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FILE: EAC 08 030 51332 Office: VERMONT SERVICE CENTER Date: JUN 19 2008

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was recommended to be approved by the Director, Vermont Service Center (VSC), 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). The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

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 continue to employ the beneficiaries as welders 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 November 1, 2007 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 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 director determined that sufficient countervailing evidence has been submitted to overcome the findings of the DOL and recommended the approval of the petition. The petition is now before the AAO on certification of the director's decision recommending approval of the petition.

Upon careful review of the entire record of proceeding, the AAO finds that the record does not support the director's decision to approve the petition. As discussed below, the AAO finds two separate and independent grounds for remanding the petition, namely: (1) that the petitioner has not established a temporary need for the services of the three beneficiaries (welders) in accordance with the H-2B regulations at 8 C.F.R. § 214.2(h)(6); (2) the petitioner has not established that the three beneficiaries possess the minimum amount of experience to perform satisfactorily the job duties described in the proffered position. Since these deficiencies were not mentioned in the director's decision, the case will be remanded.

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)(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 review, the record, as it is presently constituted, does not contain evidence of the beneficiaries' experience. Therefore, the AAO cannot ascertain whether the beneficiaries have the two years of experience in the job being offered. The record contains copies of the beneficiaries' nonimmigrant visas and Forms I-94, Arrival-Departure Records. Forms I-94 show that the beneficiaries were admitted into the United States to work for the petitioner. The record does not contain any evidence of the beneficiaries' employment history with the petitioner, such as a letter attesting to the beneficiaries' work experience with the petitioner or any other work experience with another employer. Absent documentary evidence of the beneficiaries' two years of experience in the job being offered, the petition may not be approved

This petition can not be approved for another reason.

The petitioner seeks approval of the proffered position as a peakload need, in accordance with the provision at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

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:

(2) Seasonal need. The petitioner must establish that the services or labor are traditionally tied to a season of the year by an event or pattern and are of a recurring

nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

(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.

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:

Weld together metal components as specified by blueprints and work orders or oral instruction using brazing and various arc and gas welding equipment.

In its Final Determination letter, DOL states that it is receiving subsequent H-2B applications filed, in many instances, by the same employers under the same standard of temporary need for approximately the same period of need. DOL states that this situation makes it difficult to determine whether the employer's need is actually temporary. DOL explains that since the employer's request for temporary workers is based on a need identified as a result of Hurricanes Katrina and Rita, it is unable to make a determination and that this finding should be presented to Citizenship and Immigration Services (CIS) for final adjudication.

The petitioner filed a petition with CIS, Director, VSC, with countervailing evidence to overcome the DOL's decision. Evidence in support of the petition includes a statement from the petitioner explaining the temporary need for H-2B workers; Form I-129, Petition for Nonimmigrant Worker, with Supplemental H and Attachment 1, in duplicate original; attestation of returning H-2B workers; copies of workers' I-94 cards and visas; final determination letter from the DOL and an uncertified copy of Form ETA 750 requesting 150 welders on a temporary basis.

In its request for evidence (RFE) dated February 12, 2008, the director requested the petitioner to submit evidence to establish that the petitioner's need for the beneficiaries' services is temporary.

In response to the director's RFE, counsel for the petitioner submitted a letter of intent to contract between Bender Shipbuilding & Repair Company, Inc. and the petitioner, and a letter from the petitioner stating that its client has a peakload need for temporary workers.

As reflected in the discussion below, the AAO finds that the evidence of record is insufficient to establish the H-2B need asserted in the petition.

The letter dated March 11, 2008 signed by the petitioning entity's vice-president states that the petitioner's client, Bender Shipbuilding & Repair, has a peakload need for temporary workers through October 2008. The petitioner has not submitted any documentary evidence that, at the time the petition was filed, there was any contractual commitment from the petitioner to provide, and from Bender Shipbuilding & Repair Company, Inc. to use, the three H-2B welders for the period stated in the petition. The record of proceedings contains no documentary evidence of the factual basis of the letter's assertions that the projected need is peakload or that the need will be over by October 2008.

In the intent to contract letter dated August 28, 2007, the petitioner states that its client, Bender Shipbuilding & Repair Company, Inc. intends to issue a purchase order for H-2B workers from the petitioner. The record, as it is presently constituted, does not contain a purchase or work order for the petitioner to supply its client with three H-2B workers. The intent to contract states that the petitioner is applying for a visa extension for 250 workers but the petitioner has not established why it has decreased the number of workers requested to three. Neither this letter nor any other evidence of record conveys specific information about Bender Shipbuilding & Repair Company, Inc.'s particular operational needs; its history with regard to its employment of permanent staff, temporary U.S. workers, and H-2B workers as welders; and the staffing agencies, employment contractors, and other sources from which it may be drawing workers. Further, the record of proceedings contains no

documentary evidence of the basis upon which the petitioner deduced a peakload need for three welders. There is an insufficient factual basis for a finding that Bender Shipbuilding & Repair Company, Inc. has an H-2B need for the three workers specified in the petition or that the petitioner will employ the three welders temporarily as specified in the ETA 750. 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)).

Since these deficiencies were not mentioned in the director's decision, this case will be remanded to the director in order to give the petitioner an opportunity to submit proof of the beneficiaries' two (2) years of experience in the job being offered and establishing that the petitioner will temporarily employ the three beneficiaries pursuant to a peakload need. At a minimum, the petitioner should be directed to provide: (1) monthly payroll report and staffing tables – signed and certified as true and accurate by an appropriate officer of the petitioner – that summarize *for each month* of the two years preceding the employment period specified in the petition: (a) the number of welders the petitioner employed, divided into separate columns for (a) permanently employed welders; (b) temporarily hired U.S. welders; and (c) H-2B welders; (2) copies of the petitioner's Employer's Quarterly Federal tax returns and records of Federal Unemployment (FUTA) Deposits and Filings, for the two years preceding the date that the petition was filed; and (3) its contractual commitment with Bender Shipbuilding & Repair Company, Inc.; (4) any other documents that demonstrate that the labor or services sought in the petition constitute the type of H-2B temporary need asserted there.

The director must afford the petitioner a reasonable time to provide evidence pertinent to these issues, and any other evidence the director may deem necessary to adjudicate the matter at hand. The director shall then render a new decision based on the evidence of record as it relates to the issues, and certify that decision to the AAO for review.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of June 12, 2008 recommending approval of the petition is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. Upon completion, the director shall certify the decision to the AAO for review.