

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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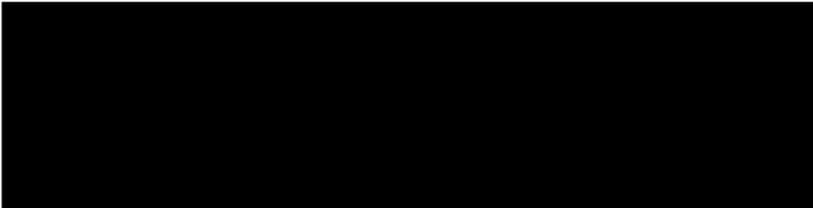


DATE: **DEC 04 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE:

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 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,

for 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, although the matter is moot due to the passage of time.

On the Form I-129 visa petition, the petitioner describes its business as a single-employee "Livestock Farming" operation established in 2009. In order to extend its employment of the beneficiaries in what it designates as "Farm Worker – Livestock" positions from December 4, 2011 until April 30, 2012, it seeks to extend their nonimmigrant classification as temporary agricultural workers pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(a).¹

The director denied the petition on the basis of her determination that the petitioner had failed to demonstrate that its temporary need for the services of the beneficiaries is "seasonal" as that term is defined within the regulations controlling the H-2A program.

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 notice of intent to deny (NOID) the petition; (5) the petitioner's response to the NOID; (6) the director's decision denying the petition; and (7) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon review of the entire record, the AAO finds 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.

Beyond the decision of the director, the AAO finds additionally that the petitioner has failed to demonstrate that the beneficiaries meet the requirements listed by the petitioner on the temporary agricultural labor certification as necessary minimum qualifications. For this additional reason, the petition must also be denied.

Applicable Law

Section 101(a)(15)(H)(ii)(a) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), defines an H-2A 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 agricultural

¹ In his December 15, 2011 RFE the director notified the petitioner that according to USCIS records one of the beneficiaries, [REDACTED] departed the United States on December 1, 2011 and was not physically present in the United States when the petitioner filed the instant petition on December 5, 2011. In his February 2, 2012 letter, the petitioner's agent notified the director that Mr. [REDACTED] (to whom the petitioner referred as Mr. [REDACTED]) had elected to return to South Africa and indicated that he would not be returning.

labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of the Internal Revenue Code of 1986, agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. [§] 203(f)), and the pressing of apples for cider on a farm, of a temporary or seasonal nature. . . .

The regulation at 8 C.F.R. § 214.2(h)(5)(iv) states, in pertinent part, the following:

Temporary and seasonal employment—

- (A) *Eligibility requirements.* An H-2A petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.
- (B) *Effect of Department of Labor findings.* In temporary agricultural labor certification proceedings the Department of Labor separately tests whether employment qualifies as temporary or seasonal. Its finding that employment qualifies is normally sufficient for the purpose of an H-2A petition . . . [E]ligibility will not be found, notwithstanding the issuance of a temporary agricultural labor certification, where there is substantial evidence that the employment is not temporary or seasonal.

Finally, the regulation at 8 C.F.R. § 214.2(h)(5)(v) states the following:

The beneficiary's qualifications—

- (A) *Eligibility requirements.* An H-2A petition must establish that any named beneficiary met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed. . . .
- (B) *Evidence of employment/job training.* For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met the certification's minimum employment and job training requirements, if any are prescribed, as of the date of the filing of the labor certification application. . . .
- (C) *Evidence of education and other training.* For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met the certification's minimum post-secondary education and other formal training requirements, if any are prescribed in the labor certification application as of the date of the filing of the labor certification application. . . .

Discussion

The petitioner claimed on the Form I-129 and the temporary agricultural labor certification that its temporary need for the beneficiaries' agricultural services is seasonal, as defined at 8 C.F.R. § 214.2(h)(5)(iv)(A). In its December 1, 2011 letter, the petitioner's representative stated the following:

We have an annual recurrent need for livestock labor during the winter and early spring season since it is our peak production period. Due to hot weather, which is not conducive to breeding calves, we are forced to work overtime during the colder months. Modern breeding techniques allow for specialized breeding cycles where we can crunch up the production of calves during the colder months.

So due to the above we breed and purchase in calves which we raise to the next level. Since the winters don't allow for planting crops the purchasing in and raising of cattle is the only way we can supplement our income and make full use of the whole year.

So this forces us . . . during the non-plant[ing] part of the year to take care of the head of cattle we bring in. Since livestock is also affected by the cycles of nature we use the colder months (especially January to April) concentrating a lot of the breeding and raising during these months – which in turn forces us to employ more people to assist in all the tasks associated with the breeding and calving.

The petitioner stated that the temporary, seasonal duties proposed for the beneficiaries would include the following:

- Attending to livestock;
- Mixing feed and additives;
- Filling food troughs and watering the livestock;
- Breaking any ice covering the water troughs;
- Examining animals in order to detect disease and injuries;
- Vaccinating animals;
- Applying medication to cuts and bruises;
- Spraying livestock with insecticide;
- Confining livestock to stalls, washing them, and clipping them, in order to prepare them for calving;
- Assisting the veterinarian during delivery;
- Castrating the livestock by either binding, clamping, or surgically removing testes;
- Clipping identifying notches or symbols on livestock, or branding livestock with a branding iron, in order to indicate ownership;
- Cleaning livestock stalls and sheds;
- Maintaining buildings and equipment; and

- Maintaining breeding, feeding, and cost records.

At page 4, Part F, Item 5 of the temporary agricultural labor certification, the petitioner stated that performance of these duties required three months of experience, basic literacy and arithmetic skills, as well as the ability to work outside during adverse weather conditions, and that the beneficiaries must be capable of maintaining breeding, feeding, and costs records. The U.S. Department of Labor (DOL) certified the temporary agricultural labor certification for the employment of four workers between December 4, 2011 and April 30, 2012.

In her December 15, 2011 RFE, the director noted that according to U.S. Citizenship and Immigration Services (USCIS) records, all four beneficiaries were already working for the petitioner in H-2A status, and that if the petition were approved, they would be working for the petitioner on a year-round basis. Accordingly, the director requested evidence to establish that the proposed employment was in fact seasonal in nature. The director also instructed the petitioner to specify the period of time each year during which it does not need the beneficiaries' services.

In response the petitioner submitted, *inter alia*, a copy of an Application for Temporary Employment Certification that had been certified for the temporary employment of six workers as "Farm Workers – Grain 1" from March 14, 2011 through December 31, 2011.

The response to the RFE did not persuade the director that the petitioner's need for the services of the beneficiaries was seasonal rather than permanent. In her January 11, 2012 NOID, the director noted that the petitioner had been employing one of the beneficiaries, [REDACTED] since December 30, 2010, and that the petitioner now sought to extend his employment through April 30, 2012. The director also noted that the petitioner had been employing a second beneficiary, [REDACTED] since March 30, 2011, and that the petitioner now sought to extend his employment through April 30, 2012. The director stated that "it appears as though the petitioner is using these workers on a year-round basis to satisfy a permanent need."

In his February 2, 2012 response to the director's NOID, the petitioner's agent explained that the petitioner has two distinct seasonal needs, namely: (1) that during the summer season, it needs workers to plant, cultivate, spray, and harvest crops; and (2) that during the winter season, it needs workers to care for its livestock. The agent stated that each season is distinct, unique, and separate, based upon differing seasonal characteristics. The agent also suggested that the prior H-2A approvals merit deference, stating, "Our client has had workers during the summer who were transferred every year from their summer permit to their winter permit, without problems or questions concerning [its] seasonal need."

The director denied the petition on February 24, 2012, finding that the petitioner had failed to demonstrate that it has a temporary, seasonal need for the services of the beneficiaries tied to a certain time of year by an event or pattern, or specific aspect of a longer cycle. The director also stated that the employment did not appear to be temporary because, for [REDACTED], the employment had already lasted longer than 12 months, and its employment of [REDACTED] would also extend beyond one year if the petition were approved. In conclusion, the director stated that although the petitioner may be routinely switching the beneficiaries between summer and

winter duties, there are no breaks in their employment and that its employment of them was therefore not seasonal.

On appeal, newly-retained counsel contends that the regulatory framework of the H-2A program does not preclude its practice of back-to-back employment of the beneficiaries, within the same year, as H-2A temporary agricultural workers pursuant to two separate H-2A petitions per year, each filed for seasonal work. Newly-retained counsel's "Letter Brief" in support of the appeal includes the following overview of the petitioner's contention:

[The petitioner] has a cattle operation and a grain/grass cultivation operation. The workers in the cattle operation perform different duties at different times of the year from the workers in the grain/grass operation. [The petitioner] files separate Applications for Temporary Labor Certification - a "winter" contract to meet its temporary needs for the cattle operation and a "summer" contract to meet its temporary labor needs for the grain/grass operation. [The petitioner] moves some of the temporary workers from the cattle operation to the grain/grass farming operation. [The petitioner], however, has separate and distinct needs for the labor in the summer and winter. [The petitioner's] petition should not have been denied.

The record reflects that - as here - one petition (for what the petitioner calls the "winter contract") is filed for the job title "Farm Worker[s] - Livestock," with a corresponding Application for Temporary Employment Certification certified for that same job title (Farm Worker[s] - Livestock) and for the SOC (ONET/OES) code and occupational title, respectively, of 45-2093.00 and "Farmworkers, Farm and Ranch Animals." The record also reflects that the other, "summer contract" H-2A petition would be filed for the job title "Farm Worker[s] - Grain 1," accompanied by an Application for Temporary Employment Certification certified for that same job title and for the respective SOC (ONET/OES) code and occupational title of 45-2091.00, "Agricultural Equipment Operator."

On appeal, newly retained counsel contends that the director erred in denying the petition, arguing that the petitioner has separate and distinct temporary labor needs in the summer and in the winter. Counsel explains that the petitioner's feedlot will receive approximately 4,300 calves between early November and early December, which is a 437 percent increase from the number it typically receives in October, and that in early December its business operations focus on feeding and taking care of these calves. Counsel explains further that the petitioner's cow/calf unit, which exists separately from its feedlot, becomes active in December and, by late January, the first calves are born, and that by March 1, there will be 800 of them in the cow/calf unit, and they are branded and given shots. Counsel states that the petitioner then begins processing mature cows for calving, and moves them to calving pastures. The first calves from the mature cows will be born around April 1 and, by the end of April, 2,500 calves will have been born. Counsel explains that although calving continues through the end of May, the labor needs of the petitioner's cattle operation wind down in late April and early May, and will "ramp up again" in November. Finally, counsel explains that a third component of the petitioner's cattle operations - the yearling unit - also experiences a seasonal surge beginning each November and December, when it buys as many as 6,000 cows.

Counsel claims that, for all of these reasons, the petitioner annually experiences a seasonal need for the services of the beneficiaries in its cattle operations from November through April.

Counsel claims that although the petitioner's need for the services of the beneficiaries in its cattle operations ends in late April, its need for their services in its farming unit "increases rapidly" in the summer. Counsel explains that the petitioner farms approximately 15,000 acres of land in northwestern South Dakota, and that its farming operation experiences two peaks: one from April to May, when crops are planted; and a second from August through October, when crops are harvested.

Counsel argues that the petitioner's need for the services of the beneficiaries to work in its livestock operation is temporary and seasonal. Counsel asserts that the need expressed in the petition here under review is explicitly tied to the reproductive cycles of the cattle. With regard to the petitioner's H-2A practices now in question, counsel also contends that H-2A employers are not limited "to a single temporary or seasonal need." In pertinent part, counsel claims the following:

Many large, diversified employers like [the petitioner] have multiple distinct needs and Congress did not prohibit them for [sic] accessing the H-2A program to meet all of their needs. [The petitioner's] needs are clearly distinct. They involve different peaks, different skills, and different seasons.

Counsel also cites to a 1987 opinion from the U.S. Department of Justice, Office of Legal Counsel (OLC), which addressed the definition of "temporary" as that term relates to H-2A and H-2B temporary workers. Counsel cites to the following passage from that memorandum, in which the OLC stated the following:

If an employer makes a bonafide application showing that he needs to fill a job on a temporary basis, the work is "of a temporary or seasonal nature." It is irrelevant whether the job is for three weeks to harvest a crop or for six months to replace a sick worker or for a year to help handle an unusually large lumber contract. What is relevant is the employer's assessment -- evaluated, as required by statute, by the Department of Labor and the INS [(now USCIS)] -- of his need for a short-term (as opposed to a permanent) employee. The issue to be decided is whether the employer has demonstrated a temporary need for a worker in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary.

Temporary Workers Under § 301 of the Immigration Reform and Control Act, 11 Op. Off. Leg. Counsel 39, 41-42 (1987).² Counsel argues that "the proposed employment is 'temporary'" because "it is [the employer's] good faith assessment that it cannot handle the increased need for labor in its cattle operations because with its regular staff and that it needs short-term employees to get the work done."

² Counsel incorrectly cited this opinion of the Office of Legal Counsel as having been published at page 51 of Volume 11.

Upon review, the AAO finds that the petitioner has failed to demonstrate that its temporary need for the services of the beneficiary is seasonal as that term is defined at 8 C.F.R. § 214.2(h)(5)(iv)(A). Counsel and the petitioner have explained how the petitioner's two distinct needs for the beneficiaries' services differ: again, the petitioner needs them to work during the summer months to plant and harvest crops, and to work in its cattle operation during the winter months. They argue that the crop duties are exclusive to the summer months, and that the livestock duties are exclusive to the winter months. Counsel urges us to view those needs separately, and to consider each one a separate, seasonal need.

The AAO does not agree with the petitioner's position. Rather, the AAO finds that the petitioner's two distinct needs combine to create a continuous, overlapping need that lasts the entire year. The beneficiaries of the instant petition, whom the petitioner seeks to employ in its livestock operations during the winter months, are fully capable of performing its farming operation during the summer months. The record indicates that the petitioner could employ the beneficiaries on a permanent basis and simply assign them to farming duties during the summer months and to livestock duties during the winter months. In fact, that is precisely what the petitioner appears have done in the past.

The OLC's opinion regarding the meaning of the term "temporary" cited by counsel on appeal supports our finding. While counsel quoted most of the language the AAO excerpted from that opinion above, he omitted the following two sentences: "The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary." 11 Op. Off. Leg. Counsel at 42; *see also Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm'r 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; it is the nature of the petitioner's need rather than the nature of the duties that controls). Counsel's argument that the petitioner has two separate seasonal needs for the services of the beneficiaries, however, is based entirely upon his characterization of the *nature* of the needed services of the beneficiaries instead of the petitioner's need for these services. The AAO notes that the OLC's opinion cited to *Matter of Artee Corp.*, stating that when *Matter of Artee Corp.* was issued in 1982, the agency "reversed a long-standing rule that the functional nature of the duties of the job controlled its characterization." 11 Op. Off. Leg. Counsel at 42 (citing *Matter of Artee Corp.*, 18 I&N Dec. at 367). Counsel makes no attempt to reconcile his argument with this portion of the OLC opinion, or with *Matter of Artee Corp.*

The two "seasons" during which the petitioner claims to experience temporary needs for the services of the beneficiaries collectively cover the entire year. As the nature of the petitioner's need for the beneficiaries' services, and not the nature of the underlying job duties, is the controlling factor, the record establishes clearly that the petitioner has a permanent, year-round need for farm workers. It is also clear that the petitioner could employ the beneficiaries on a year-round basis and assign them to perform the farming duties during the summer months and to the livestock duties during the winter months. Since the petitioner does not have a seasonal need for the beneficiaries' services but rather a constant, year-round need for them, it has failed to demonstrate that its temporary need for the services of the beneficiaries is a seasonal one, as required by 8 C.F.R. § 214.2(h)(5)(iv)(A).

Furthermore, the petitioner has not carefully documented its claimed seasonal need through data regarding its historical need for additional supplemental labor and its usual workload and staffing needs. For example, the petitioner has not substantiated its statements or those of counsel and its agent regarding its claimed workload increase in livestock operation, such as staffing charts of permanent and temporary workers employed by the petitioner for each month of the year to confirm the accuracy of the information provided in those statements and to establish that the petitioner's business activity has in fact formed a pattern whereby its need for temporary workers is for a certain time period and will recur again next year. Absent supporting documentation, the petitioner cannot show 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Nor is the AAO persuaded by the assertions regarding the prior approvals granted to the petitioner, as 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'r 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. *Cf.* 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 nonimmigrant petitions on behalf of a 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 petitioner's agent also highlighted the fact that the DOL certified the temporary agricultural labor certification for seasonal employment. However, 8 C.F.R. § 214.2(h)(5)(iv)(B) specifically states that "eligibility will not be found, notwithstanding the issuance of a temporary agricultural labor certification, where there is substantial evidence that the employment is not temporary or seasonal." As discussed *supra*, such is certainly the case here.

Accordingly, we agree with the director's determination that the petitioner failed to demonstrate that its temporary need for the services of the beneficiaries is a seasonal one.

Finally, it is noted that 8 C.F.R. § 214.2(h)(5)(v)(A)-(C) requires that H-2A petitions filed for named beneficiaries be filed with evidence that the beneficiaries met the stated minimum requirements and were fully able to perform the stated duties when the petition was filed. As discussed *supra*, the minimum requirements listed by the petitioner on the temporary agricultural labor certification include three months of experience, basic literacy and arithmetic skills, the ability to work outside

during adverse weather conditions, and the capability of maintaining breeding, feeding, and costs records. However, the petitioner did not submit any evidence to establish that any of the beneficiaries meet these requirements, and the petition must be denied for this additional reason.

In conclusion, the petitioner has failed to demonstrate that its temporary need for the services of the beneficiaries is a seasonal one pursuant to section 101(a)(15)(H)(ii)(a) of the Act and 8 C.F.R. § 214.2(h)(5)(iv)(A). Accordingly, the appeal will be dismissed, and the petition will be denied. Beyond the decision of the director, the petitioner has also failed to establish that the beneficiaries are qualified to perform the duties of the proposed positions, as required by 8 C.F.R. § 214.2(h)(5)(v)(A)-(C), and the petition must be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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 appeal is dismissed. The petition is denied.