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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 02 155 51898 Office: Texas Service Center

Date: **SEP 24 2002**

IN RE: Petitioner:  
Beneficiaries



Petition: Petition for 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, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner is an industrial service provider, furnishing industrial workers to companies throughout the United States. It desires to employ the beneficiaries as welding machine operators for ten months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that a temporary need for the beneficiaries' services had not been established.

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 that the temporary need is unpredictable.

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 peak-load 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:

Sets up and operates welding machine to weld metal parts according to blueprints, layout and operating charts; starts machine and observes meters and gauges, or observes welding action for compliance with procedures.

The petitioner also explains in its letter dated August 2, 2001 that its peakload need is due to its current contracts to provide the temporary workers to Avondale Shipyard during an upswing in Avondale business prompted by recent military and commercial shipbuilding contract awards.

Upon review, the petitioner's stated need for welding machine operators does not show that the petitioner supplements its permanent staff on a temporary basis due to a short-term demand. The petitioner's need for welding machine operators for ten months cannot be considered a short-term demand as there is no indication on the petition if the petitioner currently has permanent employees and when it operates with these employees. Further, the duties associated with the position, which is the nature of the petitioner's business, will always exist.

Further, the petitioner has not been shown to be the actual employer. In this instance, it is the petitioner's business to supply workers in order to satisfy its contractual commitments with Avondale Shipyard. In acting as an employment contractor, the petitioner has a permanent need to have workers available to perform labor or services. Consequently, the petitioner has not established that its need for the beneficiaries' labor or services is a peakload need and is temporary.

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 petition is denied.