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**U.S. Citizenship  
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FILE: LIN 06 094 52081 Office: NEBRASKA SERVICE CENTER Date: NOV 21 2007

IN RE: Petitioner: [Redacted]  
Beneficiaries: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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.

*for* *Margaret H. Sargeant*  
Robert P. Wiemann, Chief  
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 sustained. The petition will be approved although the matter is moot due to the passage of time.

The petitioner is a landscape company that filed this petition in order to newly employ 15 aliens as landscape workers, in accordance with the provisions for H-2B temporary nonagricultural workers at 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), and its implementing regulations at 8 C.F.R. § 214.2(h)(6).

The Department of Labor (DOL) determined that a temporary labor certification (Form ETA 750) by the Secretary of Labor could not be made because the petitioner had not complied with the DOL requirements for attempting to recruit and hire U.S. workers. The DOL's Final Determination, dated January 13, 2006, states:

The employer has job offers for 15 landscape laborers. A total of three U.S. workers responded to the employer's job offer according to the recruitment report dated December 15, 2005.

The employer rejected all of these applicants due to its inability to readily reach them. It appears that the employer submitted its recruitment report two days after sending certified mail to the applicants. The employer did not allow sufficient time for responses. Therefore, the employer did not make a good faith effort to contact and interview the applicants. Under such circumstances, the employer has failed to adequately establish a lawful job related reason for turning down these applicants.

In light of the above, the Department of Labor is unable to issue a favorable determination in this.

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 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  
....

Accordingly, the regulation at 8 C.F.R. § 214.2(h)(6)(i) states:

*General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after a DOL denial of the petitioner's application for temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The acting director's decision recounted the petitioner's recruiting efforts, which, at the time of the decision included the petitioner's continuing to try to arrange an interview with one of the three persons whom the Illinois Department of Employment Security (IDES) had referred to the petitioner. In denying the petition, the acting director determined that the petitioner had not overcome DOL's objections regarding the petitioner's efforts to recruit U.S. workers.

In contrast to the director, the AAO finds that the particular facts of this petition do not support denying the petition on the basis of a failure to adequately ensure against displacement of capable U.S. workers. There is sufficient evidence of record that IDES dictated the length of the recruiting period, and that the petitioner engaged in reasonable efforts to hire U.S. workers. Further, the record of proceedings indicates that the petitioner's need for the workers in question was temporary and seasonal as defined at 8 C.F.R. § 214.2(h)(6). Therefore the appeal will be sustained, and the petition will be approved. However, as will be noted below in this decision's order, the matter is moot as the period of intended employment has already expired.

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 met that burden.

**ORDER:** The appeal is sustained and the petition is approved, although the matter is moot due to the passage of time.