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U.S. Citizenship
and Immigration
Services

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FILE: SRC 04 054 50915 Office: TEXAS SERVICE CENTER Date: JAN 04 2005

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.

sa *Michael T. Kelly*
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 petitioner is a fence installation company. It desires to employ the beneficiaries as laborers for ten months. The director determined that the petitioner had not established that its need for the beneficiaries' services is temporary. The director also determined that the petitioner had not submitted sufficient evidence to prove the prevailing wage rate for the occupation and that qualified United States workers are not available.

On appeal, the petitioner states that it has complied with all the requirements placed on the company by the State. Additional evidence has been submitted with the appeal for consideration.

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 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 a one-time occurrence and that the temporary need recurs annually. On appeal, the petitioner states that the company has experienced a peakload demand from February through December.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

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 nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

employees will load materials onto truck daily, unload delivery trucks. use post hole diggers to dig holes, mix concrete in wheel barrels, lay out material for fence layers, clean up debris at job sites [sic].

The petitioner submitted on appeal a copy of the invoice for three days of advertisement in the Mississippi Press, a copy of the advertisement placed in the Mississippi Press for three days, a copy of the job posting notice, letters from the petitioner explaining the results of the State referrals and the local paper advertisement, copies of the letters sent to the applicants by certified mail, and a copy of the online search for the wage rate for laborers.

Upon review, the evidence submitted shows that a good faith effort was made by the petitioner to recruit workers for the positions of laborers. However, the AAO does not find that the petitioner has adequately established countervailing evidence that it recruited for the position at the prevailing rate. The petitioner submitted evidence from the United States Department of Labor, Employment and Training Administration, that it indicates is a determination from the State of Mississippi that the prevailing wage rate is \$8.08 per hour. The petitioner advertised and recruited for the position at \$7.50 per hour. In order for the recruitment effort to be sufficient, it must present the job to the public at or above the prevailing wage rate. The petition cannot be approved for other reasons.

To establish that the nature of the need is peakload, the petitioner must establish that it regularly employs permanent workers and that it needs to supplement its staff temporarily due to a seasonal or short-term demand. In this case, the petitioner has not documented its asserted peakload situation by providing data on its usual workload and staffing needs, and the special needs created by the current situation or contract. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

The petitioner has not demonstrated that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future. The petitioner currently employs 32 individuals. The petitioner's business, which is fence installation, will always need laborers to keep its business operational. Furthermore, the petitioner has not shown that the employment situation, otherwise permanent, is in this case a temporary event of short duration that has created the need for temporary workers. The petitioner has not submitted the contract showing a clear termination date. The petitioner has not demonstrated that its need to supplement its permanent staff on a temporary basis is a one-time occurrence, or peakload, and for a temporary period.

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

(iii) *Named beneficiaries.* Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Service's Headquarters.

The decision to allow unnamed beneficiaries on an H-2B petition should be based on evidence from the petitioner clearly describing the "emergent situation." In general, the decision to allow unnamed beneficiaries on an H-2B petition should be based on valid business reasons.

The petitioner has not submitted any evidence to justify why the beneficiaries are unnamed on the petition. The petitioner has not presented an emergent situation that would allow the director to waive the names of the temporary nonagricultural workers at the time of filing.

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.