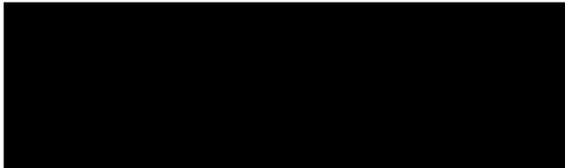




U.S. Citizenship
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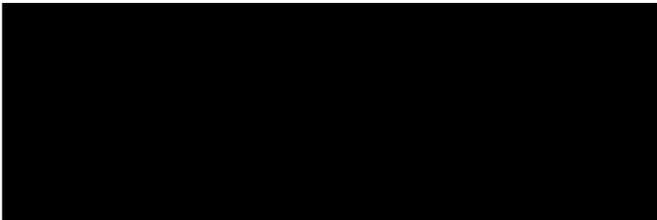
D4

FILE: EAC 07 128 51041 Office: VERMONT SERVICE CENTER Date: NOV 06 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:



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. The petition will be denied.

The petitioner is a railroad company, located in Springdale, Arkansas. It desires to employ the beneficiaries as locomotive diesel mechanics 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 the period from January 16, 2007 to November 16, 2007. The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor. The director determined that the countervailing evidence submitted by the petitioner was sufficient to overcome the DOL's decision. The AAO reviewed the decision and withdrew the director's decision and remanded the case for further action. The director sent the petitioner an intent to deny, and the petitioner forwarded a response to the director. Upon reviewing the response, the director denied the petition since the petitioner failed to submit the required evidence as discussed in the AAO's remand decision.

On appeal, the petitioner indicates that the seasonal need for supplemental workers is recurrent every year and critical to the success of the company. The petitioner explains the seasonal need of the company runs from January through November since the railroad experiences an "increase in the haulage of heavy equipment and construction materials; specifically sand, which is used in the production of cement." The petitioner further explains that the sand cargo is different from the year round agricultural cargo since it is "heavier, abrasive and damaging to the gears and axels of the cars and locomotive engines; resulting in an increase in the frequency of equipment breakdown."

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:

(1) *One-time occurrence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(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.

(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.

(4) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

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 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.

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 nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads in pertinent part:

Overhaul engine on ALCO Locomotive (Vintage locomotives from 1950's and 1960's); re-wire low voltage and high voltage electrical systems; test, load and adjust systems; disassemble and assemble complete truck, traction motors, do wheel reports and turn wheels when needed; knowledge and use of a signal car test gauges for greight car repair, operation of heavy equipment in a safe manner; welding, inspection, gauging, cutting.

The AAO finds that the petitioner has not established the type of H-2B temporary need asserted in the petition.

Upon filing the instant petition, the petitioner indicated that its need is peakload. The petitioner submitted a statement indicating the peakload needs of the company during each spring and summer when the

railroad haulage increases with heavy construction materials such as sand that requires additional maintenance and employees to perform the maintenance. However, the statement has not been substantiated by financial or other documentary evidence, such as business contracts with the companies requiring the haulage of sand materials that occur every year, evidence of additional maintenance needs during the spring and summer months compared to the winter months, payroll records and staffing needs to confirm the accuracy of the information given in the statement and establish that the petitioner's business activity has formed a pattern where its need for temporary workers is for a certain time period and will recur next year at the same time.

In the notice of intent to deny, dated May 4, 2007, the director specifically requested that the petitioner present evidence for 2005 and 2006 of the "yearly maintenance schedule that requires the work of diesel mechanics; and pay records that indicated the number of permanent and H2B temporary locomotive diesel mechanics employed in each month of the year." In response, the petitioner submitted a list of the company's 8 current employees. The I-129 indicates that the petitioner employs 70 people; however, in response to the director's request for additional evidence, the petitioner stated that it currently employed eight individuals. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner did not submit information regarding the H-2B temporary locomotive diesel mechanics employed in each month of the year. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner submitted a graph indicating the total of sand cars for each month from January through December 2006. It appears from the graph that that the rise of sand cars occurs from January through July and drops from August through December. Thus, this documentation does not demonstrate a peakload need from January through November as requested on the Form I-129. In addition, the petitioner did not submit any contracts for 2007 indicating that the petitioner will continue to haul sand materials due to a seasonal or short term demand and that the workers will not become a part of the regular business operations. Absent supporting documentation, the petitioner has not shown that its need for the beneficiaries' services is tied to a seasonal trend or a particular event that recurs every year. 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)).

In addition, the director requested a yearly maintenance schedule that requires the work of diesel mechanics for 2005 and 2006. The petitioner did not submit the requested documentation. Instead, the petitioner submitted a two-page table that indicated out-of-service cars; however, it did not state the dates of the maintenance required. The petitioner also submitted eleven documents entitled "major component serial no. and changeout record" which lists repairs made from March through August. The petitioner did not submit the yearly maintenance schedule as requested by the director and thus the AAO cannot determine if the petitioner requires additional maintenance during the months of January through November. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies

whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12).

Beyond the decision of the director, the appeal may not be approved since the petitioner has not established that seven of the beneficiaries possessed the requisite education listed on the labor certification.

The regulation at 8 C.F.R. 214.2(h)(6)(vi)(C) states:

Alien's qualifications. Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary.

The Application for Alien Employment Certification (Form ETA 750) at Part A indicates that the minimum amount of training and experience required to perform satisfactorily the job duties is a high school degree and four years of experience in the job being offered. The record does not contain evidence of the beneficiaries' four years of experience in the job being offered. For this additional reason, the petition must be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.