U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

PUBLIC COPY

JAN 25 2001

File: SRC 00 264 50461 Office: Texas Service Center Date:

IN RE: Petitioner: [redacted]
Beneficiaries:

Petition: Petition for 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]

identification data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied on October 6, 2000, by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. As provided for in the certification notice, the petitioner was given 30 days in which to respond to the director's decision. On October 18, 2000, a decision was rendered by the Associate Commissioner for Examinations. Upon receipt of the Associate Commissioner's decision, the petitioner stated that he had not been given an opportunity to submit additional evidence for consideration as provided for in the certification notice. Therefore, the Associate Commissioner's decision affirming the director's decision was vacated and the petitioner was given an opportunity to submit additional evidence. Upon review of the additional evidence, the director's decision will be affirmed.

The petitioner engages in the business of shipbuilding. It desires to employ the beneficiaries as first class welders for a period of one year. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that a temporary need for the beneficiaries' services had not been established.

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), as 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 for a Nonimmigrant Worker (Form I-129) indicates that the dates of intended employment for the beneficiaries are from September 15, 2000 until September 14, 2001. The petition also indicates that the employment is a one-time occurrence.

The Application for Alien Employment Certification (Form ETA 750) indicates that the beneficiaries will be employed full-time with 10 hours over-time and paid a salary of $13.62 per hour, which calculates to an annual salary of $28,329. The nontechnical description of the job in the newspaper ad and on Form ETA 750 reads:

> Weld with stick and mig performing fillet and butt welds. Perform a variety of skilled welding of steel plate and pipe in the repair and/or construction of marine vessels and associated equipment. A significant portion of the duties will involve training of U.S. workers to work as full time welders. Duties may include demonstration, classroom, on-the-job, and supervisory training; as well as mentoring and development of training curriculum.

Counsel states that the petitioner has demonstrated that there are no U.S. workers qualified, available and willing to perform the described duties. Counsel states that this conclusion is supported by the Department of Labor's own study confirming the shortage of workers in the ship-building industry in south Louisiana. The shortage of U.S. workers does not establish that the employer's need for the workers is temporary.

The Department of Labor indicated that a certification could not be made since the petitioner had not established that the job opportunity is temporary. In a letter dated June 23, 2000, the petitioner states that the first class welder positions it is petitioning for are to satisfy a one-time peakload need.

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 peak-load 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 petitioner explains that its peakload need is due to its client's recent announcement of a $350 million short-term new vessel construction program and a $4.3 billion dollar overall new vessel construction program. The petitioner states that it employs 54 workers to fulfill its short-term construction obligations and that it needs these temporary workers to supplement its regularly employed workforce of 109 employees.

The petitioner states that it may need to supplement its permanent staff with temporary workers for several years, to fulfill its contracts and to train U.S. workers. The period of time requested is not seasonal or short-term. The petitioner has not shown that its need for the beneficiaries' services is a peakload need.

The petitioner argues that its need for temporary workers is both a peakload need and a one-time occurrence. The regulation at 8 C.F.R. 214.2(h)(6)(ii)((B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future.

Counsel states that a contract by definition is a one-time need. However, the need for the welding of steel plate and pipe in the repair and/or construction of marine vessels and associated equipment, which is the nature of the petitioner's business, will always exist. The petitioner has an ongoing, continuing need for the services sought.

The petitioner states that "to date we have turned down in excess of $20 million worth of business due to the shortage of skilled workers, more particularly first class welders." The petitioner has not shown that the increase in production is a one-time occurrence. The petitioner has not demonstrated that the nature of its need for welders is temporary in nature.

Further, the beneficiaries' job description states that "a significant portion of the duties will involve training of U.S. workers to work as full time welders." Petitions pursuant to section 101(a)(15)(H)(ii) of the Act for a class or type of employee for which the petitioner has a permanent need where the petitioner makes attempts to establish the temporariness of its need for the beneficiary's services by stipulating that the beneficiary will function as a trainer or instructor rather than in a productive capacity must be accompanied by evidence of the existence of a training program, by evidence that the petitioner has recruited or hired trainees, and by evidence that the petitioner can viably employ a full-time instructor and can viably simultaneously operate a training program and a commercial or other enterprise. Matter of Golden Dragon Chinese Restaurant, 19 I&N Dec. 238 (Comm. 1984). The petitioner has not presented evidence of its training program.

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.