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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: SRC 01 184 57778 Office: Texas Service Center

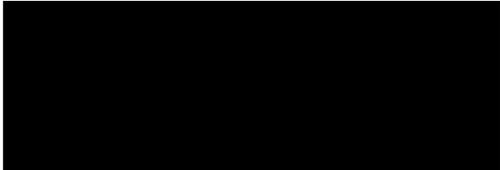
Date: 06 NOV 2001

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:



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, who certified his decision to the Associate Commissioner for Examinations for review. The director's decision will be withdrawn and the petition will be approved.

The petitioner seeks to employ the beneficiaries as heavy equipment operators for a period of 10 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 he determined that the petitioner had not established that its need for the occupation is temporary.

In response, counsel argues that the petitioner's need is temporary. Counsel argues that the beneficiaries are needed for a peakload period due to circumstances beyond the petitioner's control.

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.

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. Pursuant to 8 C.F.R. 214.2(h)(6)(ii)(B)(3), to establish a peakload need, 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.

Counsel argues persuasively that the petitioner's contract with Travis County has been extended due to numerous delays and through no fault of the petitioner. Furthermore, counsel indicates that the petitioner has found itself, through no fault of its own, with more work than it could handle with his current personnel. Counsel also argues that changes in the labor market have made it difficult to find qualified workers. The petitioner's owner indicates that he has no intention of retaining the beneficiaries once the contracts have been honored.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 361. The petitioner has sustained that burden. Accordingly, the decision of the director will be withdrawn and the petition will be approved.

**ORDER:** The director's decision is withdrawn and the petition is approved.