U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

[redacted]

FILE: EAC 02 276 51473 OFFICE: VERMONT SERVICE CENTER DATE: NOV 24 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a New Jersey crane operators and rentals company. It seeks to extend its employment of the beneficiary in H-2B status and continue to employ him as a crane operator/erector and trainer for the Krupp Grove 5120B crane for an additional year. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made because the petitioner had already received a one-year temporary alien employment certification in 2001. The DOL found that the position of overhead crane operator was a permanent, year-round continuous position. The director determined that the position being offered was not temporary in nature.

On appeal, counsel states that the Krupp Grove 5120B is a technically complex and sophisticated machine that has never been used by the petitioner before, and that the beneficiary had been training the petitioner's workers in the operation of the machine and would need an additional amount of time to complete the training. Counsel submits documentation with regard to the beneficiary's training in the Netherlands on the Krupp crane.

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 peak load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

The petitioner indicates on the Form I-129 that the employment is a peak-load need. It also identifies the peak-load as the fall and winter months. Pursuant to 8 C.F.R. § 214.2 (h)(6) (ii)(B)(3), 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 issue in this proceeding is whether the position offered to the beneficiary is a temporary one. The non-technical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Transport, operate, erect, derect and maintain European-built Krupp (Grove) all ter[r]ain mobile cranes, 80 tons and up. Start Crane engine. Move levers and pedals to rotate crane on chassis, to raise and lower crance [sic] boom and to raise and lower loadline. Stay with crane on out-of-town projects. Diagnose and solve problems by reading electronic, electric, pneumatic and hydraulic schematics. Perform inspections on crane.

An additional initialed addition to the Form ETA 750 states "job title of workers to be supervised by the employee are Crane Operators/Workers." The cover letter submitted by counsel with the original I-129 petition submitted to the Vermont Service Center in September 20, 2002, stated: "[The petitioner] only needs an operator of this crane during its peak season." The letter of support from the petitioner stated:

> Currently we have 13 cranes of various tonnage[s], and trained, certified operators assigned to each, one of which is [the beneficiary's]. To keep fully staffed, we have[,] on a regular and consistent basis[,] sought qualified operators to insure continued operation of our company. It has been extremely difficult finding workers with excellent safety and operational records or interested applicants willing to be trained.

On November 2002, the director requested further evidence with regard to the temporary nature of the position and stated that the position's job duties appeared to be continuous and permanent. On February 13, 2003, the petitioner stated that it had purchased the newest model of the Krupp Grove 520B in November 2002, and that it needed to train its current six U.S. workers who are experienced in other Krupp cranes, in the usage of the newest Krupp crane. The beneficiary, in addition to operating the petitioner's Krupp Grove 5210B, would also train the six U.S. workers in the use of the crane. The petitioner described the machines as "state of the art" and more sophisticated than the traditional crane, and outlined the

areas in which the beneficiary would train the other workers.

On May 5, 2003, the director denied the petition. In his decision, the director determined that, since the beneficiary had already been in the United States for a year, the beneficiary could have already trained the necessary people to run the cranes as needed. The director further stated that that the beneficiary perhaps was not trained on the new crane if the petitioner purchased it in November 2002 and the beneficiary had been working in the United States at the time. The director also determined that the receipt of new contracts as described by the petitioner in its letter in response to the director's request for further evidence appeared to establish that the petitioner would always require someone to operate and continuously train new people on the Krupp crane. Finally the director determined that the position being offered was not temporary in nature.

On appeal, counsel asserts that the petitioner purchased the newest model of the Krupp crane in November 2002 and therefore the beneficiary could not have been training other crane operators on it prior to that date. Counsel submits no further documentation to establish this assertion. According to counsel, the petitioner needs a worker who could train the other employees on the use of the crane for a period of at least ten months to one year after the machine was purchased and activated. Counsel also submits a letter from the President of Verschoor-Kranen-Transport, Sassenheim, Netherlands, that stated the beneficiary had received special training on the "Krupp 5100/5120 B(US ton) mobile telescopic crane," from March 2001 to September 2001. Counsel also asserts that the petitioner already employs six crane operators and does not plan to hire any new workers.

Upon review of the record, the petitioner has submitted sufficient documentation to establish that the beneficiary has received training on the Krupp crane. The evidentiary documentation is less persuasive with regard to the petitioner's need for the continued temporary employment of the beneficiary. This is due in part to the fact that the need appears to have changed. For example, the materials submitted with the original I-129 petition contain no mention of any training component to the job while the further documentation submitted by the petitioner in response to the director's request for further evidence specifically notes the temporary need for training of six crane operators on the newest Krupp Crane.

Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. *See Matter of Michelin Tire,* 17 I&N Dec. 248, 249

(Reg. Comm. 1978).

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the petition was filed merits classification as a temporary position as defined in 8 C.F.R. § 214.2(h)(6)(ii)(B). *Matter of Michelin Tire, id.* If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Therefore, the analysis of this criterion will be based on the initial job description of crane operator/erector. Accordingly, the petitioner has not established that the need for the services of crane operator/erector is a peak-load need and limited to the fall and winter months that the petitioner identified as its peak-load season. The nature of the need appears to be for a long-term permanent position. For these reasons, the director's decision will not be disturbed.

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 met that burden.

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