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and Immigration
Services

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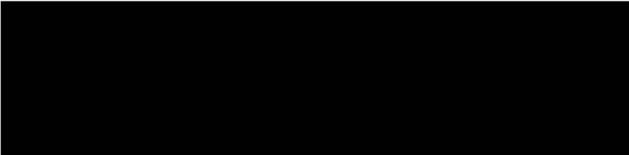


FILE: EAC 08 092 51184 Office: VERMONT SERVICE CENTER Date: JUN 17 2008

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was recommended to be approved by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). Upon review, the AAO withdrew the director's decision and remanded it to the director for further action and consideration. On June 5, 2008, the director issued a new decision and certified it to the AAO for review. The decision of the director will be affirmed in part and the petition will be approved for two of the nine named workers, specifically [REDACTED] and [REDACTED]. The decision of the director will be withdrawn in part and the petition will be denied for seven of the nine named workers, specifically, [REDACTED]

and [REDACTED]

The petitioner is a Mississippi Limited Liability Company supplying labor and industrial services for the marine and petroleum/chemical industries in the Mississippi Gulf Coast area. It desires to employ the beneficiaries as fitters pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b), from February 7, 2008 to September 1, 2008. (see the dates of intended employment specified at item 8 of Part 5 of the Form I-129 (Petition for a Nonimmigrant Worker)). The beneficiaries will be working in the Mississippi Gulf Coast area, specifically, Mobile, Alabama and Tampa, Florida. The Department of Labor (DOL) determined that unique, complex, and persistent circumstances generated in the Gulf Region by Hurricanes Katrina and Rita made it impossible to determine whether a temporary labor certification should be issued in the present case. The petitioner then filed a petition with the Director, VSC, containing countervailing evidence to overcome the DOL's decision. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition.

Upon review, the AAO withdrew the director's decision because the record of proceedings did not contain evidence that the beneficiaries possessed the minimum amount of experience to perform satisfactorily the job duties described in the proffered position. The AAO remanded the case to the director on March 28, 2008 for further action.

The petition was initially filed for the employment of nine H-2B workers. In response to the director's request for evidence (RFE) dated April 8, 2008, counsel states in his letter dated May 23, 2008 that the petitioner requested a change in the number of requested workers to two (2) named workers, specifically, [REDACTED] and [REDACTED]. The letter also included experience letters for [REDACTED] and [REDACTED]. The letters establish that the beneficiaries possess the requisite experience specified on the Form ETA 750. Therefore, on June 5, 2008, the director approved the petition and certified his decision to the AAO for review.

Section 101(a)(15)(H)(ii)(b) of 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)(6)(vi) requires the petitioner to submit:

(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 regulation at 8 C.F.R. § 103.2(b) states:

(3) *Translations.* Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The Application for Alien Employment Certification (Form ETA 750) at Part A, item 14 indicates that the minimum amount of experience needed to perform satisfactorily the job duties is two years of experience in the job being offered.

Upon careful review of the entire record of proceeding, the AAO found that the director inadvertently approved the petition for nine workers although counsel had informed the director in a letter dated May 23, 2008 that the petitioner only wanted to continue to process the H-2B petition for two beneficiaries, namely, [REDACTED] and [REDACTED]. The record contains sufficient evidence to establish that two of the beneficiaries, specifically, [REDACTED] and [REDACTED] possess the minimum amount of experience, specifically, two years of experience in the proffered position to perform satisfactorily the job duties described on Form ETA 750. However, the petitioner has not established that the remaining seven workers named in this petition possess the requisite two years of experience stipulated on Form ETA 750. Such evidence was requested from the petitioner in the director's RFE dated April 8, 2008. The record of proceeding contains evidence of work experience for two of its workers and counsel for the petitioner indicated that the petitioner only wanted to continue to process the H-2B petition for two of its workers, namely, [REDACTED] and [REDACTED]. Therefore, the other seven named workers, specifically, [REDACTED] are found to be ineligible for temporary H-2B status and will not be considered in this petition.

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 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 Part A, section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Lay out position of parts and metal working from blueprints and templates using scribe and hand tools. Align parts in relation to each other using jacks, come-alongs, turnbuckles, clips, wedges and mauls. Tack weld clips and brackets into place prior to permanent welding.

In a letter dated January 29, 2008, the petitioner states that the rigs, platforms, vessels, ports and other related facilities were damaged during Hurricane Katrina. The petitioner explains that the company is behind in its committed schedules for the marine and petrol/chemical sectors' construction, service and repair. In summation, the petitioner contends that its current need is a peakload need and estimates within the coming year that the workforce should normalize following the post-storm cleanup, repair and reconstruction cycle.

The petitioner also submitted copies of its 2006 Federal Unemployment (FUTA) Statements of Deposits and Filings. The statements show the amount of FUTA (Federal Unemployment Tax Act) payroll or employment tax paid solely by the employer was \$48,859, \$64,190, \$72,077 and \$105,764 during the 1st through 4th quarters. The evidence demonstrates a steady increase in the amount of payroll or employment tax paid by the petitioner per quarter.

Upon review, the petitioner has provided sufficient countervailing evidence to establish its need for the beneficiaries' services from February 7, 2008 through September 1, 2008. The petitioner has been shown to regularly employ permanent workers to perform the services or labor at the place of employment. The documents submitted establish that the nature of the petitioner's need is peakload based on the additional workload that occurred following Hurricane Katrina. The petitioner has submitted sufficient evidence to show that the need for fitters is peakload and temporary.

The Vermont Service Center will issue the appropriate approval notice for

and

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met for two of the nine workers named in the petition.

ORDER: The decision of the director is affirmed in part and the nonimmigrant visa petition is approved for two of the nine workers named in the petition namely [REDACTED] and [REDACTED]

ORDER: The decision of the director is withdrawn in part and the nonimmigrant visa petition is denied for seven of the nine workers named in the petition, namely, [REDACTED]

and [REDACTED]