



DH

U.S. Department of Justice
Immigration and Naturalization Service

Public Copy

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



File: LIN 01 086 51614 Office: Nebraska Service Center

Date: SEP 12 2006

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:



Redacting data deleted to prevent clearly unwarranted invasion of personal privacy

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: This is a motion to reconsider the Associate Commissioner for Examination's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The Associate Commissioner for Examinations summarily dismissed the appeal because counsel had not responded specifically to the grounds stated for denial and no brief or further evidence had been submitted. The motion to reconsider will be granted and the previous decision of the director will be affirmed.

The petitioner is a beef processing plant. It desires to employ the beneficiaries as meat dressers for nine months. The Department of Labor determined that a temporary certification by the Secretary of Labor could be made. The director determined that the petitioner had not established that the need for the services or labor is peakload.

On motion, counsel states that a brief was timely filed, and a copy of the brief has been submitted with this motion.

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 was filed on January 22, 2001. The petition indicates that the employment is peakload and the temporary need recurs annually.

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

Butchers livestock, such as hogs, sheep, and cattle, in private slaughter house or on customer's premises: Kills animals, using rifle and sticker knife. Raises carcass from floor, using hoist. Skins animal with skinning knife and cleans carcass with brush and water. Cuts carcass for packing, smoking, freezing, and salting, according to knowledge of meat cutting and customer's specifications, using saw, knives, an cleaver. May wrap meat. May grind meat into sausage.

Upon review, the duties are shown to be ongoing, and it is clear that the petitioner has a permanent need for workers in the positions. The services to be rendered cannot be classified as duties that are seasonal or of a short-term demand especially when counsel states in his brief that "...Nebraska Beef made clear, however, that it handled intensified periods of production with its permanent labor force by foregoing ancillary operations. Nebraska Beef has a year round need for labor...With temporary labor for the high season of nine and a half months, Nebraska Beef can maximize meat production in all aspects."

Further, the president of the petitioning entity states in his letter dated December 19, 2000 that "we customarily have to hire up for peakload needs for the time from January through November." Therefore, the petitioner works only with this permanent staff one month out of each year. Moreover, this period of intensified production recurs annually, and therefore, cannot be considered temporary, or a short-term demand. The petitioner's need to supplement its permanent staff every year has become part of its regular operations. Consequently, the petitioner's need for the beneficiaries' services cannot be deemed to be a peakload need and for only a temporary period.

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 nonimmigrant visa petition is denied.