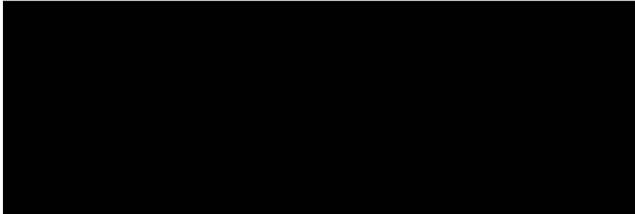




U.S. Citizenship
and Immigration
Services

D4



FILE: EAC 07 246 51092 Office: VERMONT SERVICE CENTER Date: **JAN 17 2007**

IN RE: Petitioner: [Redacted]
Beneficiaries [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:

SELF-REPRESENTED

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 approved by the Director, Nebraska Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The decision of the director will be affirmed in part and the petition will be approved for 48 of the 50 workers initially named in the petition, that is, for all the named workers except [REDACTED] and [REDACTED].

The petitioner is engaged in residential and commercial construction. It desires to employ the beneficiaries as laborers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from October 1, 2007 to August 1, 2008. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner, A [REDACTED] b, had failed to fulfill Item 23(d) of the Form ETA 750, Part A, which requires that the employer place the aliens on its payroll. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections made by the DOL and approved the petition.

On certification, the petitioner has not provided any additional evidence for consideration. Therefore, the record is considered complete.

Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record does support the director's decision to approve the petition in part. The petitioner, Arellano Roofing, has provided adequate documentation to establish itself as an employer under the regulations.

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)(6)(iii) states in pertinent part:

(B) An H-2B petitioner shall be a United States employer, a United States agent, or a foreign employer filing through a United States agent. . . .

The regulation at 20 C.F.R. § 655.200(c) states in pertinent part:

Employer means a person, firm, corporation, or other association or organization (1) which currently holds a location within the United States to which United States workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises, or otherwise controls the work of such employees. . . .

Items 23(a) and (d) of the Form ETA 750, Part A, Employer Certifications, stipulate that the employer must certify that it has sufficient funds available to pay the wage or salary offered the aliens, and that the employer will be able to place the aliens on the payroll on or before the date of the aliens' proposed entrance into the United

States. Additionally, Item 24 of the Form ETA 750, Part A. Declarations, requires the employer to declare, under penalty of perjury, that the information furnished on the Form ETA 750, Part A, is true and correct.

In its denial notice, the DOL stated that the record established that the petitioner does not have an active TWC tax account number. The DOL also noted that the petitioner does not file quarterly reports because it subcontracts all of its workers, distributes 1099's at the end of the tax year and does not carry permanent workers. In its decision, the DOL stated that Form 1099 is used to report payments made in the course of a business to another person who is not an employee. Therefore, the DOL stated that it was unable to confirm whether the petitioner is capable of fulfilling Item 23(a) of the Form ETA 750, Part A, that requires the employer to have sufficient funds available to pay the wages or salary offered to the alien(s).

In response to the objections made by DOL, the petitioner stated in its memorandum dated August 7, 2007 that it is currently making arrangements to acquire a Texas Tax Account number. The record of proceeding contains proof of the petitioner's registration with the TWC. The petitioner also stated that it relied on its accountant to file its taxes and maintain its records and did not know the meaning of a 1099 form and that it contradicts with the Form ETA 750. The petitioner states that it intends to hire the workers and place them on its payroll and the monetary value of its contracts would ensure the necessary funds to hire and place the workers on the payroll. A copy of its contractual agreement is contained in the record of proceeding. In reviewing the petitioner's contract, ELFEGA Homes (owner), agrees to pay the petitioner the actual cost of the materials plus the sum of \$725,000.00 for performing the services set forth in the contract under scope of work.

Based on the contract, [REDACTED] has established itself as the proposed employer of the named beneficiaries. The petitioner has established that it will retain control over the beneficiaries where they are to be employed. The petitioner has established that it will be responsible for wages, firing, setting hours and working conditions, insurance, leave, and other employment-related factors. The contractual agreement states that the owner agrees to compensate [REDACTED]. Therefore, the petitioner has overcome the objections of the DOL. Absent derogatory information concerning the petitioning entity's intention to utilize the beneficiaries as contractors, the petitioner has provided adequate documentation to establish itself as an employer and sufficient evidence to establish that the need for the beneficiaries' services is peakload and temporary.

Subsequent to the director's decision, the AAO attempted to contact the petitioner by fax on December 4, 2007 at 2:53 PM and 6:36 PM and by letter, mailed on December 6, 2007, to inform him that the beneficiaries [REDACTED] and [REDACTED] must be removed from consideration. Absent a response from the petitioner, the AAO has removed [REDACTED] and [REDACTED] from the petition. The record, as it is presently constituted, does not establish their eligibility for H-2B classification.

The Vermont Service Center will issue the appropriate approval notice.

ORDER: The decision of the director is affirmed in part and the nonimmigrant visa petition is approved for all the workers originally named in the petition except [REDACTED] and [REDACTED], who are removed from the petition.