

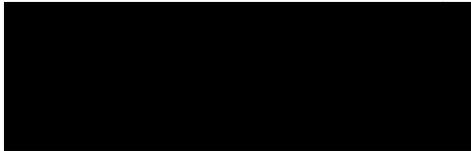
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 Eye Street, N.W.  
Washington, DC 20536



FILE: LIN 02 174 51345 OFFICE: NEBRASKA SERVICE CENTER

DATE:

DEC 05 2003

IN RE: Petitioner:  
Beneficiary



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 Citizenship and Immigration Services (CIS) 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 Director, Nebraska Service Center, denied the nonimmigrant petition. The petitioner submitted a motion to reopen or reconsider to the Service Center. The director granted the motion to reopen and then subsequently denied the petition on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Missouri common and contract refrigerated carrier-trucking company that desires to employ seventeen beneficiaries as tractor-trailer drivers from April 30, 2002 to December 15, 2002. The certifying officer of the Department of Labor (DOL) declined to issue a labor certification because the petitioner had not established a temporary peakload need for the beneficiaries. On August 28, 2002, the director determined that the petitioner had not submitted the requested evidence as to the petitioner's peakload need for the beneficiary's services and denied the petition. On motion, the petitioner submitted information as to number of truck drivers employed by the petitioner on a monthly basis for past two years. Similar information was provided with regard to revenue and truckloads levels.

On February 24, 2003, the director granted the motion to reopen the case and considered the additional materials submitted by the petitioner. The director then determined that the new evidence submitted by the petitioner did not establish that the petitioner's need was temporary. The director stated that, based on the increases in both loads delivered and numbers of full-time employees over the past two years, it appeared that the petitioner had a growing business with a continual need for more full-time employees. The director stated that a peakload had not been established and denied the petition.

On appeal, the petitioner notes that all evidence had already been submitted to Citizenship and Immigration Services (CIS), and submits the names of ten beneficiaries still in the United States.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), 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 . . . .

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. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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 petitioner indicates on the Form I-129 that the employment is a peakload, periodic need. To establish that the nature of the petitioner's need is a peakload need, the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

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

To meet all federal and state requirements to obtain a Commercial Driver License for a Class A combination vehicles and airbrakes. Must be able to properly load and unload all freight safely and securely. Must be able to accurately and in legible handwriting complete all paperwork associated with delivery of freight. Must be able to safely operate a combination Class A vehicle under all types of circumstances including inter-city travel, road conditions, and in close confines of warehouses and docks.

On the petitioner's letter of support submitted with the I-129 petition, the petitioner explains that it specializes in transporting refrigerated freight, primarily fresh fruit and produce. The petitioner stated that it is difficult to hire drivers to haul a refrigerated trailer for various reasons.

The petitioner stated that it had 68 permanent truck drivers with 17 permanent part-time regional drivers. It explained that the permanent part-time drivers only wish to work part-time and prefer to work in the close regional area. The temporary drivers in contrast all drove long-distance truckloads. According to the petitioner, the peakload season varies from year to year, dependent upon its customers' need and the needs of U.S. households. In general, the petitioner stated that the peakload starts from the spring months and goes through to the end of the Christmas holiday season. The petitioner also provided a series of charts on the

staffing levels, truckloads delivered, and the revenues generated. As noted in the director's decision, the petitioner's chart shows an overall trend of increased numbers of fulltime employees that does not necessarily document a peakload, but rather a continual increase in the petitioner's business and a continued need for truckers year-round. With the apparent addition of temporary staff in August of 2001, a steady number of truckloads delivered by temporary truckers is also documented from August 2001 to September 2002. The chart does not document any particular peakload for truckloads delivered by temporary staff.

Based upon such documentary evidence, it appears the petitioner's need for additional drivers is a long-term situation that occurs throughout the year rather than a short-term need. The petitioner has not established that the need for the services to be performed is a peakload need and, therefore, temporary in nature. For these reasons, the director's decision will not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed. The petition is denied.