

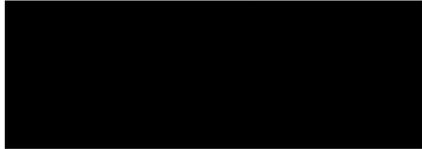


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U.S. Department of Justice
Immigration and Naturalization Service

Public Copy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: SRC 00 035 53334 Office: Texas Service Center Date: AUG - 6 2002

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]

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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, Director
Administrative Appeals Office

DISCUSSION: This is a motion to reconsider the Associate Commissioner for Examination's decision dismissing the appeal of the revocation of the approval of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

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 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 for Examinations 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 director determined that a temporary need for the beneficiaries' services had not been established. The director's decision was affirmed by the Associate Commissioner on appeal.

On motion, counsel states that the training program was submitted in the initial filing. Counsel also states that the petitioner needs to supplement its permanent workforce on the basis of a peakload need and at the same time to use these workers to engage in on-the-job training with the goal of producing a 100% domestic workforce. Counsel asserts that the H-2 visa classification is reserved for "the purpose of alleviating labor shortage as they first or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production...."

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. Counsel states in his motion that the petitioner requested oral argument in order to complete the administrative record which the petitioner believes will reveal that the H-2 classification is being misapplied nationwide and industry-wide to the detriment of this petitioner. Counsel states that the petitioner can produce this readily available information. Therefore, 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 period of intended employment for the beneficiaries is 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.

Counsel states on motion that the petitioner needs to supplement its permanent workforce on the basis of a peakload need and at the same time to use these workers to engage in on-the-job training with the goal of producing a 100% domestic workforce.

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.

Further, the Hutco, Inc. Employer Plan-Shipfitters, which counsel states is the petitioner's training program, does not explain in detail the on-the-job training program. For example, what the shipfitter school/clinical based training consists of, what elementary shipfitting functions and skills are, and when these skills are considered mastered so that one can perform them safely. Further, if a significant portion of the beneficiaries' duties will involve training of U.S. workers to work as full time shipfitters, rather than in a productive capacity, the training program must be accompanied by evidence of the existence of the training program, by evidence that the petitioner has recruited or hired trainees, and by evidence that the petitioner can viably employ full-time instructors 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 such evidence along with the training program.

Counsel asserts that the H-2 visa classification is reserved for "the purpose of alleviating labor shortage as they first or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production...." The statute states that the alien must be "coming temporarily to the United States to perform other temporary service or labor..." The petitioner has not shown that its need for the services of the beneficiaries 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 Associate Commissioner's decision of July 30, 2001 will be affirmed. The petition is denied.