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Immigration and Naturalization Service

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



File: WAC 01 204 56133 Office: California Service Center

Date: DEC 16 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



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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is a transportation company that transports produce and other commodities. It desires to employ the beneficiary as a dispatcher for ten months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had failed to submit the required labor certification or establish that qualified U.S. workers are unavailable.

On appeal, counsel submitted sufficient countervailing evidence to overcome the concerns addressed in the director's decision. Therefore, the objections of the director have now been satisfied. However, the petition may not be approved for another reason beyond the decision of the director.

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 a one-time occurrence and the temporary need is unpredictable.

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, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

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

Responsible for scheduling, dispatching and overseeing truck drivers, planning delivery schedules, and maintaining records.

The petitioner explains that its temporary need for the beneficiary's services is based on one of its employees being diagnosed with a medical condition that is expected to require long-term treatment. The petitioner states that once the employee is fully recuperated, he is expected to resume his position as dispatcher. Therefore, the services to be rendered cannot be classified as duties that will not need to be performed in the future.

Additionally, the petitioner has not shown that the replacement of an employee due to his medical condition is a temporary event of short duration especially when the petitioner states that he is expected to require long-term treatment. The petitioner's need to have a dispatcher, which is essential to his business operation, will always exist. Consequently, the petitioner has not established that the nature of its need for a dispatcher is temporary in nature.

Since the aforementioned issue was not discussed in the director's decision, the case will be remanded so that the director may address this matter. The petitioner should be given an opportunity to submit any additional evidence that the director deems necessary. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision of May 16, 2002 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.