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FILE: WAC 05 003 50396 Office CALIFORNIA SERVICE CENTER

Date: OCT 04 2005

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

The petitioner engages in the business of building houses. It desires to employ the beneficiaries as house carpenter-construction workers for eleven months to perform the tasks of general construction and wood carpentry. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. 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 did not provide a certified Application for Alien Employment Certification (Form ETA 750) and denied the petition.

On appeal, counsel states that it is the petitioner's intention to temporarily employ ten house carpenters-construction workers to complete the work on the Calexico residential project. Counsel also states that following the completion of the phase of the Calexico's project, the beneficiaries will return to Mexico.

In his decision, the director determined that the petitioner did not provide a certified Application for Alien Employment Certification (Form ETA 750). However, by regulation, the petition can either be accompanied by a labor certification or a notice detailing the reasons why such certification cannot be made. The record of proceeding contains such a notice. Therefore, this issue does not need to be addressed in this proceeding. The remaining issue is whether the petitioner had established a temporary need for the beneficiaries' services.

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 a one-time occurrence and that the temporary need is unpredictable.

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)(I).

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

- Construct, erect frame buildings and carpentry work in residential construction.
- Install structures and fixtures wood, plywood, and wallboard.
- Assemble, cut and shape materials and fasten them together with nails, dowel, pins or glue to create exterior and interior walls.
- Requires knowledge and experience in using petty bond machine, handtools, power tools.

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.

The petitioner states, in its letter dated January 26, 2004, that "... Our company has entered into a building contract with [REDACTED] as the project owner, and [REDACTED] as the project's builder. The contract calls for us to build residential developments known as [REDACTED] and [REDACTED] in Calexico, California. The project involves the building of over 72 houses and full facilities. . . While the complete Calexico project will take approximately three years, the construction work on the [REDACTED] and in the [REDACTED] will require approximately one year to finish. . . ."

The U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states in pertinent part: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project . . ." Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business.

Moreover, the petitioner has not demonstrated that it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future. The petition indicates that the petitioner currently employs 135 individuals.

Further, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for carpenter-construction workers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist. Therefore, the petitioner has not established that a temporary event of short duration has created the need for carpenter-construction workers and that its need for the beneficiaries' services is a one-time occurrence and temporary.

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

ORDER: The appeal is dismissed.