

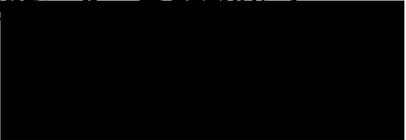


DH

U.S. Department of Justice
Immigration and Naturalization Service

Identifying data deleted
prevent clearly unwarranted
invasion of personal
privacy

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



05 SEP 2002

File: SRC 01 214 51589 Office: Texas Service Center Date:

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:



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

The petitioner employs eleven persons and manufactures pallets. It seeks to employ the beneficiaries as box makers for a period of ten months. The petition was accompanied by certification from the Department of Labor. The director determined that a temporary need for the beneficiaries had not been established.

On appeal, counsel states that the employer never held that the occupation itself was seasonal, rather the H-2B application demonstrates a seasonal, peak load need for additional workers to meet seasonal contractual demands. Counsel further states that the State Employment Service and the United States Department of Labor determined the need to be seasonal and the Service failed to clarify the kinds of additional documentation required to meet its higher-than-USDOL standards for determining seasonality.

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), as 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 dates of intended employment for the beneficiaries are from July 1, 2001 until April 30, 2002. The

petition also indicates that the employment is a seasonal need which recurs annually.

A seasonal need is described in regulations at 8 C.F.R. 214.2(h)(6)(ii)(B)(2), which states that:

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 petitioner asserts that its need is seasonal because the largest broker of its product provides pallets to dog food manufacturers whose needs are seasonal. The petitioner encloses a letter dated March 20, 2001 from the broker which states that:

We currently provide pallets to seasonal users in the dog food manufacturing industry. These producers are very busy during the year except the months of June and July. Animals do not eat much during the extremely hot months.

In this case, the petitioner is requesting that the beneficiaries be employed in July, one of the two months when it is indicated that dog food manufacturers have a diminished need for pallets. Additionally, the petitioner would almost double its existing work force without showing a need that would justify the larger workforce during a predictable seasonal period. In view of the foregoing, it is concluded that the petition may not be approved.

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 appeal is dismissed.