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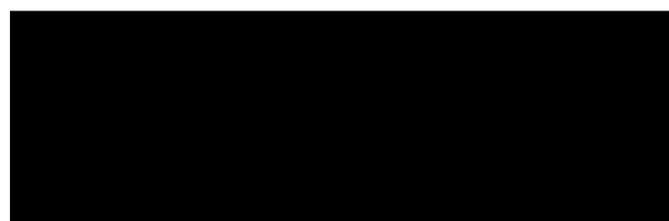
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D3



FILE: WAC 09 041 50794 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2010

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:
[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


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 runs a golf course and it seeks to employ the beneficiaries as landscapers, 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 of April 1, 2009 to October 31, 2009. The Department of Labor (DOL) certified the petitioner's temporary labor certification (Form ETA-750), valid from January 2, 2009 until October 31, 2009.

The director determined that the petitioner had not established a temporary need for the beneficiaries' services. The director also concluded that the petitioner did not establish that the beneficiaries will not displace United States workers capable of performing the services. In addition, the director denied the petition based on the fact that the petitioner failed to submit evidence requested by the director.

On appeal, counsel for the petitioner states that the petitioner has established a seasonal need during its high season from January to October since the duties required of the beneficiaries are never completed during the winter snow season. Counsel also states that the petitioner was previously approved for H-2B classification and thus, has established a pattern that is recurring in nature. Counsel further stated that the certified temporary labor certification is "positive evidence to demonstrate that the positions of landscapers requested will not be displacing US workers." Counsel also states that the petitioner provided sufficient evidence to establish eligibility for H-2B classification.

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) *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.

(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.* 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:

(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 regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied 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 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.

The petitioner seeks approval of the proffered position as seasonal. 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).

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).

On the Form I-129, the petitioner explained that it has been impossible to hire enough U.S. workers to fill the required positions of landscapers. The petitioner explained that the reasons for not finding sufficient U.S. workers are the following:

First, the summer elements make the work extremely difficult, and sometimes dangerous. Many temporary U.S. workers are not willing to tolerate the harsh weather conditions. Second, U.S. workers typically want permanent, year-round jobs, which is impossible with these landscaping positions. Third, many U.S. workers consider landscaping tedious and labor-intensive work. For these

reasons, we need H-2B visas to employ temporary foreign workers to supplement our U.S. workers.

On December 9, 2008, the director requested further information regarding the petitioner's seasonal need, and evidence regarding the petitioner.

In its response, the petitioner submitted a letter dated September 9, 2008, a date prior to when the petition was filed, and stated the temporary landscapers will perform the following duties: Mowing, trimming, planting, watering, fertilizing, digging and raking. The petitioner stated that it has a need for 50 landscapers from January 2, 2009 until October 31, 2009 because "during the summer, our workload for our company is extremely high."¹ The petitioner also submitted a list of individuals employed by the petitioner in 2007. In the director's denial, the director noted that the staffing charts submitted by the petitioner show that the months of July through September have the highest staffing levels, and the remaining months also have a steady number of employees. The director noted that no month indicates a "cessation of all employment," and thus, the need is not temporary but instead a year-round need. On appeal, counsel for the petitioner states that the "On-Line Wage List Summary reports are ineffective for evidence of 'need', as the information presented reflects all employees that the company employs and does not differentiate between different activities." In addition, counsel states that some operations continue throughout the year, but landscaping does not.

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload need in landscaping services. The petitioner has not carefully documented the seasonal need 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. As indicated, the petitioner submitted staffing charts for 2007. The charts had temporary and permanent employees but the petitioner did not differentiate the different job titles of all the employees. The petitioner failed to provide a chart of the temporary and permanent employees for the position of landscapers only, and therefore it is impossible to determine if the petitioner has a seasonal need for landscapers.

Although the petitioner submitted a statement indicating the seasonal peak needs of the company during each spring and summer, the statement has not been substantiated by financial or other documentary evidence, such as staffing charts of permanent and temporary landscapers employed by the petitioner for each month of the year to confirm the accuracy of the information given in the statement and establish that the petitioner's business activity has formed a pattern where its need for temporary workers is for a certain time period and will recur next year at the same time. Absent supporting documentation, the petitioner has not shown that its need for the beneficiaries' services is tied to a seasonal trend or a particular event that recurs every year. Simply going on record without supporting documentary evidence is not sufficient for purposes of

¹ It is noted that, while the start date of January 2, 2009 matches that on the certified ETA 750, it does not match the intended employment start date of April 1, 2009 requested in the Form I-129.

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. In other words, the petitioner's need for landscapers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

It is also noted that the petitioner requested the beneficiary's services from April 1, 2009 until October 31, 2009. Therefore, the period of requested employment has passed.

The petitioner noted that United States Citizenship and Immigration Services (USCIS) approved other petitions that had been previously filed on behalf of the petitioner for the same seasonal need, arguing that that is sufficient evidence to establish eligibility for the current petition. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The director also denied the petition, because the petitioner failed to submit all documentation requested by the director. The director requested additional information due to inconsistencies in the record. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In addition, 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).

Finally, in the denial, the director concluded that the petitioner failed to provide sufficient evidence to establish that the beneficiaries will not displace U.S. workers capable of performing such duties. The petitioner provided a temporary labor certification certified by DOL. The certified temporary labor certification is sufficient to establish this criterion. The AAO will withdraw this portion of the director's decision.

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

ORDER: The appeal is dismissed. The petition is denied, although the matter is now moot due to passage of time.