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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services



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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **JAN 12 2011**

IN RE:

Petitioner:

Beneficiaries:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a)

ON BEHALF OF PETITIONER:



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 \$630. 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 director of the California Service Center revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner states it is a farm, and it seeks to employ 85 unnamed beneficiaries as farm workers pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(a).

On June 7, 2010, the director revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A)(2). The director determined that the petitioner did not submit sufficient evidence in rebuttal to the USCIS' Notice of Intent to Revoke and has not overcome the grounds for revocation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation, dated March 15, 2010; (2) the director's notice of intent to revoke (NOIR), dated May 13, 2010; (3) the petitioner's response to the NOIR; (4) the director's notice of revocation; and (4) the Form I-1290B filed on July 6, 2010. The AAO reviewed the record in its entirety before issuing its decision.

On March 15, 2010, the petitioner filed the Form I-129 (Petition for Nonimmigrant Worker) to employ 85 beneficiaries in the H-2A classification for the period from April 2, 2010 to July 22, 2010. The director approved the petition. On May 13, 2010, the director notified the petitioner of her intent to revoke approval of the H-2A petition. In the notice of intent to revoke, the director explained that the U.S. Consulate General in Nuevo Laredo, Mexico received information that two separate companies were petitioning for H-2A workers but the beneficiaries would work at the same job site, with the same managers, and doing the same work duties. Thus, the director noted that "it is apparent that the petitioner and [REDACTED] do not operate as two independent businesses with separate seasonal needs, but in fact effectively operate as one enterprise and petition workers separately in order to circumvent the seasonal nature restriction." The director also stated that one of the petitioner's beneficiaries worked for 16 continuous months on the same job site doing the same work as both the petitioner and [REDACTED]. [REDACTED] would file for extensions or transfers to continue his employment in H-2A status.

In the response letter, dated May 20, 2010, the petitioner stated that its seasonal need is from mid-October until mid-August. The petitioner further stated that "multiple H-2A applications for temporary labor certification are filed because the number of temporary job openings is not the same throughout the growing season." The petitioner also stated that it believed it could contract with Onion Patch Harvesting, Inc. because it is a separate corporation.

On appeal, the petitioner provides a much more detailed letter in response to the director's concerns. On appeal, the petitioner states that it contracted [REDACTED] so that it may locate temporary workers for its seasonal need. On appeal, the petitioner discusses the different vegetables grown and its separate harvesting times. The petitioner fails to clearly

identify its own seasonal need. The petitioner states that its seasonal need is evidenced "in the separate and distinct requests for alien labor certification with the U.S. Department of Labor for different levels of workers petitioned for in the separate I-129 submissions." However, in reviewing the previous approval notices for H-2A workers for the petitioner, there is no clear seasonal period. The previously approved H-2A petitions were for all different time periods through the year, and were not consistent with the petitioner's claim that the seasonal need is from mid-October through mid-August.

The petitioner also submits a document entitled, "answers to issues in notice of intent to revoke." In that document, the petitioner states that the work locations and worksites farmed by the petitioner and [REDACTED] are the same. The petitioner also states that it had a contractual arrangement with [REDACTED] to "perform farmwork at our worksites." In response to the type of work being performed, the petitioner stated that "although the workers all did farmwork, the specific crop activities being performed were the same during some of the employment period where there are overlapping labor certifications and different during other times during the employment periods." The petitioner contends that it is a separate business entity from [REDACTED]

The petitioner did not present sufficient evidence to overcome the director's ground for revocation. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the notice of intent to revoke is not accurate does not qualify as independent and objective evidence. 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).

The petitioner explained that it has a contract with [REDACTED] to provide labor personnel to the petitioner. The petitioner also stated that both companies are separate entities yet they do share the same office location, the same worksite and the same need for farm workers. The petitioner also stated that it did not have an intention to circumvent the H-2A program and that since the two companies were separate entities, the I-129 filings were proper. Although the petitioner admits the close connection to [REDACTED], it fails to explain why both companies were petitioning for H-2A workers if the beneficiaries were at the same worksite and doing the same job duties. The petitioner vaguely claimed that it petitioned for farm workers for its seasonal need of mid-October to mid-August and [REDACTED] petitioned for farm workers for other times throughout the year. Thus, it appears that the petitioner requires farm workers all year round.

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 period of the petitioner's need must be temporary or 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 requires labor levels far above those necessary for ongoing operations. 8 C.F.R. § 214.2(h)(5)(iv)(A).

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 for farm workers. The petitioner has not clearly explained why it and [REDACTED] are petitioning for H-2A workers for the same job site, doing the same job duties. Furthermore, 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. Although the petitioner submitted a statement indicating the seasonal need of the company for workers from mid-October to mid-August, the statement has not been substantiated by documentary evidence, such as staffing charts of permanent and temporary farm workers 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 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)).

For the reasons discussed above, the appeal will be dismissed. Accordingly, the director's revocation decision will be affirmed.

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 approval of the petition is revoked.