



U.S. Department of Justice

Immigration and Naturalization Service

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



DA

28 AUG 2002

File: SRC 02 176 50026 Office: Texas Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to § 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, 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 commercial renovation and construction. It seeks to employ the beneficiaries as construction helpers for nine months. The certifying officer of the Department of Labor declined to issue a labor certification because the petitioner had not established a temporary need for these workers and their employment would have an adverse effect on wages and/or working conditions of U.S. workers similarly employed. The director determined that the petitioner had not established that the need for the services to be performed is temporary.

The director also determined that the period of time the beneficiaries are to be employed differs on the ETA 750A. The petition reflects the dates of intended employment as January 15, 2002 to October 15, 2002. The ETA 750A reflects the same dates. Therefore, there is no need to further address this issue.

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), 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 indicates that the employment is seasonal and that the temporary need recurs annually.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Assists contractor by loading/unloading/hauling materials, demolishing existing structures, cleaning the work area. May also use basic tools such as screw/nail guns, hammers and saws to assist carpenters in interior renovation.

The petitioner explains that its primary earnings are derived from contracts to renovate/remodel the interior of commercial buildings, especially retail establishments located in shopping malls. The petitioner states that the nature of this type of work requires that all renovation activity ceases during the holiday season, which begins mid-October and then ends after the January sales. Therefore, all renovations begin in mid-January of each year so that the work will be completed no later than October 15th.

Contractual work involving the renovation and remodeling of the interior of commercial buildings cannot be considered as seasonal work as it is not traditionally tied to a season of the year by an event or pattern. Although the petitioner explains that some of the buildings it renovates or remodels are located in shopping malls where work is restricted during the holiday seasons, in general, commercial renovation and remodeling can be done throughout the year and during the holiday seasons. Further, renovation and remodeling contracts are not necessarily of a recurring nature and the period during which the services or labor is not needed is unpredictable or subject to change.

The petitioner has a permanent need for workers to fulfill its renovation/remodeling contracts, which is the specific nature of the petitioner's business. The petitioner's need for the services of the beneficiaries as construction helpers has not been shown to be temporary.

This petition may not be approved for another reason beyond the decision of the director. The petitioner has not established that the employment of the beneficiaries would not have an adverse effect on wages and/or working conditions of U.S. workers similarly employed.

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.