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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

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DATE: NOV 01 2011 OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont 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 engaged in vegetation control, and it seeks to employ the beneficiaries as pesticide handlers 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 March 1, 2011 until November 30, 2011.

The director denied the petition, concluding that the petitioner had not established a temporary need for the beneficiaries' services.

The Department of Homeland Security (DHS) published the H-2B Nonagricultural Temporary Worker Final Rule in the Federal Register on December 19, 2008. The final rule became effective on January 18, 2009. *See* 73 Fed. Reg. 78103. This final rule amended DHS regulations regarding temporary nonagricultural and agricultural workers, and their U.S. employers, within the H-2B and H-2A nonimmigrant visa classification. The current Petition was filed with United States Citizenship and Immigration Services (USCIS) on February 14, 2011, after the date the new regulations came into effect, thus the revised regulations will be applied to the current petition.

Section 101(a)(15)(H)(ii)(b) of 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, 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 peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioner indicates in its statement of temporary need that the employment is peakload.

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 AAO finds that the petitioner has not established the type of H-2B temporary need asserted in the petition.

Upon filing the instant petition, the petitioner indicated that its need is seasonal. In the Form I-129, the petitioner explained its temporary need for the alien’s services as follows:

[The petitioner’s] primary business during the summer months is herbicide application. Herbicide application can only be performed when the leaves on trees are growing. This creates a temporary seasonal need for workers. We are hereby requesting H-2B certification for 30 workers to supplement our existing workforce. We have extensive contracts in the states of South Carolina and Georgia. We are planning to use our permanent staff to work the majority of the state and our temporary workers to help out in the stated counties on the job order. These are large contracts with the power companies for these states. We will be filing a total of two job orders based on these contracts.

On February 28, 2011, the director sent a request for further information. The director requested additional evidence of the petitioner’s temporary need. In response, the petitioner submitted a chart showing temporary and permanent herbicide handlers for 2009 and 2010. The petitioner also submitted payroll records, quarterly wage reports and Form W-2 and W-3 for all of the petitioner’s employees for 2009 and 2010.

The director denied the petition because the chart submitted by the petitioner of herbicide handlers employed in 2009 and 2010 indicate that the petitioner employed temporary workers for every month out of the year, and thus, the need for herbicide handlers is not temporary but in fact a year-long need.

On appeal, in a letter dated April 15, 2011, an agent for the petitioner stated that the chart of temporary and permanent Herbicide Handlers was incorrect and stated the following:

The original Attachment A that was submitted with the Request for Additional Evidence contained some erroneous information. There was some miscommunication as to what all should be included in this document. Somehow, during the months of January, February and December there were workers included that had other job duties different than the pesticide handlers. Please see the new Attachment A that is included with this appeal. This should be used in substitution for what was submitted earlier.

In January, February, and December 2010 there was no Herbicide Spraying at all during this period of time. The activity that is listed for temporary workers were those who were engaged in cutting down trees, mowing right-of-ways, cutting with chain saws and brush cutters and machetes. Because of cold weather no herbicide is to be used because the trees are dormant. Since these employees were not Herbicide Applicators, they never should have been included on the sheet.

On appeal, the petitioner submitted a new chart indicating the permanent and temporary Herbicide Handlers for 2009 and 2010 and in this chart, the petitioner did not employ any temporary herbicide handlers in December, January and February.

In this instance, 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. As indicated by the director, the petitioner initially indicated that it employed temporary herbicide handlers for every month of the year beginning in March of 2009 and all of 2010. On appeal, the petitioner submits a new chart and deleted the temporary employees from December, January and February. However, the petitioner did not present any corroborating evidence to support the claim that no temporary herbicide handlers are employed three months out of the year.

The petitioner did not submit any signed work contracts, letters of intent from clients, and/or monthly invoices from previous calendar year(s) clearly depicting the type and regularity of work that was, or will be, performed during each month of the requested period of need. The petitioner also did not submit summarized monthly payroll records/reports over the past two calendar years that clearly identify and separately distinguish the petitioner's permanent employee staff from its temporary H-2B staff in the requested occupation. Stating on appeal that an error was made is not sufficient evidence to establish a seasonal need for temporary workers. The petitioner has not presented sufficient documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. 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. The petitioner is engaged in vegetation control and its need for herbicide handlers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, may always exist without further evidence from the petitioner to prove otherwise.

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.