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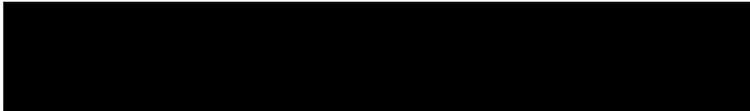
D21



FILE: EAC 07 138 52637 Office: VERMONT SERVICE CENTER

Date: JUN 29 2007

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:

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.

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 The decision of the director will be withdrawn and the petition will be denied.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 general construction company. It desires to employ the beneficiaries as construction 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) for eight and one-half 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 beneficiaries' services. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition.

On notice of certification, the petitioner did not present additional evidence for consideration. Therefore, the record is considered complete.

As discussed below, the AAO agrees with the findings of the DOL that the petitioner has not established a temporary need for the beneficiaries' services. Upon careful review of the entire record of proceeding, 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 Accordingly, the director's decision will be withdrawn and the petition will be denied.

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:

(2) *Seasonal need.* The petitioner must establish 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 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 seasonal need. The petitioner states that the temporary need recurs annually.

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:

Perform tasks involving physical labor at building, highway, and heavy construction projects, retaining walls, excavations, and grading. May operate hand and power tools of all types. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris. May assist other craft workers.

In its final determination notice, the DOL stated that the petitioner did not provide sufficient documentation to establish a temporary need for the occupation indicated in the Form ETA 750. The DOL determined that although the petitioner provided its Federal Quarterly Tax Returns with their application, the documents only provide general information concerning the total number of employees and the taxes paid for that year.

The I-129, Petition for a Nonimmigrant Worker (Form I-129) indicates that the dates of the intended employment are from April 1, 2007 until December 15, 2007.

In rebuttal to the DOL's finding, the petitioner provided a copy of its monthly payroll report for its permanent and temporary workers in the designated occupation for the 2005 and 2006 calendar years. The report shows that workers were permanently employed by the petitioner from January through December of 2005 and 2006. The report also shows that workers were temporarily employed by the petitioner from January through December of 2005 and 2006. There is no time period where the petitioner does not employ temporary workers. Therefore, the petitioner has shown a permanent need for the beneficiaries' services in the proffered positions. The petitioner employed temporary workers all year-round and has not shown that its need for the beneficiaries' services is tied to a particular pattern or event that recurs every year.

The petitioner explains at Section 2, item 3 of the Form I-129 that its business operates with a temporary need normally beginning in February 15, 2007 and continuing through December 15, 2007. The petitioner states that this year, because it is struggling at the regional level, it will accept an April 1, 2007 start date. The petitioner also states that the construction laborers will start activities as soon as weather permits. The petitioner has not established that its business activity is traditionally tied to a season of the year by an event or pattern and will recur next year at the same time.

The petitioner provided one agreement dated June 29, 2006 between itself and Vantage Pointe Investments of Waynesville, LLC. The agreement states that the petitioner shall perform all site development work for the project. 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. . . ." Therefore, the agreement does not demonstrate that the petitioner's need is other than a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business.

Moreover, the services to be performed by the beneficiaries are ongoing and the petitioner's need to have additional workers to perform these services has not been shown to be a seasonal need. The petitioner's monthly payroll report does not show the period(s) of time during each year in which it does not need temporary services or labor. The financial evidence submitted does not justify the petitioner's seasonal need for the beneficiaries' services, and therefore, 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 decision of the director dated May 8, 2007 is withdrawn. The petition is denied.