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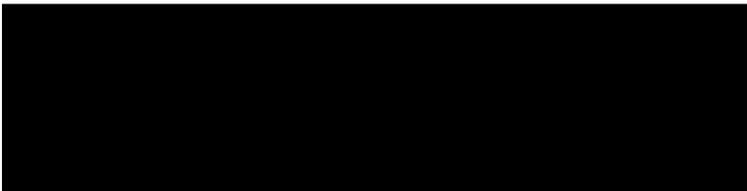
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 07 176 51529 Office: VERMONT SERVICE CENTER

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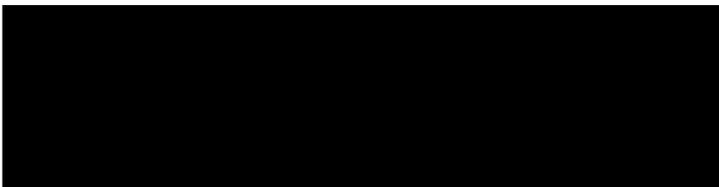
IN RE: Petitioner:
Beneficiaries:



JUL 27 2007

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 approved by the Director, Vermont 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 The decision of the director will be withdrawn and the petition will be denied.

The petitioner is a construction company. It desires to employ the beneficiary as a roofer from April 16, 2007 to February 16, 2008. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made.

The director determined that sufficient countervailing evidence has been submitted 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 temporary.

The petitioner has presented no additional evidence for consideration in response to the director's Notice of Certification. As the period for response to the Notice of Certification has passed, the record is considered complete and ready for adjudication.

Upon review of the entire record of proceeding, the AAO finds that the evidence of record does not support the director's decision to approve the petition. Accordingly, the director's decision will be withdrawn and the petition will be denied.

The totality of evidence in the record of proceeding, including the countervailing evidence submitted to overcome the basis cited by DOL for its denial of the temporary labor certification, does not establish that the petitioner's claimed "peakload" need for a roofer is a peakload need within the meaning of the regulations governing H-2B petitions.

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 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 asserts that the employment is peakload.

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).

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

Cover roofs with roofing materials. Align materials with edges of roof. Apply alternate layers of hot asphalt or tar and roofing paper to roof, according to specification. Apply gravel over top layers of roof, using rakes or brooms. Apply plastic coatings and membranes, fiber glass, or felt over sloped roof before applying shingles. Cement or nail flashing-strips of metal or shingle over joints to make watertight. Cover exposed nailheads with roofing cement or caulking to prevent water leakage and rust. Cover roofs and exterior walls with slate, asphalt, gravel, or related materials, using various tools. Cut felt, shingles, and strips of flashing, and fit into angles formed by walls, vents and intersecting roof surfaces. Nail or staple roofing in overlapping strips. Glaze top layers to make smooth finish.

The documents accompanying the petition include copies of (1) the petitioner's employee list; (2) a chart of the petitioner's employment levels; and (3) an affidavit from the managing partner. The AAO notes that the employee list does not include any information on the number of permanent and temporary roofers employed by the petitioner. In addition, the aforementioned chart does not provide details of the number of permanent and temporary roofers employed by the petitioner.

In this instance, the petitioner has not shown that that it needs to supplement its permanent staff 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 petitioner has not adequately documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiary's services, this petition cannot be approved.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the director is withdrawn. The nonimmigrant visa petition is denied.