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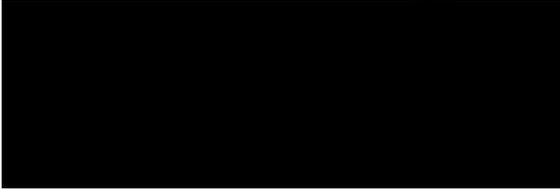
U.S. Department of Homeland Security

Citizenship and Immigration Services

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invasion of personal privacy**

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



File: SRC 03 127 50592

Office: Texas Service Center

Date: **NOV 26 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: Self-represented

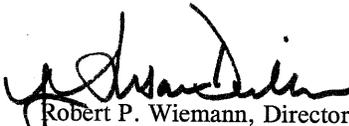
INSTRUCTIONS:

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 decision of the director will be affirmed.

The petitioner operates a welding business. It desires to extend its authorization to employ the beneficiary as a machinist for nine months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner has not established a temporary need. The director concurred with the findings of the Department of Labor.

On notice of certification, the petitioner states that he has requested nonimmigrant workers since before September 2001 because it has been a difficult task getting qualified individuals to work steadily. The petitioner requests that one more extension be granted.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii), 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, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession. . . .

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), codified in current regulations at 8 C.F.R. § 214.2(h)(6)(ii), specified that 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. See 55 Fed. Reg. 2616 (1990).

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 petition indicates that the employment is peakload, and the temporary need is unpredictable.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) states that for the nature of the petitioner's need to be a peakload need, 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 and that the temporary additions to staff will not become a part of the petitioner's regular operation.

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

Setups and operates 6" horizontal boring mill and a vertical boring mill with a 72" swing chuck to fabricate metallic parts, and fits and assembles machined parts into complete units, applying the knowledge of machine shop theory and procedures, shop mathematics, machinability of materials, and layout techniques. Studies blueprints, drawings, and specifications to determine dimensions of finished workpiece.

In its decision, the DOL determined that the employer had not provided sufficient documentation to establish that the job opportunity is temporary. The DOL's decision states that the employer is requesting machinists for the period beginning March 3, 2003. The DOL's decision also states that the employer has requested workers for every month since September 25, 2001, and therefore, the employer has a year-round need for machinists.

In his letter dated June 25, 2003, the petitioner rebuts the DOL's finding by stating that, with his new staff, he was able to increase productivity and bid on more work. The petitioner goes on to state that without these workers he will have to "shut the doors" because he cannot rely on American workers.

Upon review, the petitioner has not presented evidence to establish that its need to supplement its permanent staff of 32 employees on a temporary basis is due to a seasonal or short-term demand. With the petitioner's increase in productivity and projects, the petitioner has only shown an ongoing need for these workers.

Further, the petitioner does not indicate the specific period of time in which he does not need the additional labor or services. In his letter dated March 31, 2003, the petitioner states that he applied for 70 workers, and in 2001, he was granted approval for 69 workers. He also states that he was granted an extension for these same individuals from June 2, 2002 until March 2, 2003. 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 beneficiary's 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 it needs to supplement its permanent staff at the place of employment on a temporary basis. The petitioner has not demonstrated that the nature of its need for a machinist is peakload and temporary.

ORDER: The director's decision is affirmed. The petition is denied.