U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 06 093 52571 Office: VERMONT SERVICE CENTER Date: MAR 24 2006

IN RE: Petitioner:
Beneficiaries: [redacted]

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:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Acting Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(*2*)(*ii*). The decision of the acting director will be withdrawn and the petition will be denied.

The petitioner is engaged in the business of home repair. It seeks to employ the beneficiaries as laborers for nine and one-half months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the employer had not established a temporary need for the beneficiaries' services. The acting director determined that sufficient countervailing evidence has been submitted to overcome the objections of the DOL and approved the petition.

On notice of certification, the petitioner did not present additional evidence for consideration. Therefore, the record is considered complete. Upon review, the AAO does not concur with the director's decision.

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 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. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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). The petition indicates that the employment is seasonal and that the temporary need recurs annually.

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*).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Will load and unload tools, tarps, supplies and equipment. Pick up trash and debris and remove to trash location.

Obtain supplies and carry in wheelbarrow. Take off wrapping and bands from supplies and discard. Sweep and remove dirt and saw dust.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

The services to be performed by the beneficiaries are ongoing and the petitioner's need to have additional workers perform these services has not been shown to be seasonal. The petitioner submitted a statement dated September 6, 2005 showing its 2004 sales statistics and a month to month chart for the years 2004 and 2005 indicating the number of laborers working, the number of hours worked and the total wages paid to the workers that month. The petitioner did not submit any contractual and/or financial evidence such as income tax returns to substantiate the information stated on the petitioner's letter and chart. The petitioner has not demonstrated that its business activity has formed a pattern where its needs for laborers are traditionally tied to a season of the year and will recur next year at the same time. 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)).

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

ORDER: The decision of the acting director is withdrawn. The nonimmigrant visa petition is denied.