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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



FILE: SRC 02 225 53219

OFFICE: TEXAS SERVICE CENTER

DATE: OCT 25 2002

IN RE: PETITIONER:
BENEFICIARIES:



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:

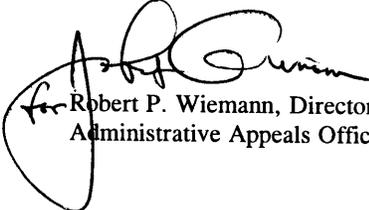
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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


for 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 shall be affirmed.

The petitioner is an agricultural corporation employing seven persons. It seeks to employ the beneficiary for a period of six and one-half months as a farm equipment mechanic. The petitioner's initial request to the Department of Labor was for a period of eleven and one-half months. On July 17, 2002, after the Department of Labor certifying officer had issued his determination, counsel indicated that the beneficiary's expected period of employment would be reduced to six and one-half months. The director denied the petition because it was not accompanied by a temporary labor certification from the Department of Labor, the petitioner had not established that its need for the duties of the offered position is temporary, and the wage offered was not within 95% of the prevailing wage.

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

Labor certification for this application is denied because the employer has not established a temporary need for Eduardo Ruggiero. The employer must establish that the temporary need for the worker is based on either: (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. The job offer for the period 3/1/02 through 2/15/03, is deemed to be for permanent employment and not appropriate for H-2B temporary labor certification. Additional reason for denial: (1) employer offered a wage less than 95% of the prevailing wage.

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)(E) states that a petition not accompanied by a 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.

On certification, counsel submits an affidavit from the petitioner dated July 10, 2002 indicating that the position is temporary in nature in that it is a peakload need. The petitioner explains that its regular mechanic has taken a temporary leave of absence for one year leaving the firm short handed this year and that he is expected to return to employment in February 2003.

The petitioner currently employs a regular farm equipment mechanic on a permanent basis. It has a continuing need for the services of a farm equipment mechanic. The fact that a regularly employed worker has taken a temporary leave of absence and is not due to return until February, 2003 does not negate the petitioner's permanent need for a farm equipment mechanic. Additionally, it is noted that the certifying officer of the Department of Labor did not find that there were insufficient qualified U.S. workers available as asserted by counsel. The certifying office made no determination concerning that issue.

Counsel submits a prevailing wage determination from the State of Florida Department of Labor for a skill level 2 farm equipment mechanic showing an hourly wage rate determination of \$15.51. Counsel argues that this State determination should be considered as overcoming the U.S. Department of Labor determination made by the certifying officer at the Atlanta Federal Center. Service regulations at 8 C.F.R. 214.2(h)(6)(iv) require a certification from the Secretary of Labor. The State of Florida wage rate determination advanced by counsel does not meet Service regulatory requirements. In this case the final determination quoted above takes precedence. Even if the State determination were to be found acceptable, it would not change the outcome of this case because the visa petition was filed on July 18, 2002. The State hourly wage determination submitted by counsel is valid for filing applications and attestations for only 90 days from October 4, 2001, the date of determination, and was not valid on the date the visa petition was filed. After review of the evidence contained in the record, the decision of the director is found to be correct.

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.