

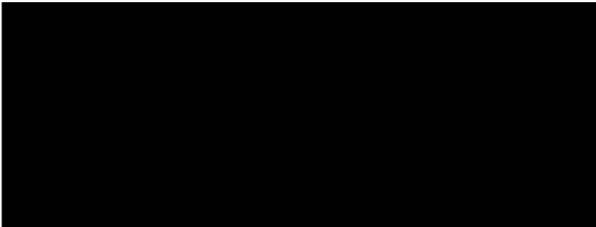


U.S. Citizenship
and Immigration
Services

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FILE: SRC 06 020 51879 Office: TEXAS SERVICE CENTER Date: MAR 22 2006

IN RE: Petitioner:
Beneficiaries:



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 of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner engages in the business of freight transportation. It desires to employ the beneficiaries as tractor-trailer truck drivers for one month. The director determined that the petitioner is not allowed to request a substitution of beneficiaries in this case because such a request can only be made abroad at the Consulate office. The director also determined that the petitioner had not established that the need for the beneficiaries' services is temporary.

On appeal, the petitioner states that the regulations allow for substitutions within the United States.

The regulation at 8 C.F.R. § 214.2(h)(2)(i) states in pertinent part:

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. . . .

The regulation at 8 C.F.R. § 214.2(h)(2) states in pertinent part:

(iii) *Named beneficiaries.* . . . If all of the beneficiaries covered by an . . . H-2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with a copy of the same labor certification. Each petition must reference all previously filed petitions for that labor certification.

(iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H-2B petitions that are approved for a group, or H-2B petitions that are approved for unnamed beneficiaries, or approved H-2B petitions where the job offered to the alien(s) does not require any education, training, and/or experience. . . .

In a previous letter, dated October 17, 2005, the petitioner requested the substitution of four of the previously approved workers, whose visas had not been issued, with the beneficiaries named in this petition. A copy of the Notice of Action (Form I-797B), dated June 3, 2005 indicates that a petition, SRC-05-172-50329, was previously approved for 20 H-2B nonimmigrant workers and lists the four workers that will be replaced by the beneficiaries. The beneficiaries named in this petition are currently in the United States, in H-2B status until October 30, 2005. The beneficiaries are seeking a change in employers as their current employer's season is completed.

The petitioner followed the proper procedure and filed Form I-129, Petition for a Nonimmigrant Worker, on October 26, 2005, to request H-2B classification and extension of the beneficiaries stay in the United States. The record of proceeding contains the labor certification (Form ETA 750) and the final determination notice from DOL that indicates the petitioner was approved for 50 tractor-trailer truck drivers for the period from March 10, 2005 through November 25, 2005.

In its letter dated January 19, 2006, the petitioner states that it only used 28 of the available approved 50-nonimmigrant visas. However, the record of proceeding does not contain a copy of the Notice of Action, Form I-797B, showing the petitioner had been approved for 50 H-2B workers. The record contains a copy of Form I-

797B for a previously approved petition, SRC-05-172-50329, for 20 H-2B workers, for the period of June 22, 2005 through November 25, 2005. If the petitioner used 28 of the available approved nonimmigrant visas, there are no nonimmigrant visa allocations available for the four beneficiaries named in the instant petition. Absent evidence of an approved nonimmigrant visa petition for 50 nonimmigrant H-2B workers and evidence to establish that only 28 visa allocations were utilized and that at least four remain available to be used, the petition cannot be approved. The petitioner has not provided a list of the beneficiaries' names, date and country of birth of the workers who were admitted into the United States under the approved petition, employment records or other documentary evidence to establish that only 28 of the 50 approved nonimmigrant visas have been issued. The petitioner states that 28 of the 50 approved nonimmigrant H-2B positions have been filled. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Absent such evidence, CIS cannot utilize the labor certification the petitioner filed with SRC-05-172-50329 for the current petition. Moreover, the time period of the requested employment has expired.

This petition may not be approved for another reason. 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 does not indicate whether the employment is seasonal, peakload, intermittent or a one-time occurrence.

In the director's request for evidence, dated November 2, 2005, the petitioner was asked to resubmit evidence demonstrating that the position of tractor trailer tractor driver is a one-time occurrence, seasonal, peakload, or an intermittent need. The petitioner's response to the director's request for evidence dated November 8, 2005 did not address that request. The petitioner has not shown that the need for the beneficiary's services is seasonal, peakload, intermittent, or a one-time occurrence and temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.