

U.S. Department of Homeland Security

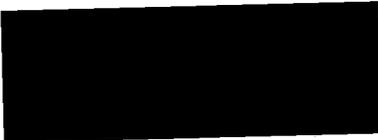
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 E Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



AUG 05 2003

FILE: LIN 02 261 52886 Office: Nebraska 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)

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 denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an interstate trucking equipment and leasing company that owns refrigerated tractor-trailer rigs, all of which it leases to its sole client, [REDACTED]. [REDACTED] is a seasonal produce hauling company, that specializes in transporting fresh agricultural commodities, from growing areas primarily in California, Arizona, Washington, Oregon, and Idaho to markets in the Mid-west. The petitioner desires to employ the beneficiaries as tractor-trailer truck drivers, who will be leased to [REDACTED] for six months. The certifying officer of the Department of Labor (DOL) declined to issue a labor certification because the petitioner had not provided adequate documentation to establish itself as an employer. The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the objections of the Department of Labor.

On appeal, counsel states that there is no evidence in the record to support the erroneous conclusion of the DOL.

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 seasonal and the temporary need recurs annually. The petitioner also states that it

has a peakload component in that, its permanent core of drivers needs to be augmented during the season, to handle the increased volume during that specifically defined time.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

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:

Over-the-road truck driver, driving 53-foot refrigerated tractor-trailer rigs, solo or in two-person teams, hauling fresh, seasonal produce and incidental freight, in the 48 states and Canada. Major sites served are growing areas of California, Arizona, Washington, Texas, and Florida and markets in the mid-west. Drivers receive job orders from dispatcher; drive to directed locations to load or unload cargo; check and maintain vehicle to ensure its safety; obey all traffic, safety, wage and hour and other applicable regulations; may drive up to 14 days on and have 3 days off, a maximum of 70 hours in 8 days; keep all required records in the English language, including travel and freight loading and unloading; be able to communicate in spoken English with loading dock personnel; account for mileage and expenses.

In the DOL's denial of certification, it explains that the certification could not be issued because the employer had not provided sufficient documentation to establish itself as an employer. The DOL's decision goes on to state that it appears that the employer does not pay wages and has no employees.

The regulation at 8 C.F.R. § 214.2(h)(4)(C)(ii)(4) states in pertinent part:

United States employer means a person, firm, corporation, contractor, or other association or organization in the United States that:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax Identification number.

The lease agreement executed January 1, 2001 between the petitioner, [REDACTED] (referred to as the lessor), and [REDACTED] (referred to as the lessee), indicates under item 2 entitled "Term of Lease" that the equipment is leased for the period, one hundred-four (104) weeks, beginning on the 1st day of January 2001 and ending on the 1st day of January 2003. The lease agreement also indicates in pertinent part:

13. Indemnity

The lessee has and shall retain sole financial responsibility for all workers' compensation coverage obligations and withholding any employment taxes due to federal, state or municipal governments on account of workers necessary for the performance of its obligations under the terms of this lease agreement.

14. Workers of Lessee

The lessee shall determine the manner, means and method of the performance of all transportation service undertaken by the lessee under the terms of this lease agreement. The lessee has and shall retain exclusive responsibility to employ drivers or other workers, set wages, hours and working conditions and adjust grievances of, supervise, train, discipline and hire all such workers conditions and adjust grievances of, supervise, train, discipline and hire all such workers necessary for the performance of his obligations under the terms of this lease agreement and such other workers are and shall remain those of the lessee and shall have no relationship with the lessor.

The Amendment to the Lease Agreement dated February 4, 2002 states in pertinent part:

Notwithstanding any other provisions of this lease agreement, in the event that the lessee is unable,

despite best efforts, to supply sufficient drivers to operate the leased units during the peak produce hauling seasons, the lessor may, at the lessee's expense, hire drivers to meet seasonal demands and provide them as leased employees to the lessee.

The Second Amendment to the Lease Agreement dated August 8, 2002 states in pertinent part:

Notwithstanding any other provision of this lease agreement, in the event that the lessor petitions for and obtains permission to hire temporary, foreign drivers for its leased trucks to meet seasonal demands and provides them as leased employees to the lessee as described in the preceding paragraph, lessor shall pay such employees their wages and compensation directly and shall guarantee the wages stated in the labor certification and petition on at least a monthly basis.

Upon review, the petitioner has not provided sufficient evidence to demonstrate that it will be the actual and sole employer of the unnamed beneficiaries. The petitioner has not been shown to retain control over the beneficiaries regardless of where the beneficiaries are to be employed. The lease agreements show that the lessor and the lessee share financial and other employment-related responsibilities. For example, item 13 of the lease agreement states that the lessee is responsible for withholding any employment taxes due to federal, state or municipal governments. Further, the petitioner has not been shown to be responsible for firing, setting hours and working conditions, insurance, leave, and other employment-related factors that demonstrate control as the actual employer. The regulations do not recognize the concept of joint-employers.

Furthermore, the petitioner states in its letter dated July 1, 2002, that it has twenty (20) permanent employees. The letter also states that they must hire at least forty-three (43) temporary drivers each season to supplement its permanent driving staff. The petition, that was filed August 14, 2002, gives the current number of employees working for the petitioner as thirteen. The record, as it is presently constituted, does not contain a copy of the petitioner's 2002 income tax return to substantiate this statement. However, the record does contain copies of petitioner's 1999 and 2000 U.S. Corporation Income Tax Returns that reflect that no salaries and wages were paid during those tax years. The tax returns also show that no compensation was paid to officers and that there were no labor costs paid. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Therefore, the petitioner has not overcome the objections of the DOL. The petitioner has not provided adequate documentation to establish itself as an employer.

The petition cannot be approved for other reasons beyond the director's decision. In determining whether the beneficiaries are coming temporarily to the United States to perform temporary services or labor, the test is whether the need of the petitioner for the duties to be performed is temporary.

Counsel states in his letter dated August 13, 2002 that the petitioner has only one client, New Rising Fenix, Inc. and is restricted by its leasing contracts to recruiting drivers only for the period of May 1 to January 15 each year. Counsel also states that the petitioner does not lease equipment or drivers to any other company and that it can only recruit or apply for drivers to meet the peak season defined in the lease agreements.

The petitioner has not provided evidence of having a permanent staff of employees. In this instant, in order for the petitioner to fulfill its lease agreement with [REDACTED] each year, it would require a permanent cadre of employees available to fill the positions on a continuing basis. Therefore, the petitioner is shown to have a permanent need for its employees in order to fulfill its lease agreement with [REDACTED]. The petitioner's need for tractor-trailer truck drivers has not been shown to be for only a temporary period.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(iii) states in pertinent part:

Named beneficiaries. Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Bureau's Headquarters. . . .

Counsel states that it would be extremely cumbersome, if not impossible, to identify the beneficiaries of this petition in advance. Counsel goes on to state that time constraints, and the mixed history of H-2B visa petition approvals for truck drivers make it economically infeasible to commit foreign drivers prior to having an approval for visas in hand. Counsel also claims that it is a business necessity to have an approved blanket petition for unnamed beneficiaries. However, the petitioner has not presented an emergent situation and clearly described its business reasons as to why the beneficiaries are unnamed. Counsel's explanation as to why the beneficiaries are unnamed does not present an emergent situation but rather an inconvenience for the petitioner. The petitioner has not presented an emergent situation that would allow the Bureau to waive the names of the temporary nonagricultural workers at the time of filing. For these additional reasons, the petition may not be approved.

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 appeal is dismissed.