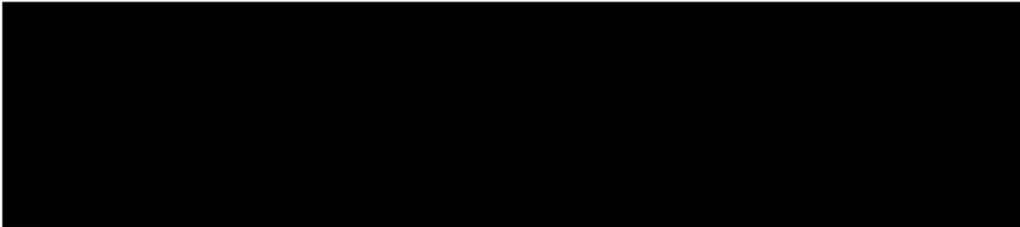


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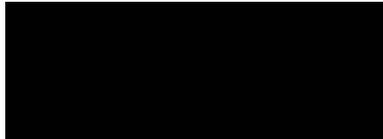
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FILE: EAC 06 043 53371 Office: VERMONT SERVICE CENTER Date: JUL 12 2006

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Vermont Service Center. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner is a manufacturer of thermoplastic sheets for various applications in construction, industry, agriculture, and advertising. It seeks to employ the beneficiary as a multi-wall production line improvement manager for twelve months pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b). The Department of Labor (DOL) determined that a temporary labor certification could not be issued. The director concurred with the DOL, ruling that the petitioner failed to establish that it had a temporary one-time need for the beneficiary's services as a production manager since it appeared that the petitioner's need for the beneficiary's services was permanent in nature.

On appeal the petitioner emphasizes that its need for the beneficiary's services is a one-time occurrence and emphasizes that the proffered position – a temporary multi-wall production line improvement manager – is not a production manager, as found by the director, and does not involve any software-related duties, as also found by the director.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(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 pertinent part, as follows:

(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) *One-time occurrence.* The petitioner must establish 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.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states that 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 multi-wall production line improvement manager as a one-time need from November 2, 2005 to October 31, 2006. To establish that the nature of its need is a "one-time occurrence," the petitioner must demonstrate that it has not employed anyone in the past to perform such services and will not have a need for such services in the future. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

The petitioner was formed in March 2000 as a U.S. subsidiary of an Israeli company that manufactures extruded thermoplastic sheets from polycarbonate, PVC, and other materials for worldwide markets. The petitioner began working on the development of a multi-wall production line in June 2002, commenced production in mid-2003, and at the time the instant petition was filed (November 2005) had 13 employees dedicated to the product. According to the petitioner, the product – described as a "structured sheet" with multiple layers of material – is unique in the United States, requires a special expertise, and has encountered problems in its production. The problems include low productivity and inefficiency due to a lack of trained operators, supervisors and managers. According to the petitioner, the operation that was expected to produce 200 metric tons/month of finished goods was only producing 120 tons/month. Therefore, the petitioner is seeking a temporary manager to review the production line operation and implement improvements. The duties of the proffered position, as listed at section 13 on the Application for Alien Employment Certification (Form ETA 750) and in the petitioner's initial letter to the service center, are as follows:

- Oversee engineering, design, and troubleshooting in connection with implementation and improvement of polycarbonate multi-wall production operation.
Train production management and production staff in multi-wall production functions.
Establish and oversee development of quality control function.
- Establish and oversee development of preventative maintenance systems.

The petitioner indicates that the job can be completed in ten to twelve months, and that the beneficiary is qualified to perform the job based on his ten years of experience as a multi-wall production line manager with another company in Israel. The petitioner states that a similar temporary worker was sent several years ago to the parent company's affiliate in the United Kingdom, where a multi-wall production line was implemented in a little over a year.

The director found that the duties of the proffered position were those of a production manager of a complex production line that would be supported by a new software program. In the director's view, the duties of the position would have to be performed on a year-round basis, making the petitioner's need permanent rather than temporary in nature. The director concluded that the petitioner failed to establish that its need meets the regulatory definition of temporary services or labor as described at 8 C.F.R. § 214.2(h)(6)(ii).

On appeal, counsel reiterates that the petitioner has the need for a temporary employee who can diagnose problems with the multi-wall production process, establish the proper quality control and preventative maintenance systems, and train both production management and production staff in multi-wall production functions. The director misinterpreted an analogy the petitioner drew in its response to the director's request for evidence of a company's need for the temporary services of a software consultant, counsel explains, by incorrectly finding that monitoring, training, and supervision of a new software program would be a permanent feature of the proffered position. The director also erred in finding that the beneficiary would be performing the duties of a production manager on a year-round basis, counsel declares, pointing to the petitioner's organizational charts and operating budgets for 2005 and 2006 which identify a permanent production manager position for both years which is distinct from the "multiwall advisor" identified on the 2006 organizational chart and the "temporary multi-wall production line improvement manager" identified on the 2006 budget. No such temporary position is identified on the 2005 organizational chart and operating budget, counsel emphasizes, and the 2006 budget contains the notation (10/12) next to the temporary position and allocates \$35,000 in salary to the position (which the petitioner stated in the Form I-129 has an annual salary of \$48,000), further confirming the temporary nature of the position. Counsel restates the petitioner's intention to employ the beneficiary in the same manner as it did at its U.K. affiliate in 1999, when a temporary multi-wall improvement manager was engaged for 15-16 months to implement the multi-wall production line at that facility. Counsel refers to a previously submitted letter from the managing director of the U.K. affiliate confirming that it hired an experienced individual from Israel on a temporary basis from May 1999 to September 2000 as a consultant and trainer to help implement the multi-wall production line, after which the individual returned to Israel. Counsel indicates that the petitioner's production line is farther along than its U.K. counterpart was in 1999, so that the same task could be completed within 12 months at the U.S. facility, after which the beneficiary will return to Israel and resume his work with the parent company.

Based on the evidence of record and the foregoing analysis, the AAO determines that the petitioner has established its one-time need for a temporary multi-wall production line improvement manager for the requested time period of November 2, 2005 to October 31, 2006.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden. Accordingly, the AAO will sustain the appeal and approve the petition.

ORDER: The appeal is sustained. The petition is approved.