

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



D4

DATE: **JAN 09 2012** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

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 petitioner is engaged in the manufacturing of raw sugar. It seeks to employ the beneficiary as a maintenance repairer, 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, 2011 until July 31, 2012. The Department of Labor determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification.

The director denied the petition on August 25, 2011, concluding that the petitioner had not established a temporary need for the beneficiary's services.

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.

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.

In response to the director's request for evidence, the petitioner stated the seasonal need as follows:

Due to the expansion and repairs of the sugar mill scheduled for this year and 2012, [the petitioner] is in dire need of additional Maintenance Repairers that are skilled in this type of work to ensure that the Sugar Mill is in its best working condition at the beginning of the harvesting season that begins in October and during the harvesting season which generally ends in the middle of January. As soon as harvesting season is completed all sugar mill equipment must be evaluated and all equipment must be repaired or replaced to ensure that the equipment in the mill is at its best working condition for the following year. The sugar cane is harvested once a year, every year at the same time making this position in a sugar mill seasonal that processes raw sugar cane into raw sugar and prepare the raw sugar for the refinery.

The petitioner submitted a chart showing the number of temporary maintenance repairers employed in 2009 and 2010. (Appellate brief, ex. 9.) The chart does indicate that the petitioner's need for temporary maintenance repairers is traditionally tied to a season of the year by an event or pattern and is of a recurring nature, but the recurring need is for the four-month period from September through January, and not for the ten-month period from October through July. The evidence submitted by the petitioner does not overcome the concerns noted by the director and does not provide sufficient evidence establishing a seasonal need for temporary maintenance repairers from October through July. It is noted that the chart shows year-round employment of between 122 and 184 permanent maintenance repairers during 2009 and 2010, which indicates a permanent need for maintenance repairers. The Form I-129 indicates that the petitioner has 70 employees in the United States, suggesting that the numbers on the chart for 2009 and 2010 may no longer be a valid indication of the number of the petitioner's employees.

The petitioner also submitted contracts between the petitioner and sugar cane growers for the "2010 crop year," showing the purchase of sugar cane to be harvested in 2010. The contracts do not indicate the months that consist of the "2010 crop year," and do not corroborate the petitioner's claim of a seasonal need from October through July.

The petitioner submitted a chart entitled "2011 Grinding Season" and another chart entitled "2011 Grinding Season, 2011 Summer Estimates." On appeal, the petitioner explained that the charts indicate that "1.8 million tons of sugar cane will begin arriving at [redacted] for processing," and that "968,030 tons of sugar cane is scheduled to arrive at [redacted] for processing." The charts do not clearly state when the grinding season begins and ends and do

not provide further evidence of the petitioner's need for temporary maintenance repairs in connection with the grinding season, or during the period of October through July. 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.

The petitioner noted that United States Citizenship and Immigration Services ("USCIS") approved other petitions that had been previously filed on behalf of the petitioner. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. 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. 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).

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 the nonimmigrant petitions on behalf of the 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 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 met that burden.

ORDER: The appeal is dismissed.