



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



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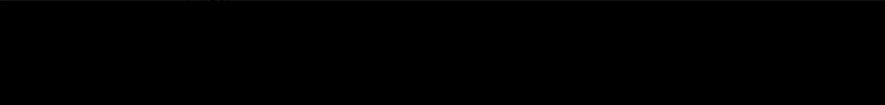
File: SRC 01 181 50947

Office: Texas Service Center

Date: 06 NOV 2001

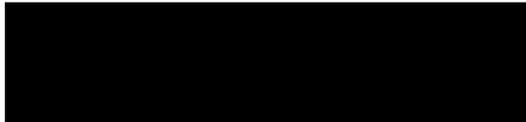
IN RE: Petitioner:

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)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a transportation firm which seeks to employ the beneficiaries as truck operators for a period of ten months. The director denied the petition because it was not accompanied by a temporary labor certification from the Department of Labor. The certifying officer declined to issue a labor certification because the petitioner has an ongoing need for the occupation.

On appeal, counsel argues that the petitioner does have a temporary need. Counsel cites Matter of Golden Dragon Chinese Restaurant, 19 I&N Dec. 238 (Comm. 1984), in support of his assertions.

8 C.F.R. 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made. 8 C.F.R. 214.2(h)(6)(iv)(A) states that a petition not accompanied by temporary labor certification must be accompanied by countervailing evidence from the petitioner that addresses the reasons why the Secretary of Labor could not grant a labor certification.

Counsel has correctly cited Matter of Golden Dragon Chinese Restaurant, supra, in which the Commissioner determined that, in proceedings pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii), the role of the Department of Labor is purely advisory and its determinations are not binding on the Service. However, this consideration does not preclude concurrence with such an advisory opinion. The petitioner is still required to establish through countervailing evidence that the determination of the Department of Labor is erroneous or inapplicable.

The petitioner has not provided sufficient evidence in support of its assertion that its need for the services of the beneficiary is temporary.

Matter of Artee Corporation, 18 I&N Dec. 366 (Comm. 1982), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties that is controlling.

Counsel asserts that a contract with a major beef processor has caused a one-time need of the beneficiaries' services. The nature of a one-time occurrence is discussed in the regulations at 8 C.F.R. 214.2(h)(6)(ii)(b)(1):

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.

The petitioner is a transportation firm. It has needed truck operators in the past and will need truck operators in the future. A ten-month contract cannot be considered a temporary event of short duration. Accordingly, it is concluded that counsel has not established that the petitioner's need is temporary.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.