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

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street NW
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: SRC 03 141 53478 Office: Texas Service Center

Date: SEP 12 2003

IN RE: Petitioner: [Redacted]
Beneficiaries: [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: [Redacted]

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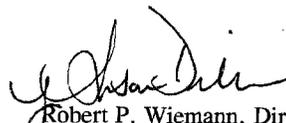
INSTRUCTIONS:

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 the Bureau of Citizenship and Immigration Services (Bureau) 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 withdrawn. The petition will be approved.

The petitioner engages in the business of providing long-distance freight transportation and delivery. It desires to employ the beneficiaries as interstate tractor-trailer truck drivers for seven 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. The director also determined that the petitioner had not established that the recruitment of United States citizens had been thoroughly pursued for a reasonable period of time.

On certification, the petitioner submitted evidence that established that the recruitment of United States citizens had been thoroughly pursued for a reasonable period of time. Therefore, there is no need for it to be further addressed in this proceeding. The remaining issue is whether the petitioner has established that the need for the beneficiaries' services is temporary.

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 that the temporary need recurs annually.

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 regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, the petitioner must establish 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.

In its decision, the DOL determined that the petitioner had not established a temporary need. Specifically, the DOL stated that the employer had not provided any documentary evidence or information establishing a temporary need. The DOL also determined that the jobs are deemed to be for permanent employment and must be advertised and offered to United States workers on that basis.

In a letter dated April 9, 2003, the petitioner stated that it specializes in providing transportation for the building supply industry, air-conditioning industry, as well as some general goods. The petitioner goes on to state that the industries it hauls for have a peakload need each year consistent with the building and construction season as well as consumer fall/spring season. The petitioner has submitted several letters from building suppliers who have stated that the petitioner is one of its primary carriers during its peakload period, April through October each year, due to its additional consumer and manufacturing needs.

The petitioner states in its letter dated May 14, 2003, that it has a fleet of 1,150 trucks, 75 of which are 53ft flatbed trailers, which are used to haul over-dimensional construction materials and machinery. The petitioner also states that the months of April through October are the busiest months for the company because of increase demands from regular customers and from other customers who only use them during peak season months.

Upon review, the petitioner has established that its need to supplement its permanent staff of 1,307 permanent truck drivers and

98 permanent part-time drivers on a temporary basis is due to a peakload demand. The petitioner has not shown that its contracts during the peakload time period call for transporting goods that are tied to a season of the year by a pattern and is of a recurring nature. Consequently, the petitioner has demonstrated that the nature of its need for tractor-trailer truck drivers is a peakload need and temporary in nature.

ORDER: The director's decision is withdrawn. The petition is approved.