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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



File: SRC 02 162 52573 Office: Texas Service Center Date: **NOV 25 2002**

IN RE: Petitioner:
Beneficiaries

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: Self-represented

PUBLIC COPY

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and certified to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner engages in the business of commercial shrimping in the gulf of Mexico. It desires to employ the beneficiaries as deckhands for ten months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the evidence submitted by the petitioner did not overcome the points of the Department of Labor's denial of the certification.

The DOL determined that the employer failed to contact one of the applicants and contact with the other applicants was not only conducted after the recruitment results was submitted, but was made on the agent's letterhead and signed by the employer's agent, not the employer. The DOL concluded that the employer failed to show a good faith effort to contact the referrals, and denied the certification. The director indicated in her decision that she concurred with the DOL's determination.

Upon review, the petitioner has submitted insufficient countervailing evidence to overcome the concerns addressed by the DOL, which were reiterated in the director's decision. Further, the petitioner has not shown that the initial recruitment results letter or report submitted to the DOL was written after the referrals were contacted, or that the individuals who were contacted by the petitioner were given sufficient time to respond to the job offer. For these reasons, the petition may not be approved. The petition may not be approved for another reason beyond the decision of the director.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), 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, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), 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 of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must 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 petition indicates that the employment is seasonal and the temporary need recurs annually.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, 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.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Assist the other crew members in the preparation of the trawler for fishing activities. Assist the rigger to set out and retrieve the nets. As soon as the catch is unloaded on the boat's deck, the header sorts and returns unwanted catch back to sea. Heads and rinses the shrimp with sea water. Assists the rigger to dip the shrimp in preservative and to ice it down and store it in the boat's hold. Assists with the off loading of the catch. Assists the captain and the rigger as required. Mops deck.

Upon review, the duties are shown to be ongoing. The petitioner has a permanent need for workers to perform as deckhands. The services to be rendered cannot be classified as seasonal work, as the petitioner has not shown that the services or labor are traditionally tied to a season of the year by an event or pattern. Consequently, the petitioner has not established that the nature of its need for deckhands is temporary in nature.

The petitioner cites an Administrative Appeal decision in support of his argument. The regulation at 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act. However, unpublished decisions are not similarly binding.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The decision of the director is affirmed. The petition is denied.