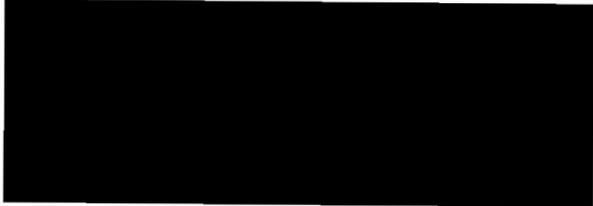


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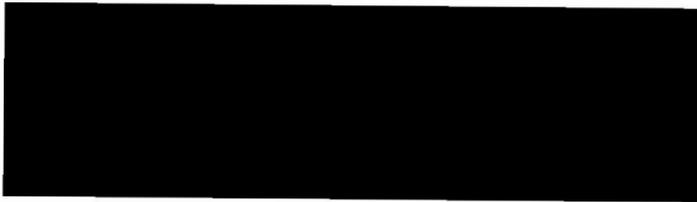
FILE: WAC 06 009 51619 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2006

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an international engineering, construction, and support services company that provides engineering, construction, management and maintenance for the communications industry in the United States. It seeks to employ the beneficiaries as journeymen linepersons for ten months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the employer had not established a temporary need for the beneficiaries' services. The director concurred with the DOL's determination and denied the 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 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 peakload and that the temporary need is unpredictable.

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).

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 can be justified.

On appeal, the petitioner states that it maintains a permanent workforce of 4,000 employees to meet the ongoing needs of its clients. The petitioner states that it now faces a sudden and temporary need for journeymen linemen in order to complete certain phases of an ongoing contract. The petitioner explains that the devastation caused by Hurricanes Katrina, Rita and Wilma severely impacted its ability to locate and reassign journeymen linemen on a temporary basis to California. The petitioner states that it would be unable to assign other workers from other regions to those areas where the journeymen linemen will be working because the pool of workers it would normally draw from has dwindled substantially due to the hurricane reconstruction work. The petitioner states and has presented evidence to show that it has sent more than 470 power employees to assist in the massive reconstruction efforts in the areas devastated by Hurricanes Katrina and Rita and some of these linemen are still working in these regions. Therefore, the petitioner is finding it difficult to find workers from within the company to fill its peakload need during the critical stages of its contracts.

Upon review, the AAO finds that the petitioner has presented sufficient countervailing evidence to overcome the concerns stated in the DOL's determination and to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed and that the need for the services to be performed is peakload and temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden. The California Service Center will issue the appropriate approval notice.

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