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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



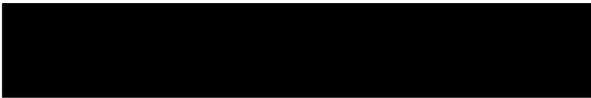
**PUBLIC COPY**

File: SRC 97 184 51638

Office: Texas Service Center

Date: 15 NOV 2001

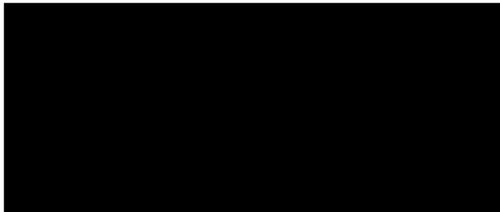
IN RE: Petitioner:  
Beneficiary:



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)

*Identifying data deleted to prevent clearly unwarranted invasion of personal privacy*

IN BEHALF OF PETITIONER:



**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, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director after appropriate notice and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiaries as shipfitters for a period of six months. The petition was accompanied by temporary certification from the Department of Labor. However, the Department of Labor determined that the certification had been approved in error because the need for the occupation appeared to be permanent and because the usual requirements for the occupation of shipfitter were not requirements for the proffered positions. Department of Labor regulations do not provide for revocation of labor certification. Accordingly, the director informed the petitioner that the labor certification had been approved in error and afforded the petitioner an opportunity to provide countervailing evidence. The director determined a temporary need for the occupation had not been established.

On appeal, counsel argues that the director failed to take into account the peakload nature of the oil boom in South Louisiana. Counsel asserts that he was not informed that the temporary labor certification had been revoked. Counsel had indicated a brief would be submitted in support of the appeal. In order to ensure fair consideration of all available material, counsel was afforded opportunity to furnish a brief or any additional material. To date, no brief or further evidence has been entered into the record of proceeding.

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....

8 C.F.R. 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary certification from the Department of Labor or notice detailing why such certification cannot be made.

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 petitioner is an employment contractor. It is clear that the petitioner has needed shipfitters in the past and will need them in the future. Therefore, the petitioner has not established that its need for the occupation is temporary. In view of the foregoing, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed.

**ORDER:** The appeal is dismissed.