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U.S. Department of Homeland Security

Citizenship and Immigration Services

*DK*

ADMINISTRATIVE APPEALS OFFICE  
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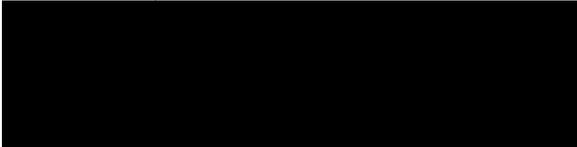
**NOV 25 2003**

File: SRC 03 078 52775 Office: TEXAS SERVICE CENTER Date:

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 nonimmigrant visa petition was approved by the Texas Service Center and certified to the AAO for review. The AAO subsequently withdrew the director's decision and denied the petition. The matter is again before the AAO on a motion to reopen. The motion shall be granted. The previous decision of the AAO will be affirmed. The petition will be denied.

The petitioner is a freight trucking company that provides long distance transport and delivery of seasonal products, consumer merchandise and the U.S. mail. It desires to employ 113 identified beneficiaries as truck drivers for the period of March 2003 to August 2003. The AAO previously determined that the petitioner had not established that its need to supplement its permanent staff of 1,299 employees was due to a seasonal demand. The AAO also determined that the petitioner's previous H-2B petition approval, which was valid from August 20, 2002 to December 30, 2002, demonstrated that the duties to be performed were both on going and occurred year-round.

On motion, counsel provides an explanation for the previous H-2B petition and submits additional exhibits to establish the need for temporary truck drivers during a peak-load period from March to August 2003.

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 peak-load need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

With regard to peak-load need, 8 C.F.R. § 214.2 (h)(6)(ii)(B)(3) states that 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. It further states that the temporary additions to staff will not become a part of the petitioner's regular operation.

With regard to the H-2B visa petition that was approved for the period August 2002 to December 2002, the petitioner stated the following:

The agent who assisted NFI [National Freight, Inc.] with the application to extend the H-2Bs for the temporary workers did not clearly explain the peak-load season for NFI or why the extensions were requested. The AAO misunderstood the intention of the extension requests. Because of the delay in the adjudication of the H-2B petitions and visa issuance, NFI did not have the temporary employees during the required peak-load season. Thus, it requested extensions in an effort to relieve backlogs produced during the shortage of workers.

The petitioner states many of the consumer products it ships are seasonal in nature, and identifies Poland Spring, and Zephyr Hills, two companies that sell water to consumers, and Ocean Spray Cranberry, as three of its customers. With regard to documenting the nature of the need for temporary truck drivers during a peak-load period of time, the petitioner submits the following additional documentation:

- o A NFI-generated chart that illustrates the volume of NFI truck driver wages for the years 2000 to 2002;
- o Federal quarterly tax records from 2002 that showed an increase in wages paid in the second and third quarters;
- o A news release announcing the petitioner's agreement to purchase southeastern U.S. carrier Core Carriers that added additional drivers and their salaries to the NFI payroll;
- o NFI graphs that show the operational trends and driver payroll records for Poland Springs in Pennsylvania and Zephyr Hills in Florida for the year 2002;
- o An Internet article on bottled water that states that Evian Company estimates that over 2 million new consumers turn to bottled water each summer.

- o A graph of the petitioner's top ten customers and the volume of orders taken from these customers from January 2002 to December 2002.

Upon review of the record, the materials submitted by the petitioner on motion are inconclusive with regard to establishing a peak-load period of work. For example, while the graph for the petitioner's ten top customers shows a gradual increase in orders placed from March 2002 to August 2002, the graph also indicates that only 44 percent of NFI total freight is represented in the graph. It is unclear whether the total picture of NFI's customers and their volume of orders would establish a similar graph. It is also not clear whether the Poland Springs and Zephyr Hills water companies, whose orders are individually charted, are both included among the top ten customers of the petitioner.

The annual driver payroll charts are equally inconclusive. For example, the payroll for 2002 indicates four months with pronounced increases in driver wages, namely, March, April, August and November. The payroll for 2001 shows increased payrolls in March with a significant increase in June and a third significant increase in November. The graph for 2000 shows significant increases in four non-consecutive months: March, June, September, and December. The only common denominator in all the charts is that the month of March has significantly increased driver wages. These documents do not link the petitioner's need for additional truck drivers to the regulatory definition of peak-load as described in 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The petitioner has not established either a particular seasonal need or a specific event that would necessitate the employment of additional truck drivers. Regarding counsel's comments concerning the AAO's alleged misunderstanding of the purpose of a prior H-2B petition, the AAO will not address this issue on motion.

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 AAO's April 25, 2003 decision is affirmed. The petition is denied.