

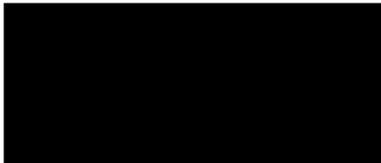
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**U.S. Department of Homeland Security**  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



D4

DATE: **JUN 24 2011** OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiaries:

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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center 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.

The petitioner is engaged in “manufacturing lawn and garden.” It seeks to employ the beneficiaries as laborers, pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b) for the period from October 1, 2010 until May 5, 2011.

The director denied the petition concluding that the petitioner did not establish 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.

The petitioner seeks approval of the proffered position as a peakload need. To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

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.

On the Form I-129, the petitioner explained its temporary need for the alien's services by stating; "we have a busy season that is temporary based upon our services to the public school systems and their needs. We get busy in October and stay busy until early May."

On July 22, 2010, the director requested additional information in support of the petition. In a response letter, dated July 26, 2010, the petitioner further explained its need for temporary workers as follows:

For several years we have to locate temporary laborers to mix rock and gravel starting close to the period of time the public schools open for their school year and ending the first week of the following May, when they close. Thereafter during the balance of May and throughout June and July we have no more work for these workers to do. This causes our historical hiring trend of temporary laborers close to the commencement of the school year because it coincides in time when we experience the start of a peak load demand for our product and we let them go about the same time that school recesses for the summer.

The increased demand for our product is the result of our supplying several companies that construct, maintain and repair track and field sites at public and private schools as well as for some municipalities. Some smaller municipalities, of course, use the public schools' track and field in the evening after school has let out.

Use of these track and field sites, tennis courts, parking lots, and other external areas around the schools are heaviest during the school term, roughly from August until early May. Our customers demand more of our product during this time causing our peak load sales.

Use of the external surface areas around schools is lowest during the hot summer months because school is out and because other citizens are more apt to use the

inside of a mall during the hot summer months to get their daily quota of walking into their schedule. Because of less use, less repair and maintenance is required and less of our product is requested.

In response to the director's request for additional evidence, the petitioner submitted a list of temporary laborers hired and their employee compensation for 2008, 2009 and 2010. The petitioner also submitted payroll data for 2008, 2009 and 2010. In addition, the petitioner submitted eight invoices of sales. Furthermore, the petitioner submitted a letter from the owner of [REDACTED] and a price list for the petitioner's materials.

In the director's denial, he noted that in response to the request for evidence, the petitioner failed to submit any evidence of the employment levels of permanent laborers or any other permanent workers. The director also noted that "while some maintenance is required throughout the school year, schools often schedule any substantial construction and repair to track and field sites while schools are recessed and the sites are not being used by the students." Finally, the director noted that the petition is for a change of employer and the beneficiaries are currently in the U.S. in H-2B status for [REDACTED], thus, it appears the petitioner and [REDACTED] operate under the same ownership and have a year round need for the services or labor provided by the beneficiaries.

On appeal, the petitioner stated that the employer's sworn statement on the ETA 9142 is sufficient evidence of its temporary need. The petitioner also provides three letters from customers that indicate a reduced amount of the petitioners' materials are purchased during the petitioner's slow season. The petitioner also states that "we are not aware of any statistics as to the habits to their [the schools] track and field sites," and further states that the company works on other surfaces besides track fields such as parking lots, driveways, sidewalks, walkways, edging, and drainage ditches. Finally, the petitioner states that the [REDACTED] Company, Inc. is a "corporate de jure."

In this instance, the petitioner has not shown 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. The petitioner submitted a chart of temporary employees and their compensation for 2008, 2009 and 2010, and payroll summaries that coincide with the charts. In reviewing the charts, the petitioner employed temporary workers each year from September until May. The petitioner did not employ temporary workers in June, July or August. The charts also listed the employee compensation for each month the petitioner employed temporary workers, and provided payroll data for the months that temporary workers were employed. In reviewing the employee compensation on the charts and the payroll data for the same months, the amount paid to payroll is almost identical to the amount paid out to the temporary workers. Thus, it appears that the petitioner only employed temporary workers from September until May of 2008, 2009 and 2010. On appeal, the petitioner also submits a chart of its permanent workers, which ranges from 4 to 5 workers each month, and the amount paid for each month for 2008 and 2009.

However, this information is not consistent with the payroll records. As mentioned above, the payroll records for the months of September through May just have the amount paid out to the temporary workers and do not indicate the amount paid to the claimed 4 or 5 permanent workers. The evidence is not sufficient to establish that the petitioner regularly employs permanent workers to perform the services or labor at the place of employment. 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).

This is not sufficient evidence to establish a peakload need. Although the petitioner submitted a statement stating the peakload need of the company is from October until May, the statement has not been substantiated by financial or other documentary evidence, such as work contracts for the previous years and for the upcoming year, or information on sales for the entire year that confirm the accuracy of the information given in the statement to establish that the petitioner's business activity has formed a need for temporary workers for a certain time period and will recur next year at the same time. The petitioner submitted invoices of sales made in the months of October through May. A few invoices do not provide a true understanding of the petitioner's sales throughout the year to indicate if in fact, it has a slow season in June, July and August. The invoices are not sufficient evidence to establish that the petitioner has a peakload need from October until May. 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 petitioner also submitted a letter from a customer, the owner of [REDACTED] that stated: "due to the nature of our business we order rock and gravel from them [the petitioner] from about the first week of October and ending during the first week of May of the following year." The owner also stated that "this is a buying pattern that is permanent and established." The petitioner submitted a second customer letter from [REDACTED] that stated: "my need for their products significantly increased from early fall of each year until the first week of May, which is my busy season." The petitioner submitted a third letter from a customer [REDACTED] that stated: "when our business slows in May we make significantly fewer trips and haul only a small amount of product from [the petitioner's] work yard until around September." The customer letters are not sufficient evidence of the petitioner's peakload need since the petitioner did not provide a comprehensive customer list and thus, it is impossible to determine if the three customers that submitted letters are a large part of the petitioner's business or if the petitioner has other customers that may need materials all year round.

Finally, the director noted that the beneficiaries listed on the Form I-129 are currently in H-2B status employed by [REDACTED] a company that appears to have the same ownership as the petitioner and thus, this may indicate that the petitioner has a year-round need for workers. In response, the petitioner stated that the two companies are in the same location

but they operate separately and have their own employees. On appeal, the petitioner states that [REDACTED] is a "corporation de jure."

The petitioner did not provide sufficient evidence to establish that the petitioner and [REDACTED] are two separate legal entities. The petitioner failed to provide any documentation of the corporation such as corporate stock certificates, a stock certificate registry or ledger, corporate bylaws, the minutes of relevant annual shareholder meetings, proxy agreements, and any other relevant documentation. 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. at 165.

Furthermore, the petitioner does not provide evidence to demonstrate that it will not continue to receive customers that would require extra work throughout the entire year. Thus, the petitioner has not established that it will not continually need to have laborers to shovel rock and gravel in order to keep its business operational. The petitioner's need for laborers to perform the duties described on Form ETA 9142, which is the nature of the petitioner's business, will always exist. Thus, the petitioner has not demonstrated that its need to supplement its clients' permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation.

It is also noted that the petitioner requested the beneficiary's services from October 1, 2010 until May 5, 2011. Therefore, the period of requested employment has passed.

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 the passage of time.