



DH

U.S. Department of Justice

Immigration and Naturalization Service

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

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



File: LIN 02 124 54671 Office: Nebraska Service Center

Date: 14 AUG 2002

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)

IN BEHALF OF PETITIONER:



Public Copy

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:** The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a refrigerated freight carrier of fresh produce. It has 42 permanent employees and an estimated gross annual income of \$12 million. It seeks to employ 95 unknown beneficiaries as truck drivers for a period of 9 months. The director denied the petition because it was not accompanied by a temporary labor certification from the Department of Labor.

The certifying officer declined to issue a labor certification because he determined that the petitioner had not established that its need for the occupation is temporary. The certifying officer stated:

On a consistent basis it appears the employer has filed an application with little more or less than a 30 day break for each of the application's filing. It appears that the employer has an ongoing need ....

On appeal, counsel argues that the petitioner's need is temporary and that the director erred in failing to acknowledge that the petitioner changed its underlying rationale for requesting the visas and supported the change by countervailing evidence.

The petitioner states that it needs the temporary services of these unknown drivers for nine months to allow time for permanent labor certifications and immigrant petitions for other previously identified drivers to be processed.

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 labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made. 8 C.F.R. 214.2(h)(6)(iv)(A) states that a petition not accompanied by temporary labor certification must be accompanied by countervailing evidence from the petitioner that addresses the reasons why the Secretary of Labor could not grant a labor certification.

Matter of Artee Corporation, 18 I&N Dec. 366 (Comm. 1982), 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 for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling.

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 a one-time occurrence to provide a transition from temporary to permanent foreign employees. The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future. In this case, the petitioner's situation does not qualify for a one-time occurrence because the firm will continue to need workers to perform the same services in the future. It is determined that the nature of the need of the petitioner is permanent rather than temporary in nature.

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.

**ORDER:** The appeal is dismissed.