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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

JUL 30 2001

File: SRC 00 035 53334 Office: Texas Service Center Date:

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

Petition: Petition for 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]

Identifying data is used to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

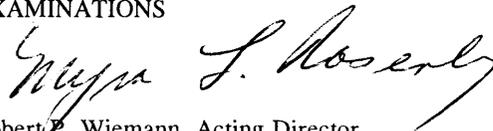
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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

*for*   
Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was initially approved by the Director, Texas Service Center. In a subsequent Service motion to reopen, the director ordered that the original decision be withdrawn and that the petition be denied and certified to the Administrative Appeals Office for review. On August 3, 2000, the Associate Commissioner of Examination's withdrew the director's decision denying the petition and remanded the petition to the director in order to follow the proper procedure for revocation of an approved petition. Accordingly, the director properly served the petitioner with notice of his intent to revoke approval of the approved visa petition, and his reason therefore, and ultimately revoked approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner engages in the business of shipbuilding. It desires to employ the beneficiaries as first class shipfitters for a period of one year. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that a temporary need for the beneficiaries' services had not been established and revoked the approval of the petition.

On appeal, counsel states that the petitioner previously submitted in this matter evidence regarding intensified production in Louisiana shipyards. Counsel also requested oral argument. However, oral argument is granted only in cases where cause is shown. It must be shown that a case involves unique facts or issues of law which cannot be adequately addressed in writing. In this case, no cause for oral argument has been shown. Consequently, counsel's request for oral argument is denied.

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 for a Nonimmigrant Worker (Form I-129) indicates that the dates of intended employment for the beneficiaries are for one year. The petition also indicates that the employment is a peakload occurrence and the temporary need is periodic.

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 peak-load 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 Application for Alien Employment Certification (Form ETA 750) indicates that the beneficiaries will be employed full-time with 10 hours over-time and paid a salary of \$13.40 per hour, which calculates to an annual salary of \$27,872. The nontechnical description of the job on Form ETA 750 reads:

Lays out and fabricates metal structural parts, such as plates, bulkheads, frame and braces structural parts in the hull of ship for welding. Lays out position of parts on metal working from blue prints or templates and using scribe and handballs. Locates and marks reference lines such as center, buttock and frame lines. Marks location of holes to be drilled, installing temporary fasteners to hold in place for welding. May tack/weld clips and brackets in place prior to permanent welding. A significant portion of the duties will involve training of U.S. workers to work as full time shipfitters. Duties may include demonstration, classroom, on-the-job, and supervisory training, as well as mentoring and development of training curriculum.

The petition indicates that the petitioner was established in 1984 and currently employs 450 workers. Counsel states that H-2B petitions are being approved in other industries where the employer's need for foreign workers is permanent. The assertion of counsel does not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaiqbena, 19 I&N Dec. 533, 534

(BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Further, the need to lay out and fabricate metal structural parts and brace structural parts in the hull of the ship for welding, which is the nature of the petitioner's business, will always exist. The petitioner has an ongoing, continuing need for the services sought. The petitioner has not demonstrated that the nature of its need for first class shipfitters is temporary based on a seasonal or short-term demand.

Furthermore, the beneficiaries' job description states that "a significant portion of the duties will involve training of U.S. workers to work as full time shipfitters." Petitions pursuant to section 101(a)(15)(H)(ii) of the Act for a class or type of employee for which the petitioner has a permanent need where the petitioner makes attempts to establish the temporariness of its need for the beneficiary's services by stipulating that the beneficiary will function as a trainer or instructor rather than in a productive capacity must be accompanied by evidence of the existence of a training program, by evidence that the petitioner has recruited or hired trainees, and by evidence that the petitioner can viably employ a full-time instructor and simultaneously operate a training program and a commercial or other enterprise. Matter of Golden Dragon Chinese Restaurant, 19 I&N Dec. 238 (Comm. 1984). The petitioner has not presented evidence of its training program.

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.