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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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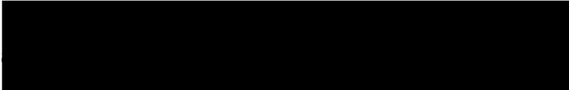


APR 25 2003

File: SRC 03 078 52775 Office: Texas Service Center

Date:

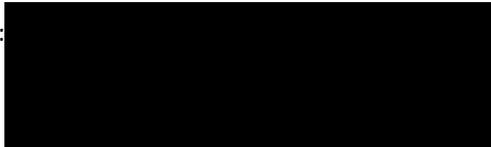
IN RE: Petitioner:
Beneficiaries



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)

PUBLIC COPY

ON BEHALF OF PETITIONER:



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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Texas Service Center, who certified her decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn, and the petition will be denied.

The petitioner engages in the business of providing long-distance transport of consumer merchandise, building industry supplies, commodities, beverage industry products, manufacturing products as well as United States mail. It desires to extend its authorization to employ the beneficiaries as tractor-trailer truck drivers for seven and one-half months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner has not established a temporary need. The director determined that the petitioner's need for temporary workers had been substantiated and approved the petition.

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 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:

Drive long distance diesel-powered tractor-trailer combinations to transport peakload freight on a temporary basis. Secure loads, deliver loads, hook and unhook trailers from the tractor, maintain daily driver logs, read maps, inspect trucks for defects and safe operating conditions, maintain daily driver hours, following the Department of Transportation regulations. Will need to drive in daylight as well as night.

In its decision, the DOL determined that the petitioner had not provided sufficient documentation to establish that the job opportunity is temporary. Specifically, the DOL states that the employer failed to define the products being shipped during the peakload months and that tractor-trailer truck driver jobs are generally considered to be permanent.

The petitioner states that during the peak season, some of the products it hauls are beer and soda containers, glass jars and bottles, air conditioners and household paint, etc., for various companies such as Anchor glass, Kimble, Friedrich, and Dap, Inc., respectively. The petitioner also states that they continually look for permanent drivers to fill any permanent vacancies.

Upon review, the petitioner has not established that its need to supplement its permanent staff of 1,299 employees on a temporary basis is due to a seasonal demand. The petitioner has not shown that its peakload time period mainly consists of transporting goods that are tied to a fixed harvesting or growing season, or that the petition has a short-term demand for its services. The petitioner's need for drivers to transport commodities and goods across the United States, which is the nature of the petitioner's business, will always exist.

Further, the record of proceeding contains a copy of the petitioner's previous H-2 approval notice valid from August 20, 2002 until December 30, 2002. The current petition indicates that the dates of intended employment are from December 30, 2002 until August 15, 2003. Therefore, the duties to be performed are presently shown to be on-going and lasting year-round. The

petitioner has not indicated a specific period of time that it does not need to supplement its permanent workers. The petitioner's need cannot be considered temporary where the need is based on a chain of temporary events leading to a continuous need for the beneficiaries' services or labor. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. The petitioner has not established that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a short-term demand. The petitioner has not demonstrated that the nature of its need for tractor trailer drivers is a peakload need and temporary in nature.

ORDER: The director's decision is withdrawn. The petition is denied.