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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

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

NOV 19 2010

IN RE: Petitioner: [redacted]
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:

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,

Jerry 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. The petition will be denied.

The petitioner is a landscaping company, and it seeks to employ the beneficiaries as landscaping laborers 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 from April 1, 2010 until December 15, 2010. The Department of Labor (DOL) certified the petitioner's temporary labor certification from April 1, 2010 until December 15, 2010.

The director determined that the petitioner had not established a temporary need for the beneficiaries' services.

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) *Petition.* (A) H-2B nonagricultural temporary worker. An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform 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.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the

near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load 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.

In addition, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states the following:

The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a favorable labor certification determination as required by paragraph (h)(6)(iv) or (h)(6)(v) of this section.

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.

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 is recurrent annually.

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 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).

Upon filing the instant petition, the petitioner indicated that its need is seasonal and the temporary need is recurrent annually. On the Form I-129, the petitioner explained its temporary need as follows:

[The petitioner] has a recurrent annual need for seasonal temporary workers. Duties are sod laying, mowing, trimming, planting, watering, fertilizing, digging, mulching, raking, sprinkler installation and installation of mortarless segmental walls. Workers are NOT needed from December 15 – February of each year due to the winter climate. Please be advised that our normal beginning date of need is February 15th. Due to processing delays and a change in regulations, we needed to amend our date to April 1st this year.

In its response to the director's request for evidence, dated March 10, 2010, the petitioner explained that "the St. Louis weather plays a big role on the length of the job season," and said that "from December 15th through April 1st, bad weather, cold temperatures, and hard winter months with occasional snow causes landscape work to slow drastically till the warming spring season."

The petitioner submitted the Missouri Quarterly Contribution and Wage Reports for all four quarters in 2009, and the petitioner wrote down the number of weeks worked by each individual. Furthermore, the petitioner submitted a list of employees for 2008 and 2009 that lists their job title, name, dates of employment and immigration status. In addition, the petitioner submitted sales reports for each month in 2009. The petitioner also submitted a landscape maintenance service contract with Nestle Purina Petcare Company for the period from October 1, 2009 until October 1, 2012.

In the director's denial, the director noted that the staffing charts submitted by the petitioner show that the months of July through December have the lowest staffing with an average of nine employees, and that the months of January through June have the highest staffing levels with eleven 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, the petitioner states that the quarterly wage reports are ineffective for evidence of need, as the information

presented reflects all employees that the company employs and does not differentiate between different job activities. Thus, the petitioner submitted a list of employees for 2008 and 2009 that states their job title, name, employment dates and immigrant status in order to provide more detailed information that cannot be found in the quarterly wage reports. That list clearly states the job titles of each individual but the employment dates are different for each individual and do not show a seasonal need. According to the list submitted by the petitioner, in 2009, the petitioner hired 13 temporary workers, four that did snow and nine that were laborers. In reviewing the employment dates of the temporary workers, each worker had different employment dates. Each temporary worker was hired in different months of the year. The chart does not indicate a clear seasonal time when more workers were required from April to December. For example, four employees were hired in January and eight employees were hired in March. In addition, all of the temporary employees stopped working with the petitioner in different months out of the year. Thus, the evidence on record does not establish a seasonal need from April 1st until December 15th.

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. Although the petitioner submitted a statement indicating the seasonal peak need of the company from April to December, 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 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.

In addition, the petitioner submitted a contract it entered into with the Nestle Purina Petcare Company that covers the period from October 1, 2009 until October 1, 2012. This was the only contract submitted by the petitioner. The contract lists the work that the petitioner will perform and while some of the items are to be performed between April to December, several items do not have a certain time period to complete. Thus, it appears that the petitioner has consistent landscaping work all year round. 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).

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.