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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: SRC 01 039 52533 Office: Texas Service Center Date: **MAR 16 2001**

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: Self-represented

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

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

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

The petitioner engages in the business of electrical power line construction. It desires to employ the beneficiaries as line erectors for a period of ten and one-half months. 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.

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 from June 23, 2000 until April 11, 2001. The petition also indicates that the employment is peakload and that the temporary need is unpredictable.

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 Application for Alien Employment Certification (Form ETA 750) indicates that the beneficiaries will be employed full-time and paid a salary of \$14.81 per hour, which calculates to an annual salary of \$30,804. The nontechnical description of the job on Form ETA 750 reads:

Erects, maintains, and repairs wood poles and prefabricated light-duty metal towers, cable and related equipment, to construct transmission and distribution power lines used to conduct electrical energy between generating stations, substations, and consumers: Assist ground helpers in attaching crossarms, insulators, lightening arresters, switches, wire conductors, and auxiliary equipment to poles preparatory to erection, as instructed by line supervisor, and assists in erection of poles or towers and adjustment of guy wires. Climbs erected poles or towers and installs equipment, such as transformers, which are ordinarily installed after poles are erected. Strings wire conductors between erected poles with assistance of ground helpers and adjust slack in conductors to compensate for contraction and elongation of conductors due to temperature variations using winch, splices, solders, and insulates conductors and related wiring to join sections of power line, and to connect transformers and electrical accessories. May trim trees and brush prior to new construction during repair of damaged lines or as part of routine maintenance.

The petitioner explains that its business has increased in 2000 by 45% over that of 1999. The petitioner states that this increase required the company to pull people out of its operation in Mississippi to work on contracts elsewhere, thereby leaving a shortage of available workers to handle existing Mississippi business.

The petitioner's stated need for line erectors does not show that the petitioner seeks to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand. The petitioner's need for line erectors for 10 and one-half months out of the year cannot be considered a seasonal or short-term demand as there is no indication when the petitioner operates with only its permanent employees. Further, the need to erect, maintain, and repair wood poles and prefabricated light-duty metal towers, cable and related equipment, which is the nature of the petitioner's

business, will always exist. The petitioner has not shown that its need for the beneficiaries' services is a 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 decision of the director is affirmed. The petition is denied.