

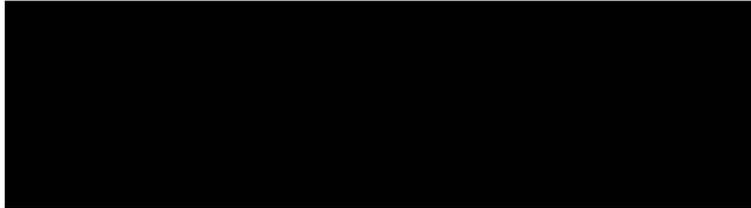


U.S. Citizenship
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Services

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FILE: SRC 06 040 52995 Office: TEXAS SERVICE CENTER Date: APR 05 2006

IN RE: Petitioner:
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:



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 Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the business of landscape lighting, installation and design. It desires to employ the beneficiaries as electrical helpers for eight months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could be made. The director determined that the petitioner had not established that its need for the beneficiaries' services or labor is temporary.

On appeal, counsel states that the DOL issued the certification, the practices and policies were observed and the petitioner had fulfilled the requirements for this type of application.

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).

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

Assists licensed electrician in the installation, maintenance, and repair of electrical distribution systems, equipment, underground cables and related facilities. Maintains tools and equipment and keeps supplies and parts in order.

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. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

When asked to explain its need for temporary services, the petitioner states on the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), that the temporary need is based on peakload work identified and certified by the DOL. Counsel states that a final review and certification by the DOL should be all the evidence that is needed.

The regulations at 8 C.F.R. § 214.2(h)(6) states in pertinent part:

(iii) *Procedures.* (A) Prior to filing a petition with the director to classify an alien as an H-2B worker, the petitioner shall apply for a temporary labor certification with the Secretary of Labor for all areas of the United States, except the Territory of Guam. . . . The labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services or labor are available and whether are not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers.

Further, the precedent decision *Matter of Golden Dragon Chinese Restaurant*, 19 I&N Dec. 238 (Comm. 1984) stated that in proceedings pursuant to section 101(a)(15)(H)(ii) of the Act, 8 U.S.C. § 1101(a)(H)(ii) (1982), the role of the DOL was strictly advisory and temporary labor certification determinations by the DOL were not binding on the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). Therefore, counsel's assertion has not been substantiated.

In its supporting documentation for Form ETA 750, the petitioner states that it has been successful in its bids to perform electrical services and construction at a number of area housing subdivisions and businesses. The petitioner also states that due to the success at landing these contracts, it currently finds itself in need of qualified workers to assist in the completion of the contracted work. The petitioner contends that the contracted work must be completed by July 2006. The record contains letters from different businesses stating that it has contracted the petitioner's services; however, the record does not contain any contractual agreements giving details of the specific job the petitioner is contracted to perform to justify the petitioner's need for the additional temporary workers. 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)).

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 as landscape lighting designers and installers. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or has different specialty skills than the 10 workers currently employed by the company. The petitioner has not provided evidence of the contracts showing a clear termination date. The petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Consequently, 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.

Moreover, in the petitioner's summary of its final recruitment results the petitioner states that despite its good faith efforts to recruit and advertise for the available positions, no one contacted the petitioner to set up an interview, fill out a job application, or inquire about the position. Thus, the petitioner requested that it be able to hire alien labor due to the unavailability of workers. 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" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.