	3
December 2010	3
January 2011	2
February 2011	2
March 2011	2
April 2011	3
May 2011	3
June 2011	3
July 2011	4
August 2011	4
September 2011	4
October 2011	3
November 2011	3
December 2011	3

- A “Quarterly Payroll Report” providing the following employment information:

Period of Time	Total Number of Temporary and Permanent Landscape Laborers
2010, First Quarter (Months of January, February, and March)	2
2010, Second Quarter (Months of April, May, and June)	5
2010, Third Quarter (Months of July, August, and September)	3
2010, Fourth Quarter (Months of October, November, and December)	3
2011, First Quarter	1

(Months of January, February, and March) 2011, Second Quarter (Months of April, May, and June)	2
2011, Third Quarter (Months of July, August, and September)	3
2011, Fourth Quarter (Months of October, November, and December)	2

- Payroll Journals;
- Copies of letters, contracts, and invoices demonstrating from several of the petitioner’s clients submitted as evidence that it had work to perform in 2012;
- A list of 20 clients to whom the petitioner was to provide landscaping services during the period of March⁶ through December 1, 2012;
- A sample work schedule; and
- A document entitled “Sales by Customer Detail,” which detailed payments received from the petitioner’s customers in 2011

The director issued an RFE on April 6, 2012, and made several observations. First, the director noted that the documentation submitted by the petitioner indicated it had three employees in the first and fourth quarters of 2010, six employees in the second quarter, and four employees in the third quarter. With regard to 2011, the director noted that the petitioner had two employees in the first quarter, three employees in the second and fourth quarters, and four employees in the third quarter. The director stated that although the petitioner requested a period of employment on the Form I-129 beginning on April 1, 2012 and ending December 1, 2012, “[its] financial documents show that [the petitioner has] approximately the same number of employees year round with very little fluctuation.”

Second, and with regard to the contracts for its services submitted by the petitioner, the director noted that the contracts indicated neither how many workers would be needed to perform the services, nor the period of time during which the workers would be needed.

Third, with regard to the petitioner’s claimed period of need on the Form I-129 (again, April 1, 2012 through December 1, 2012), the director noted that the petitioner’s evidence indicated that it performed groundskeeping services for two of its clients (the [redacted]) on a year-round basis (as opposed to its period of need for the services of the beneficiaries as stated on the Form I-129). The director noted further that the petitioner’s evidence indicated that it performed no services for two of its clients ([redacted]) during the months of April 2011. With regard to [redacted] the director noted that the petitioner’s services began on

⁶ Although a specific end-date (December 1) was provided, a specific start-date was not.

January 20, 2011 and ended on November 4, 2011 (again, as opposed to its period of need for the services of the beneficiaries as stated on the Form I-129).

Fourth, with specific regard to the petitioner's clients [REDACTED], the director notified the petitioner that he found their letters both vague and unsupported by documentary evidence.

Fifth, and with regard to the petitioner's claims regarding the "recent surge in demand for its services," the director noted that although the petitioner submitted copies of invoices, the record indicated that the petitioner had provided services to all of these customers the previous year.

The director stated that these five issues cast "significant doubt upon the validity of the employment offered." In addition, the director requested that the petitioner submit documentation establishing that it needs to supplement its permanent staff on a temporary basis during its stated period of need for the services of the beneficiaries.

The petitioner submitted a timely response to the RFE on April 11, 2012, and submitted payroll journals covering 2011 and 2012, work schedules, contracts and invoices, and, in support of the petitioner's claim of distress, it submitted a letter from one of its clients regarding the petitioner's failure to properly perform its lawncare obligations.

The director was not persuaded by the petitioner's response, and he denied the petition on April 23, 2012. On appeal, the petitioner submits a letter and copies of previously-submitted evidence. In addition, the petitioner submits a printout showing the number of landscape laborers to whom it paid wages in 2010 and 2011. The petitioner explains that because most of these landscape laborers were paid via manual check, they are considered contract workers and do not appear in its payroll. According to this information in 2010 the petitioner paid wages to six landscape laborers in April and May, five in June, four in July and August, two in September, four in October, and two in November. In 2011, it paid wages to two landscape laborers in April, three in May and June, four in July, six in August, and three in September, October, and November.

Upon review, the AAO finds that the record of proceeding does not establish that the petitioner has a temporary, seasonal need for the services of the beneficiaries as landscape laborers.

As noted above, in order to establish that the nature of its need is a temporary one based upon a seasonal need pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(2), the petitioner must: (1) 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; and (2) specify the period(s) of time during each year in which it does not need the services or labor. USCIS does not consider the employment seasonal if the period during which the services or labor is not needed is unpredictable, subject to change, or is considered a vacation period for the petitioner's permanent employees. *Id.*

The record of proceeding indicates that the period during which the beneficiaries' services are needed is subject to change. As noted above, when it filed the TLC the petitioner claimed that its seasonal need for the services of the beneficiaries extends from April 1 through January 31. As noted above, the petitioner stated on the TLC that it "has received a large number of temporary

contracts for our services for the same time period every year . . . These projects will be finalized by January.” In contrast, when it filed the Form I-129, the petitioner stated that its seasonal need for their services ends on December 1 rather than on January 31, and, in its RFE response, stated that “[i]n the state of KY the grass, flowers, etc. do not grow in the months of December, January, and February.” The petitioner’s period of seasonal need for the services of the beneficiaries, therefore, is subject to change, which is expressly forbidden by 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).⁷ For this reason alone, the petitioner has failed to establish that its claimed need for the services of the beneficiaries is a temporary one, based upon a seasonal need.

Nor does the printout showing the number of landscape laborers to whom it paid wages in 2010 and 2011 that the petitioner submits on appeal establish the petitioner’s claim. This printout, as well as the payroll summary upon which it is based, were both produced by the petitioner and are not backed by independent, objective evidence.⁸ 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). The submission of independent, objective evidence is particularly important in a case such as this, where the petitioner has made inconsistent statements. *See Matter of Ho*, 19 I&N Dec. at 591-92.

However, even if the AAO were to set aside the issue of the petitioner’s failure to support the printout showing the number of landscape laborers to whom it paid wages in 2010 and 2011 and the payroll summary upon which it was based with independent, objective evidence, which it will not do, this evidence would fail to satisfy the petitioner’s burden for another reason. Again, the petitioner stated on the TLC that its temporary, seasonal need for the services of the beneficiaries as landscape laborers extends through January 31. However, this evidence indicates that November is the last month during which the petitioner requires the services of landscape laborers, and it therefore conflicts with the petitioner’s statements made on the TLC. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Additionally, the AAO observes that not only does the evidence in the record of proceeding fail to substantiate a pattern of employment consistent with the definition of a seasonal need for H-2B temporary employment as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2), but also that, in light of the fluctuations of landscaping employment reflected in the charts presented by the petitioner, and giving due consideration to the petitioner’s explanations for them, the AAO is unable to discern

⁷ In addition to indicating that its period of seasonal need for the services of the beneficiaries is subject to change, the petitioner’s statements on the TLC are inconsistent with those made in support of the Form I-129. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

⁸ As noted above, the independent, objective evidence contained in the evidence of record, which includes the petitioner’s tax records, does not show an increase in employment during the period of the petitioner’s claimed seasonal need for the services of the beneficiaries.

how many persons the petitioner would actually need to perform landscaping work for a distinct landscaping season. In this regard, the AAO also notes that, although the petitioner submitted many records pertaining to its business, and aside from the other evidentiary deficiencies that this decision already noted in some of that documentation, the petitioner does not persuasively explain how that documentation correlates to a need for the number of beneficiaries that it sought in the petition. Likewise, the petitioner has not persuasively documented whatever methodology it applied, and upon what facts about its business, to determine its asserted need for each number of the total five beneficiaries for which it filed the petition. As noted earlier, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

For all of these reasons, the petitioner has failed to satisfy the criteria described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) for establishing that the nature of its need for the services of the beneficiary is a temporary one, based upon a seasonal need.

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.