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FILE: LIN 06 039 53707 Office: NEBRASKA SERVICE CENTER Date: **AUG 02 2006**

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner operates a fleet truck service that specializes in providing long distance transport and delivery of refrigerated, dry, tanker and livestock freight. It desires to extend its authorization to employ the beneficiaries as tractor-trailer truck drivers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for eight and one-half months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiary's services. The DOL also determined that the petitioner's job offer contained unduly restrictive requirements. The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the objections of the DOL and denied the petition.

On appeal, the petitioner states that it has used the two years' minimum experience criteria for many years. The petitioner also states that its company has year-round commitments as well as additional seasonal needs. The petitioner presents additional evidence for consideration.

Upon careful review of the entire record of proceeding, the AAO finds that the job opportunity does not contain requirements or conditions which precluded consideration of United States workers or otherwise prevent their effective recruitment. The petitioner explains in its brief that it has always required two years of experience for its tractor-trailer truck drivers. The petitioner presented its advertising brochure to demonstrate that it is a standard hiring criteria for its employees to have at least two years of experience. Absent such criteria, the petitioner states that it would be difficult to secure insurance that is affordable. The petitioner has attached an article entitled *An Introduction to Commercial Trucking Accidents* that gives information on insurance for commercial motor vehicles, negligent hiring and retention, and other information regarding commercial trucking. The petitioner also submitted evidence to show that in its previous labor certification application for tractor-trailer truck driver positions submitted on December 20, 2004, it had the same two year experience criteria on the application and the DOL accepted the two year experience requirement. The AAO finds that the petitioner's explanation for requiring two years of experience in the proffered position is reasonable and that the evidence presented has overcome the objections of the DOL. In this case, the petitioner has established that the job requirements are not unduly restrictive.

The remaining issue is whether the petitioner has established a temporary need for the beneficiaries' services. As discussed below, the evidence of record supports the director's determination that the petitioner did not establish a temporary need for the beneficiaries' services. Accordingly, the petition will be denied.

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 regulation at 8 C.F.R. § 214.2(h) provides, in part:

(6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B):*

(i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

(ii) *Temporary services or labor:*

(A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* 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:

(3) *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)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states 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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner seeks approval of the proffered position as a peakload need.

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).

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Drive long distance diesel powered tractor-trailer combinations to deliver multi drop loads of cheese and dairy products on a temporary basis. Secure loads, deliver loads, hook and unhook trailers from the tractor, maintain daily log books, read maps and inspect truck for defects and safe operating conditions. Drive in daylight as well as night. Some repetitive lifting and carrying cargo weighing 50lbs per item.

In its final determination notice, the DOL stated that the petitioner had not established a temporary need for the beneficiaries' services.

The petitioner's director of refrigerated and dry van operations explains in his letter dated June 14, 2006 that the company transits truckloads of beverages and food service syrup for the Coca-Cola Company out of California. The director also states in this letter that several other customers such as, Schreiber, Malt-o-meal, Camino Real Foods, Don Lee Farms and Ventura Foods rely on the petitioner's ability to deliver its products from California to other states during the peak season. However, the record, as it is presently constituted, does not contain any letters and/or contracts from the aforementioned companies stating that the petitioner has been contracted to deliver fresh or perishable goods on a short-term or seasonal basis. Additionally, the duties of the proffered position state that the beneficiaries will be responsible for the delivery of cheese and dairy products. However, the record does not contain any letters and/or contracts from any companies stating the petitioner is responsible for the delivery of its cheese and dairy products on a seasonal or short-term basis. The petitioner has not established that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand.. 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)).

Further, the petitioner is requesting an extension of the beneficiaries' stay in the United States. Some of the beneficiaries started working for the petitioner as early as July 2005 and as late as October 2005 and were authorized to remain in the United States until November 25, 2005. The petitioner now requests an extension of their services until August 15, 2006. Unless the petitioner can establish that it has two distinct and separate

needs for the beneficiaries' services, the petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. The petitioner has been shown to have a permanent need to have workers available to fulfill its contracts, on a continuing basis. Also, the petitioner states in the record of proceeding that it applied for an immigrant visa petition for Stephen Parker, who is one of the beneficiaries named in this petition. Therefore, by regulation, Stephen Parker, is not eligible to receive an extension of his H-2B visa classification. 8 C.F.R. § 214.2(h)(16)(ii).

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload in the trucking business. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by its current situation or contracts. The [REDACTED] has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or have different specialty skills than the 473 workers currently employed by the company. The petitioner has not provided evidence of its permanent staff and the delivery contracts showing a clear termination date.

Moreover, the services to be performed by the beneficiaries are ongoing and the petitioner's need to have additional workers to perform these services has not been shown to be due to a seasonal demand. To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). The petitioner has not submitted any contractual and/or financial evidence to demonstrate that its business activity has formed a pattern where its needs for tractor-trailer drivers are traditionally tied to a season of the year and will recur next year at the same time.

When asked to explain its temporary need for the beneficiaries' services, the petitioner states that "[we] have included many occupational and driver recruitment articles. All show that there is a shortage [of] truck drivers in our country." If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Absent evidence of the petitioner's "peakload" or "seasonal" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiaries are qualified to perform the services of the occupation.

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

(C) *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 Form ETA 750 states at section 15 that the other special requirement needed to satisfactorily perform the job duties is a Class A commercial driver's license or the ability to obtain one within two weeks of the job offer. The record of proceeding does not contain a copy of each of the beneficiaries' Class A commercial

driver's license. Consequently, the petitioner has not established that the beneficiaries possess a Class A commercial driver's license or the ability to obtain one within two weeks as stipulated on Form ETA 750. For this additional reason, the petition may not be approved.

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 appeal is dismissed. The petition is denied.