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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: SRC 03 114 50007 OFFICE: TEXAS SERVICE CENTER

DATE: NOV 25 2003

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

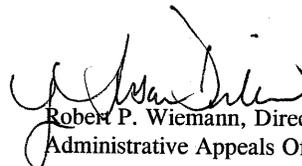
INSTRUCTIONS:

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 her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is an interstate trucking and transportation company engaged in providing long distance transport and delivery of consumer merchandise, primarily from Tennessee to California. The company does business in forty-eight states and Mexico.

The petitioner desires to employ the beneficiaries as tractor-trailer truck drivers from December 1, 2002 to July 30, 2003. The certifying officer of the Department of Labor (DOL) declined to issue a labor certification because the petitioner had not established a temporary need for the beneficiaries. The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the objections of the Department of Labor.

On notice of certification, the petitioner did not any further materials for consideration by the AAO.

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 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:

Drive long distance diesel powered tractor-trailer combinations to transport peak-load 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. [M]maintain daily driver hours, following the Department of Transportation regulations. Will need to drive in daylight as well as night. To drive as part of a team - two drivers per truck at all times.

On the petitioner's letter of support submitted with the I-129 petition, the petitioner explains that its need for the beneficiaries' services is due to the shortage of available temporary drivers. The petitioner bases this shortage on issues such as the preference for alternative work by truckers, the change in inventory practices of its clients, and the loss of younger drivers. It provides a letter from [REDACTED] a truck company owner and industry consultant. [REDACTED] identifies the shortage of truck drivers as "chronic," and identifies issues impacting the current shortage of truck drivers, including the present call-up of truck drivers into the military reserves, and the desire of truck drivers to drive closer to home. The petitioner submits graphs for actual and estimated total driving miles for 2001 and 2002 and states that its peak load season is from November to the end of July.

Based upon such documentary evidence, it appears the petitioner's need for additional drivers is a long-term, chronic problem 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 director's March 19, 2003 decision is affirmed. The petition is denied.