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Citizenship and Immigration Services

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DH

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



FILE: SRC 03 075 51140

Office: Texas Service Center

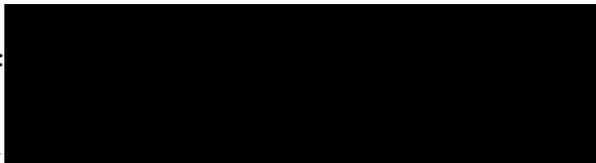
Date: DEC 10 2003

IN RE: Petitioner
Beneficial



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:



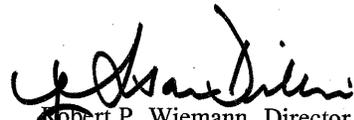
INSTRUCTIONS:

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

The petitioner engages in ship repair services. It has signed an agreement with Royal Caribbean Cruises Ltd. (RCCL) to provide services when required, and as requested in writing by RCCL, for one year. It desires to employ the beneficiaries as marine carpenters and joiners for nine months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that it had actively posted job listings for United States citizens for this need. The director also agreed with the DOL that the petitioner had not established that its need is a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

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).

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 record, as it is presently constituted, does not indicate whether the petitioner's need is a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

To establish that the nature of the need is "peakload," 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).

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

Constructs, repairs, modifies, and maintains offices, fixtures, furniture, wooden deck rails and wooden floors by performing rough or finish carpentry works; shapes and laminates wood to form part of ship using steam chambers, clams, glue and jigs; assembles and installs hardware, gaskets, floors, furnishings, and insulation using adhesives, hand tools and power tools; cuts wood or glass to specified dimensions, constructs floors, doors, and partitions using woodworking machines and

tools; transfers dimensions or measurements of wood parts or bulkhead on plywood using measuring instruments and marking devices.

The contractual service agreement between the petitioner and RCCL has shown the petitioner to be the actual employer. The service agreement stipulates that the petitioner is to provide and perform the services RCCL requires upon its notification to the petitioner. The record, as it is presently constituted, does not contain notification from RCCL indicating what kind of services are to be provided by the petitioner and when these services would be needed. The petitioner has not documented the basis of the need, and why it needs the number of workers indicated on this petition.

The duties to be performed are clearly a principal function of the petitioner's business. The petitioner's need to have employees to perform these duties will always exist. The evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

The director also stated in his decision that the petitioner had not established that it actively posted job listings to determine if qualified persons in the United States were available. Upon review, the record does not contain such evidence.

This petition cannot be approved for other reasons beyond the decision of the director. The DOL stated in its decision that the employer's wage offer is less than the required wage of \$10.58 per hour, as required under the Davis Bacon Act. The record does not contain any documentary evidence to show that the petitioner corrected the wage offer as required by the DOL.

Further, the petitioner has not established that the beneficiaries have the requisite education and experience stipulated on Form ETA 750. For these aforementioned 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 decision of director is affirmed. The petition is denied.