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

DH

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



FILE: SRC 03 083 50722

Office: Texas Service Center

Date: DEC 10 2003

IN RE: Petitioner: [REDACTED]
Beneficiaries: [REDACTED]

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)

ON BEHALF OF PETITIONER [REDACTED]

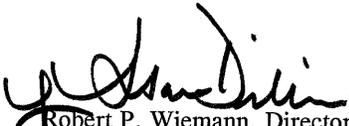
INSTRUCTIONS:

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

The petitioner operates a vessel recovery and remarketing firm that seizes, transports and auctions vessels on behalf of various government agencies. It seeks to employ the beneficiaries as first assistant engineers. The Department of Labor (DOL) states in its final determination that the employer cites a 12 month temporary need (October 2002 until October 2003) but has not provided any documentary evidence to substantiate the request. Accordingly, the DOL 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. The director also determined that the petitioner had not established that the beneficiaries qualify for the job offered.

On notice of certification, neither counsel nor the petitioner presents any additional evidence.

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).

The Petition for a Nonimmigrant Worker (Form I-129) indicates that the intended period of employment is for 29 days, from October 2002 until October 31, 2002. Since the petition was filed January 28, 2003, it is obvious that a typographical error was made. Therefore, the dates of intended employment (October 2002-October 2003) considered by the DOL will be considered in this proceeding. The petition also indicates that the employment is intermittent and that the temporary need is unpredictable.

To establish that the nature of the need is "intermittent," the petitioner must demonstrate that it has not employed permanent or full-time workers to perform the services or labor, but

occasionally or intermittently needs temporary workers to perform services or labor for short periods. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

The Addendum to Form I-129 gives the description of the job as:

Operate/maintain propulsion and other engines, boilers, deck machinery, electrical, refrigeration, sanitary equipment aboard foreign flagged vessels; inspect equipment; repair, replace defective parts; start/regulate engines, power control speeds; stand specified engine-room watch; repair machinery, using hand tools and power tools; maintain engineering bell book.

The petition indicates that the petitioner currently employs 35 individuals. The DOL indicates that the intended period of employment for the beneficiaries is one year. The list provided by the petitioner of recently arrested vessels shows that the majority of vessels have been in the petitioner's custody for over one year. Consequently, the petitioner has not shown that its need for the services or labor is an intermittent need.

The director also determined that the petitioner had not established that the beneficiaries qualify for the job offered. However, where evidence of the qualifications of the beneficiaries is required in petitions for unnamed beneficiaries, the petitioner shall submit such evidence to the consular office or port of entry prior to issuance of a visa or admission. 8 C.F.R. 214.2(h)(2)(iv).

Further, the beneficiaries in this petition are unnamed. 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 Headquarter. . . .

The petitioner states that he cannot provide names because he never knows when he will be called upon by the government to arrest and take a vessel or vessels into custody. The petitioner also states that when a vessel is seized, there is an immediate need for the worker or workers.

Although the petitioner has presented an emergent situation as to why the beneficiaries are unnamed, 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 the need for the services to be performed by the beneficiaries 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.