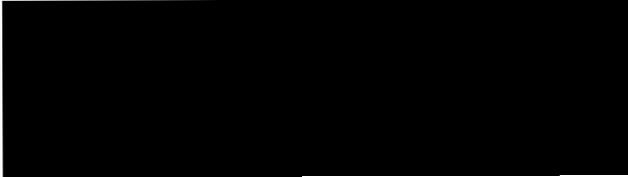


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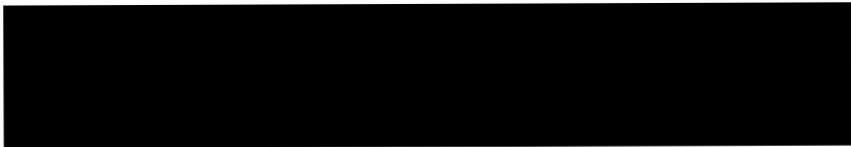
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FILE: EAC 06 044 51089 Office: VERMONT SERVICE CENTER Date: **MAY 09 2006**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be denied.

The petitioner is a general construction company that engages in the building and designing of commercial buildings and residential houses. Counsel also states that the petitioner engages in the business of landscape and ground maintenance. It desires to extend its authorization to employ the beneficiary as a construction carpenter pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for six months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiary's services. The director agreed with the DOL and determined that the petitioner had not established that the need for the beneficiary's services is temporary.

On appeal, counsel states that by a preponderance of the evidence, the petitioner has established eligibility for the benefit sought.

As discussed below, the AAO agrees with the findings of the DOL that the petitioner has not established a temporary need for the beneficiary's services. Upon careful review of the entire record of proceeding, the AAO finds that the director's decision to deny the petition was correct. The AAO will dismiss this appeal.

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) 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:

(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.

The petitioner seeks approval of the proffered position as a peakload need.

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).

Counsel states that the petitioner's need also meets the criteria for a "seasonal" need as the job opportunities to perform landscaping could only be performed during the spring, summer and fall.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor is traditionally tied to a season of the year by an event or pattern and is 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).

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

- Carpenters construct, erect, install and repair structures made of wood and metal, wood and metal products, and wood or metal subs following local building codes.
- Mark cutting and assembly lines on material.
- Cut and shape materials to prescribed measurement using hand and power tools.
- Assemble, fasten and install materials.
- Lay floors and build stairs.
- Erect roof and form work of concrete.

The job description does not mention that the beneficiary will be performing duties that involve landscaping or ground maintenance although counsel states these services are a part of the petitioner's business.

In its final determination notice, the DOL stated that the petitioner had not established a temporary need for the beneficiary's services. The DOL stated that the petitioner's need to employ additional carpenters is a permanent need due to an increase in business.

Counsel explains in her letter dated November 15, 2005 that the petitioner previously petitioned for temporary workers for the months of April 2005 to November 2005. The record of proceeding contains an approval notice for eight temporary workers to perform services for the petitioning entity from June 15, 2005 through October 31, 2005. Counsel continues by stating that the project these workers were supposed to complete is halfway finished. In order to complete this project, counsel contends that the petitioner needs to extend its authorization to employ the beneficiary from November 2005 to May 2006. As of May 2006, the beneficiary will be providing services to the petitioner for one year. Accordingly, the petitioner has shown a permanent need for the beneficiary's services in the proffered position. The petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation.

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.

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload in the construction business. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload position will be engaged in different duties or have different specialty skills than the ten workers currently employed by the company. The petitioner has not provided evidence of its permanent staff and the construction contract showing a clear termination date.

Moreover, the services to be performed by the beneficiary are ongoing and the petitioner's need to have an additional worker to perform these services has not been shown to be a seasonal need. The petitioner has not submitted any contractual and/or financial evidence to demonstrate that its business activity has formed a pattern where its needs for construction workers are traditionally tied to a season of the year and will recur next year at the same time. 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)).

When asked to explain its temporary need for the beneficiary's services, the petitioner states that "TLH Construction Corporation has a major staffing shortage because of the nature and operation of the business and seasonal needs of the workers. We simply can't recruit enough workers to meet our needs.<sup>1</sup> If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Absent evidence of the petitioner's "peakload" or "seasonal" situation to justify its need for the beneficiary's services, this petition cannot be approved.

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. The petition is denied.

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<sup>1</sup> At section 2 of Supplement H to the Form I-129, the petitioner explains its temporary need for the alien's services.