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U.S. Citizenship and Immigration Services

D4

[redacted]

FILE: LIN 05 183 52369 Office: NEBRASKA SERVICE CENTER Date: NOV 09 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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 Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the acting director will be withdrawn and the matter remanded to her for further action and consideration.

The petitioner is a long-haul trucking company that specializes in transporting fresh produce from growing areas, primarily in California, Washington state and Oregon, to markets in the Mid-west. It desires to employ the beneficiaries as tractor-trailer truck drivers for seven months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could be made. The acting director determined that the evidence submitted did not demonstrate the petitioner's temporary need for additional labor.

On appeal, counsel states that the director's decision is arbitrary, capricious and contrary to law and fact. Counsel also states that the director relied on insufficient evidence to depart from the Department of Labor's certification decision.

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 shall 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.

To establish that the nature of the need is "peakload," 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*).

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event.

The petitioner has shown through the evidence presented that the temporary workers are needed to enable its trucking operations to run in teams for the produce hauling season. The peak of the produce season runs for seven months, from May 1st to November 30th of each year. The petitioner employs 68 permanent employees. The graphs depicting driver utilization, actual numbers of teams, the number of idle truck units, and the petitioner's quarterly federal tax returns further confirm the peakload nature of the petitioner's need. Consequently, the petitioner has shown that its need for tractor-trailer truck drivers is peakload and temporary. However, the petition cannot be approved for additional reasons.

The regulation at 8 C.F.R. 214.2(h)(6)(vi)(C) states:

> *Alien's qualifications.* Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary.

The Application for Alien Employment Certification (Form ETA 750) at Part A indicates that the minimum amount of education, training and experience required to perform satisfactorily the job duties is two years of high school education, three months of training in commercial truck driving and three months of experience in the job being offered or three months of experience in a related occupation, specifically, as a commercial truck driver. The other special requirements read:

> Age 22; commercial driver's license, class A; able to understand signs, directions, loading instructions and numbers in English; pass DOT physical (qualify for 2 year physical if driving solo); cannot test positive for drugs or controlled substances; no alcohol related offenses in last 3 years; within the last 3 years, no more than 3 moving violations, no DUI/DWIs, no speeding 21 miles and over, no reckless driving and no leaving the scene of an accident; no major accidents involving a commercial vehicle within last 3 years; no accidents in personal vehicle which caused a fatality or disabling injury during last 7 years; cannot have been convicted of the following felonies; child molestation/pornography, murder, sexual assaults, drug related; no points accumulation license suspension within last 3 years; must pass a driver's road test.

Counsel for the petitioner states that all of the beneficiaries have more than the minimum combination (training and experience), but many do not have the three full months of training as commercial truck drivers as specified in the labor certification. Counsel states that this is the result of a clerical error and that the [three months] training requirement was transcribed onto the Form ETA 750 as separate rather than a combined training and/or experience requirement, as in past years, and as intended by the petitioner. Counsel requests that Citizenship and Immigration Service (CIS) consider the total of combined training and experience in its review of these drivers' records. However, in order for CIS to consider the beneficiaries' combined training and experience, the petitioner would have to submit an amended labor certification reflecting the change in the training requirement. Moreover, the petitioner has not established that the beneficiaries possess the other special requirements listed on the Form ETA 750.

Since these deficiencies were not mentioned in the acting director's decision, this case will be remanded in order to give the petitioner an opportunity to submit any additional information or evidence that the director deems necessary to adjudicate the matter at hand. The acting director may also request any additional evidence that is pertinent to the adjudication of this case.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The acting director's decision of July 12, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.