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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: LIN 02 009 52657 Office: Nebraska Service Center Date: AUG 26 2002

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

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 the beneficiaries as truck drivers for a period of 3 1/2 months. The director denied the petition because it was not accompanied by a temporary labor certification from the Department of Labor.

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.

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 argued that the petitioner's need is temporary and that the beneficiaries' services are required for a peakload period only. The Associate Commissioner dismissed the appeal finding the petitioner had not established that its need for the duties of the offered position is temporary.

On motion, counsel "specifically directs that the petition and the labor certification be amended to commence on 1 November (versus 15 October), the Petitioner's traditional start date of the winter produce hauling season." Counsel indicates that if this petition is

approved, the approved period would then correspond to the period of November 1, 2002 to February 15, 2003, the company's next winter hauling season. Additionally, the initial petition indicated that the beneficiaries would be paid based upon the actual miles driven. Counsel indicates that compensation will continue to be paid in cents per mile. However, a minimum hourly rate of $16.37 per hour will now serve as a minimum hourly rate based on hours worked.

On motion the petitioner defines its peakload period as winter months and summer months with winter months consisting of a period from November 1 to February 15 and summer months consisting of a period from March 15 to September 30. In other words, annual peakload periods consist of 320 days out of 365 days per year. Therefore, "temporary" workers for the same positions will be at work more days during the year than most United States permanent workers. This condition cannot be considered seasonal or meeting short-term demand. In view of the foregoing, it is concluded that the petitioner has not established that his need is temporary and is for a peakload period only.

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 order of February 20, 2002 dismissing the appeal is affirmed.