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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 01 050 51615 Office: Vermont Service Center Date: APR 27 2001

IN RE: Petitioner: [Redacted]
Beneficiaries: [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 unwanted 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

Robert P. Wiemann
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 wholesale distribution of gasoline. It desires to employ the beneficiaries as gas pumping station operators for a period of one year. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that the need for the services to be performed is temporary.

On appeal, counsel states that the employment will not actually start until Spring 2001. Counsel states that the employer amended the dates of employment to reflect August 1, 2000 until August 1, 2001 because it thought that it would take time to adjudicate the petition. Counsel states that now the petitioner needs the workers for the peak season from April 1, 2001 until November 30, 2001.

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 indicates that the employment is seasonal. 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 a seasonal need, 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.

On appeal, counsel states that the employer will need the workers for the peak season from April 1, 2001 until November 30, 2001. The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(3) states that for the nature of the petitioner's need to be a peakload need, the petitioner must establish 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.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads "controls operation of steam, gas or electric motor-driven compressor to maintain specified pressures on high and low pressure mains dispensing gas from gasholders: Observes pressure gauges to determine consumption rate variations and turn knobs or switches to regulate pressures. Opens valves to allow gas to flow into and out of compressors. Reads gas meters and records amount of gas received and dispensed from holders. May clean, lubricate, and adjust compressors, using handtools. Services automobiles, buses, trucks, and other automotive vehicles with fuel, lubricants, and accessories: Fills fuel tank of vehicles with gasoline or diesel fuel to level specified by customers. Observes level of oil in crankcase and amount of water in radiator, and adds required amounts of oil and water. Adds necessary amount of water to battery, and washes windshield of vehicle. Lubricates vehicle and changes motor oil. Replaces lights, and washes and waxes vehicle. Collects cash from customer for purchases and makes changes or charges purchases using customer's credit card."

The petitioner's need for gas-pumping station operators for eight months out of the year does not show that the services or labor is traditionally tied to a season of the year by an event or pattern. The petitioner has not shown that it seeks to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand. There is no indication in the record when the petitioner operates with only its permanent employees. Therefore, it is clear that the petitioner has a permanent need for workers in

these positions. The petitioner's need for these services to be performed will always exist. The petitioner has not shown that the nature of its need for gas pumping station operators' services is a seasonal or peakload need.

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.