

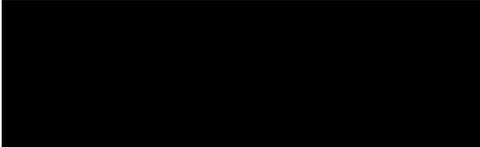


U.S. Department of Justice

Immigration and Naturalization Service

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



PUBLIC COPY

File: SRC 01 214 50898 Office: Texas Service Center

Date: 06 NOV 2001

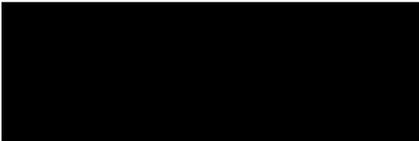
IN RE: Petitioner:
Beneficiary:



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)

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 affirmed.

The petitioner seeks to employ the beneficiaries as assemblers for a period of four months. The director denied the petition because it was not accompanied by a temporary labor certification from the Department of Labor (DOL). 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 or that it had tested the labor market.

Counsel has not responded to the notice of certification.

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.

The petitioner provided some evidence that qualified United States workers are not available. Counsel argued that the petitioner had filed an open-ended order with the Carpenters Local 551. However, the Department of Labor contacted the Local, which found no record of contact with the petitioner. The Union indicated to the DOL that there are 100 members out of work and 100 more on the apprentice program waiting list.

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. In this proceeding, counsel has not established that the petitioner's need is temporary.

Counsel argued that the petitioner's need for the occupation is temporary and is a one-time occurrence. However, the petitioner has not demonstrated that a delay of work is a one time occurrence rather than a routine aspect of doing business in the construction industry.

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 not sustained that burden. Accordingly, the decision of the director will not be disturbed.



ORDER: The appeal is dismissed.