PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Justice

Immigration and Naturalization Service

D3

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: SRC 03 005 50002 Office: Texas Service Center Date: FEB 10 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER: [redacted]

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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner is a community newspaper. It desires to employ the beneficiary as a press operator for one year. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not overcome the objections of the Department of Labor. The director also determined that the position being offered is not temporary in nature. Further, the director determined that the beneficiary had spent three years in the United States under the H-2B classification and may not seek an extension.

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:

> Make ready and operate Goss Magnum Press with universal folders and web or sheet-fed offset printing press to produce a high quality newspaper according to written specifications. Locks printing plates on printing cylinder and threads loose end of paper supply roll through and around rollers to cutter and folder. Adjusts compensators to guide paper over rollers and cylinders. Inspects printed sheets visually after registration or position printing and readjusts guides and controls to rectify spacing errors. Adjusts feed controls to rotate cylinder into position where plate locking mechanism is accessible. Unlocks plates and replaces with make-over plates according to directions. Rethreads paper through press if web breaks and readjusts tension rollers. Inspects printed material visually during production and readjusts controls to correct irregular ink distribution. Use densitometers and perform general press maintenance. Replaces cutting blades, worn or damaged ink rolls, and fills ink wells. Supervises and instructs apprentices.

The Department of Labor stated in its determination that the employer had not established a temporary need for the beneficiary. The director determined in her decision that the position being offered is not temporary in nature. However, it is the petitioner's need for the services which is controlling. Therefore, it must be shown that the petitioner's need for the beneficiary's services is temporary.

Upon review, the petitioner's stated need for a press operator for one year does not show that the petitioner supplements its permanent staff on a temporary basis due to a short-term demand. The duties associated with the position, such as the operation of the printing press to produce a newspaper, which are the nature of the petitioner's business, will always exist. The petitioner has not shown that the beneficiary would be only a temporary addition to its staff and not become a part of the petitioner's regular operation. The beneficiary's resume states that he has been working as a lead pressman for the petitioner, [redacted] from July 2001 to present. Consequently, the petitioner has not established that the need for the services to be performed is a peakload need and is temporary.

In addition, the director stated in her decision that the beneficiary has been employed in the United States from April 1999 until the present under the H-2B classification. The director determined in her decision that the beneficiary may not seek an extension of stay. 8 C.F.R. § 214.2(h)(13)(iv). On certification, the petitioner has not submitted any evidence to establish the beneficiary's eligibility to receive an extension under section 101(a)(15)(H) of the Act.

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 decision of the director is affirmed. The petition is denied.