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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: LIN 01 155 52161 Office: Nebraska Service Center Date: SEP 12 2002

IN RE: Petitioner: [Redacted]  
Beneficiaries [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: Self-represented

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 partially approved by the Director, Nebraska 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 The decision of the director will be withdrawn and the matter remanded to him for further consideration and action.

The petitioner is an agent for local employers seeking to bring in foreign pipefitters and welders. The employer, Murphy Company, is a construction company, that desires to employ the beneficiaries as pipefitters/welders for eight and one-half months. The Department of Labor determined that a temporary certification by the Secretary of Labor could be made. The director determined that 17 out of the 60 named beneficiaries did not have the requisite job experience specified on the labor certification and partially approved the petition.

On appeal, counsel submitted additional evidence to overcome the director's concerns regarding the experience of the 17 workers. However, this petition may not be approved for other reasons.

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 peakload and the temporary need is periodic.

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

Perform institutional/commercial/industrial pipefitting/welding at job sites in the Ft. Collins, Co area, see item 7. Must perform large-scale pipefitting/welding, including: lay out, fit, and erect process-by-process steel piping systems, weld stainless and carbon steel high pressure pipe, and orchestrate lifts.

The petitioner states in its letter dated January 3, 2001 that:

Murphy Co. is a construction company located in the Fort Collins, Colorado area. The company has been unable to locate sufficient American skilled pipefitters/welders for several particular one-time projects in the Fort Collins area. The attached affidavit confirms that the employer has authorized Construction Workers, Inc. (CWI) to act as agent in pursuing H-2B temporary certification on its behalf....The employer, a construction services company, has a need only during this identified peakload phase to hire temporary additional staff....

The petitioner, [REDACTED] has not been shown to be the actual employer. It appears that the petitioner is acting as an employment contractor to satisfy its commitment with the Murphy Company to provide pipefitters/welders services for its current projects. To do this, the petitioner will require a permanent cadre of employees available to fill the positions on a continuing basis. In this instance, it is the petitioner's business to supply workers. Consequently, the petitioner has a permanent need to have workers available to perform the requisite labor or services at other work sites.

Since the aforementioned issue was not discussed in the director's decision, it will be remanded so that the director may address this matter. The director should examine the contract to determine the actual employer of the alien beneficiaries and determine if the petitioner's need for the beneficiaries' services is temporary. If the employment contractor is not the actual employer, H-2B classification is not possible, because employment contractors have a permanent need for employees and an H-2B alien must be coming to the U.S. to fill a temporary position.

The petitioner should be given an opportunity to submit additional evidence. After completion of the review, the director shall enter a new decision which will be certified to the Associate Commissioner for Examinations for review.

**ORDER:** The director's decision of May 23, 2001 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which is to be certified to the Associate Commissioner for Examinations for review.