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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



Public Copy

File: EAC 01 013 50929 Office: Vermont Service Center Date: APR 27 2001

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: [Redacted]

Identification 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 which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Guyra L. Rosenbey
for Robert P. Wiemann, Acting Director
Administrative Appeals Office

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

The petitioner engages in the business of fine art services. It desires to continue to employ the beneficiary as an antique frame carver for one year. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined a temporary need for the beneficiary's services had not been established.

On appeal, counsel states that the Service failed to consider evidence submitted by the petitioner and totally relied on the Department of Labor's decision.

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), as 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 does not indicate whether the employment is a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. The petition also does not state whether the temporary need is unpredictable, periodic or recurring annually.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads "design, develop and carve a line of frames reproducing English, Italian, French and Spanish frames of the 16th to 18th centuries. Construct samples using hand and machine tools. Create custom carving and ornamentation appropriate to country and time period."

The petitioner states, in its letter dated October 13, 2000, that the beneficiary's position requires him to design and reproduce a line of picture frames appropriate to the European areas of England, Spain, France and Italy of the 16th to 18th centuries. The petitioner also states that it believes there is currently a substantial interest in European frames of this period and it intends to produce a line of frames which is specifically geared towards a client base that it believes exists for this product. Since this is the nature of the petitioner's business, the services to be performed cannot be classified as duties that will not need to be performed in the future. The petitioner has not specified a time or season of the year where the beneficiary's services are not needed. The petitioner has not established that it regularly employs permanent workers to perform these particular services or labor. For instance, the petitioner states that the beneficiary's models serve as prototypes so the other wood carver employees can copy from the beneficiary's designs. Therefore, the petitioner has a permanent need for a worker in this position. Consequently, the petitioner has not established that the nature of its need for an antique frame carver is temporary.

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 appeal is dismissed.