



...analyzing data data...
prevent clearly unwe...
invasion of personal
... '96

U.S. Department of Justice

Immigration and Naturalization Service

D4

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



File: SRC 01 166 58331 Office: Texas Service Center Date: 28 AUG 2004

IN RE: Petitioner: [Redacted]
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]

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, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a regional airline. The petitioner seeks to employ the beneficiary as an airframe and powerplant mechanic for a period of five months. The director determined that the petitioner did not submit evidence of temporary labor certification (Form ETA 750) from the Department of Labor. The director also determined that the beneficiary is being trained for a position in the United States.

On appeal, counsel states that the petitioner did send evidence that an original Form ETA-750 was previously submitted and, therefore, was not obligated to send a copy of Form ETA-750. Counsel also states that the director's argument that the beneficiary is being trained for ultimate staffing of domestic operations in the United States is based on a misinterpretation of 8 C.F.R. 214.2(h)(7)(iii)(F).

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....

The regulations at 8 C.F.R. 214.2(h)(2)(i)(F)(3)(iii) states in pertinent part that:

If all of the beneficiaries covered by an H-2A or H-2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with **a copy of the same labor certification**. Each petition must reference all previously filed petitions for that labor certification.

In this case, the Petition for a Nonimmigrant Worker (Form I-129) was filed by Express Airlines I, Inc. dba Northwest Airlink on April 27, 2001. The petition was filed to change the beneficiary's status from an H-3 to an H-2 nonimmigrant. The petition was also filed without a copy of the original temporary labor certification,

or notice detailing the reasons why such certification cannot be made. Counsel states on appeal that the copy of the H-2B approval notice (Form I-797B) indicating approval for 15 unnamed H-2 workers for Express Airlines I, Inc. dba Northwest Airlink was sufficient evidence, and that a copy of the temporary labor certification was unnecessary. However, the above cited regulations state that a copy of the same labor certification must be filed with the petition. Further, the petitioner has not informed the Service how many petitions have been filed using the same temporary labor certification. Absent a copy of the original temporary labor certification, or a new temporary labor certification from the Department of Labor valid for the period of time requested, the petition cannot be approved.

It is noted that the Secretary of Labor may issue a temporary labor certification for a period of up to one year. As the H-2B petition approval was valid from February 28, 2001 until November 30, 2001, the temporary labor certification must now be expired.

The record also contains evidence of the beneficiary's classification as an H-3 nonimmigrant with the petitioning entity, Northwest Airlink, from October 26, 1999 until October 1, 2001. The director states in his decision that it appears the beneficiary was being trained for a position with the petitioner's domestic operation. This office is in agreement with the director. The petitioner has evidenced its desire to employ the beneficiary by filing this petition in his behalf. The statute involved here was designed to accomplish the training of alien nonimmigrants in order that they could utilize the benefits of that training in a foreign country. The intent of Congress, as expressed in the definition of a nonimmigrant trainee in section 101(a)(15)(H)(iii) is clear. They did not contemplate use of the statute to recruit and train aliens for the ultimate staffing of United States firms in their domestic operations. Matter of Glencoe Press, 11 I&N Dec. 764 (Reg. Comm. 1966).

This petition may not be approved for another reason beyond the decision of the director. The petitioner has not established a temporary need for the beneficiary's services. The petition indicates that the employment is a peakload need.

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 peakload 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 record contains a copy of an unendorsed Application for Alien Employment Certification (Form ETA 750) that indicates the beneficiary will be employed full-time and paid an annual salary of \$31,096. The nontechnical description of the job on Form ETA 750 reads:

Provide repair and service to company aircraft. Perform maintenance as well as major repair to company fleet. Determine air worthiness of aircraft and components according to IAW established procedures and Federal Aviation regulations.

The petitioner has not shown that it supplements its permanent staff on a temporary basis due to a short-term demand. The petitioner has not established that its need for an airframe and powerplant mechanic can be considered a short-term demand as the need to provide repair and service to the company's fleet of aircraft, which is the nature of the petitioner's business, will always exist. The petitioner has not established that the need for the services to be performed 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 appeal is dismissed.