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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 02 176 52683 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 approved by the Director, Nebraska Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be withdrawn.

The petitioner is a turkey processing plant. It seeks to employ the beneficiaries as turkey dressers for ten months. The certifying officer of the Department of Labor declined to issue a labor certification because the employer failed to substantiate a temporary, peakload, or seasonal need. The director determined that the petitioner had established that the need for the services to be performed is temporary and approved the petition.

The regulation at 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.

The regulation at 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.

The director determined that the petitioner had submitted sufficient countervailing evidence to show that qualified workers in the United States were not available, that the employment policies of the Department of Labor have been observed, and that the positions offered are temporary.

After review of the evidence contained in the record, the decision of the director is found to be in error. The petition was filed on May 3, 2002 for 17 unnamed H-2B workers. 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.

In its letter dated February 15, 2002, the petitioner's general manager states that Oak Valley Farms has become a supplier to schools and institutions. The school contracts are to supply turkey-based meat, turkey pieces and sliced cold meat during the school term from September to May of every year. The petitioner

has not indicated the name and number, or the time period it supplies meat to the institutions. Therefore, the Service is unable to determine whether workers are only needed for a seasonal or short-term demand, as stated by the petitioner, or year round.

Further, the petition does not indicate whether the petitioner regularly employs permanent workers. The record indicates that the petitioner has filed two other petitions, one for 30 unnamed turkey dressers and one for 13 named turkey dressers. The petitioner has not established that its need for the workers is peakload and for only a temporary period.

ORDER: The decision of the director is withdrawn.
The nonimmigrant visa petition is denied.