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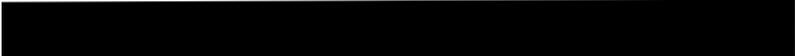
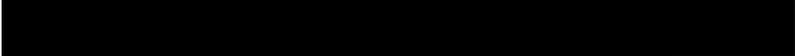
**U.S. Citizenship
and Immigration
Services**

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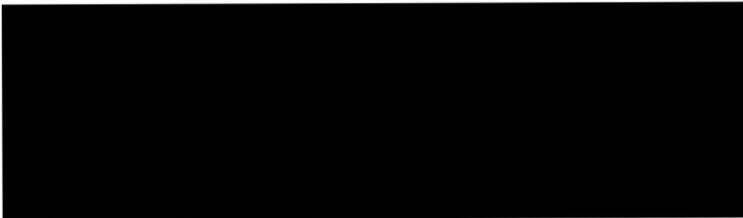


FILE: EAC 08 093 51224 Office: VERMONT SERVICE CENTER Date: **AUG 18 2008**

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:



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 recommended to be approved by the Acting Director, Vermont Service Center (VSC), 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 The decision of the acting director will be withdrawn and the petition will be denied.

The petitioner is a general labor contractor. It desires to employ the beneficiaries as welders and fitters 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 February 1, 2008 to October 31, 2008. In accordance with the Application for Alien Employment Certification (Form ETA 750), the petitioner would employ and assign the beneficiaries to work with Signal International in Port Arthur, Texas. The Department of Labor (DOL) provided notification to the employer that a temporary labor certification could not be issued at this time as circumstances generated by Hurricanes Katrina or Rita made it impossible for DOL to determine whether the employer's need is temporary. The petitioner then filed a petition with the Acting Director, VSC, with supporting evidence. On March 31, 2008, the director issued a request for evidence (RFE) in which he requested the petitioner to submit evidence showing that the need for the beneficiaries' services is temporary, that there are no qualified United States workers available for the positions requested, and that the employer advertised the position for at least three consecutive days. In response to the RFE, the petitioner submitted: (1) a copy of its 2006 and 2007 monthly payroll reports (identifying total workers, total hours worked, and total earnings for permanent and temporary workers in the occupation designated by the petitioner as Welders-Fitters and Related Services; (2) a March 4, 2008 decision by the AAO; (3) and evidence that the petitioner advertised the position for at least three consecutive days. The acting director determined that the petitioner had established an H-2B temporary need and certified to the AAO a decision approving the petition. That decision is now before the AAO for review.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

The evidence of record does not support the acting director's decision to approve the petition. As discussed below, the AAO finds three separate and independent grounds for denying the petition, namely: (1) failure to establish that the H-2B alien workers would not be displacing U.S. workers capable of performing the services or labor for which the petition was filed, as required by the regulation at 8 C.F.R. § 214.2(h)(6)(i); (2) failure to provide evidence responding to the director's RFE that there are no qualified U.S. workers available for the position requested; and (3) failure to establish an H-2B temporary need for the welders and fitters specified in the petition.

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), *Petition for alien to perform temporary nonagricultural services or labor (H-2B)* states, in part:

(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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states that 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.

As indicated by section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and 8 C.F.R. § 214.2(h)(6)(i), an H-2B petition may not be approved unless the evidence substantiates that the requested alien workers are not displacing United States workers capable of performing the services or labor for which the petition was filed. The AAO finds that, despite the opportunity afforded by the RFE's express request for

such evidence, the petitioner failed to provide it.¹ This deficiency is by itself a sufficient basis to deny the petition.

The evidence that the petitioner advertised the work does not establish that U.S. workers were not available to perform it. Neither the *Times Picayune* newspaper article nor the memorandum from The Avascent Group consulting firm establishes that there were no U.S. respondents to the advertisements who were available and willing to perform the advertised work. The AAO notes the generalized entry at item 21 of the Form ETA 750, for efforts to recruit U.S. workers, but the entry includes no statement as to the number of U.S. workers who may have responded to the recruiting efforts and to the petitioner's efforts, if any, to interview and hire such workers.² Further, the record of proceedings does not specify the number of respondents to the advertisements, how many were hired, and the reasons that respondents were not hired.³ Furthermore, the petitioner's newspaper advertisements provided in response to the acting director's RFE state there are 100 openings for welders and fitters from October 1, 2007 through July 31, 2008. The petitioner's Application for Alien Employment Certification (Form ETA 750) states there are 200 openings, and the dates of intended employment are from January 1, 2008 until October 31, 2008. It appears that the newspaper advertisements submitted in response to the acting director's RFE does not relate to the dates given as the intended employment period on Form ETA 750. As the petitioner has not established that it is not displacing U.S. workers capable of performing the services or labor for which the petition was filed, as required by statute and by the regulation at 8 C.F.R. § 214.2(h)(6)(i), the petition must be denied.

¹ The pertinent portion of the RFE (at the bottom of its second page) requested that the petitioner submit "evidence showing that there are no qualified United States (U.S.) workers available for the position requested."

² That entry reads:

We have engaged in a comprehensive and continuous nationwide recruitment effort consisting of a broad number of tactics including advertising in national and local print sources, Internet advertising and direct contact with schools, colleagues, and other contacts to refer us to potential employees. Through these efforts, we have been unable to recruit a sufficient number of workers.

³ The relevance of such information is illustrated by the fact that the DOL Employment and Training Administration's Training and Employment Guidance Letter (TEGL) 21-06, Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations (Revised June 27, 2007), at Part IV, paragraph G, requires that, in addition to proof of publication of the requisite advertisements, the employer "shall submit to the SWA a written, detailed recruitment report that is signed by the employer," which must:

1. Identify each recruitment source by name;
2. State the name, address, and telephone number and provide resumes (if submitted to the employer) of each U.S. worker who applied for the job; and
3. Explain the lawful job-related reason(s) for not hiring each U.S. worker.

Further, 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). The 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's failure to provide evidence responding to the RFE's request for "evidence showing that there are no qualified United States (U.S.) workers available for the position requested" precludes the AAO from determining whether or not the employment of the aliens as H-2B workers would comply with section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and the regulation at 8 C.F.R. § 214.2(h)(6)(i) on safeguarding job opportunities for U.S. workers. For this reason also the petition will be denied.

As the third separate and independent basis for denial of the petition, the AAO also finds that the petitioner failed to substantiate its claim that the need for the temporary workers specified in the petition is a one-time occurrence within the meaning of the H-2B regulations at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) or a seasonal need within the meaning of the H-2B regulations at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

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:

Lay out, fit, and fabricate metal components to assemble structural forms, such as machinery frames, and pressure vessels, using knowledge of welding techniques, metallurgy, and engineering requirements, for the purpose of repair and construction of ships. Employer provides tools.

In its final determination notice, dated December 10, 2007, DOL stated that it is receiving subsequent H-2B applications filed, in many instances, by the same employers under the same standard of temporary need for approximately the same period of need. DOL stated that this situation makes it difficult for it to determine whether the employer's need is actually temporary. DOL explained that since the employer's request for temporary workers is based on a need identified as a result of Hurricanes Katrina and Rita, DOL is unable to make a determination and this finding should be presented to the Citizenship and Immigration Services (CIS) for final adjudication.

The petitioner includes the following items in support of its claim of an H-2B seasonal or one-time occurrence: (1) copies of its 2006 and 2007 monthly payroll reports; (2) a January 31, 2008 letter from the petitioner's executive vice president for corporate affairs to VSC explaining the need for H-2B welders and fitters; (3) an undated Countervailing Evidence Statement by counsel; (3) a March 4, 2008 AAO decision recognizing an H-2B temporary need in an earlier petition filed by the petitioner for a different client; (4) a newspaper article on labor shortages in Gulf Coast shipyards, from the February 19, 2006 edition of the *Times Picayune* newspaper; (5) a memorandum, dated July 16, 2007, from [REDACTED] of The Avascent Group regarding the shipbuilding labor shortage in the Gulf Coast area of the United States; (6) newspaper advertisements for the position, with an affidavit attesting to their publication; (7) a letter from Signal International dated September 20, 2007; and (8) two decisions certified to the AAO by the Vermont Service Center for review – they are dated November 13, 2006 and August 6, 2007 and they address, respectively, petitions filed on November 1, 2006 and May 16, 2007.

As previously stated, the petitioner is a labor contractor that supplies workers to client businesses. The petitioner asserts that it has been contracted by Signal International, Texas, to provide skilled welders and fitters to work in the shipyards. The petitioner has not provided documentary evidence, such as an executed contract and work orders that establish that Signal International, has contractually obligated itself to employ as welders and fitters, and for the period specified in the petition, the 26 alien workers sought in the petition.

According to the Petition for a Nonimmigrant Worker (Form I-129), the 26 beneficiaries would be assigned to work at Signal International in Port Arthur, Texas. The Form I-129 was filed on February 4, 2008. The January 31, 2008, letter from the petitioner's executive vice president for corporate affairs states that the petitioner has been "contracted by Signal International, located in Port Arthur, Texas, to provide skilled craftsmen to work in shipyards." The AAO notes that the evidence submitted with the petition includes no documentary evidence of any contractual arrangement with Signal International for the workers sought in this petition. Further, the petitioner's letter does not specify that it has a contractual arrangement with Signal International for 26 welders and fitters for the period asserted in the petition; rather, the letter only states that it has been contracted by Signal International "to provide skilled craftsmen to work in the shipyards." Terms, conditions, dates, and specific types of workers are not stated. The record of proceedings contains no documentary evidence of any contractual obligation for the petitioner to provide and for Signal International to use 26 welders and fitters for any period. The record of proceedings contains no specific information about Signal International, its operations, its staffing history, its workload, and the nature of its need for any alien workers. In short, the record does not substantiate that the workers sought in the petition are needed for the work asserted in the petition, that is, for assignment at Signal International as welders and fitters for the period February 1, 2008 to October 31, 2008.

The September 20, 2007 letter from the Senior Vice President and General Manager of Signal International, LLC is not documentary evidence of a contractual agreement between the petitioner, Direct Workforce, Inc. and Signal International, LLC. The letter states that based on Signal's current and projected workloads through next year, it will require 200 temporary workers (welder-fitters) from the petitioner for the period from January 1, 2008 through October 31, 2008 at its Texas facilities. Neither the specific dates nor the terms and conditions of the specific project for which the workers are needed are mentioned in the letter. The letter does not contractually bind Signal or the petitioner. The letter does not substantiate the petitioner's need for

26 welders and fitters to work for Signal International, LLC for the period of intended employment stated in the petition.

The basic points of [REDACTED]'s July 16, 2007 memorandum on the shipbuilding labor shortage in the Gulf area is captured by its Conclusion section, which states:

The shipbuilding labor shortage is primarily caused by two temporary factors resulting from Hurricane Katrina: the housing shortage (which translates into smaller labor supply) and the increased demand for labor from the construction industry.

In the past months important obstacles to addressing the housing shortage have been overcome, and significant federal funding resources have recently become available to homeowners and developers. The labor force has already started to grow more quickly, and increasing the number of housing units will help sustain this trend. Within two to three years, the severe housing shortage will have been mostly addressed, and the labor force will have increased correspondingly.

At the same time, as rebuilding efforts start to wind down, the construction industry's demand for labor will decrease. Workers who were previously employed by construction firms will seek new jobs, freeing up labor for shipbuilders. These dynamics of increased labor supply and decreased labor demand will combine to eliminate the shipbuilding labor shortage in the Gulf Coast area.

Neither this memorandum nor the *Times Picayune* newspaper article is probative. The Gulf Coast labor shortage which these two documents discuss does not establish that Signal International has the asserted need for assignment of 26 temporary welders and fitters for the time specified in the petition. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem. The AAO further notes that the *Times Picayune* newspaper article, written in February of 2006, was not current at the time of the petition's filing in February of 2008.

For the reasons discussed above, there is no evidentiary basis for finding an H-2B temporary need based upon Signal International's requirements.

As will be discussed below, the evidence of record does not establish that the petitioner has a requirement for welders and fitters that are a seasonal or one-time occurrence as defined in the H-2B regulations.

The general shortage of shipbuilding labor discussed in the memorandum and the newspaper article does not establish an actual need that the petitioner here has for a specific number of workers to assign to Signal International or to any other client for the period stated in the petition. The letter from the petitioner's executive vice president for corporate affairs is not supported by any independent documentary evidence of a point in the future when the petitioner will no longer be seeking temporary welders and fitters on a continuous basis. The letter dated September 20, 2007 from Signal International, LLC does not establish a contractual

agreement between the petitioner and Signal for 26 temporary workers (welder-fitters), for the period of intended employment.

The AAO also finds that the petition does not merit approval by application of the precedent decision *Matter of Artee*, which, as earlier noted in this decision, states that it is the nature of the petitioner's need that determines whether or not a petition establishes an H-2B temporary need. The principles of *Matter of Artee* are incorporated clearly in the H-2B temporary-need definitions at 8 C.F.R. § 214.2(h)(6)(ii), which prescribes that whether the asserted need for workers qualifies as an H-2B temporary need is to be evaluated in terms of the petitioner, not the clients it serves.

Here, the record indicates that the petitioner both started its contractor business in April 2006 and continues it "in order to address the extraordinarily rapidly growing need for skilled construction workers in the region." (Petitioner's letter of January 31, 2008) As such, it appears that the petitioner's need for temporary welder-fitters is ongoing, will be coextensive with the shortage of those workers in the Gulf Coast region, and is basic to the very nature of the petitioner's business. For instance, the petitioner's monthly payroll and staffing report for Welders-Fitters and Related Services for 2007 shows a continuous need for temporary welders and fitters, ranging from 195 to 897 workers per month. The general shortage of shipbuilding labor discussed in [REDACTED]'s memorandum and the *Times Picayune* article does not establish an end time for the petitioner's need for temporary welders and fitters. Likewise, the letter from the petitioner's executive vice president for corporate affairs does not state a definite point in the future when the petitioner will no longer be seeking temporary welders and fitters on a continuous basis; and the letter is not supported by any independent documentary evidence of such a definite point in time. As a matter of fact, the letter states that "we do not believe that our need for the increased number of workers is permanent. We anticipate that the need will last through the end of 2008." The letter dated September 20, 2007 from Signal International, LLC states that the petitioner has and continues to provide Signal with skilled workers and fitters. As stated earlier, since there is a current shortage of welders and fitters, the petitioner's need to supply these employees to its clients is ongoing, not temporary as required by section 101(a)(15)(H)(ii). Therefore, the petitioner has not established a temporary need of short duration, as required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

Moreover, the services to be performed by the beneficiaries and the petitioner's need to have additional workers to perform these services have not been shown to be a seasonal need. The petitioner provided a copy of its monthly payroll report for its permanent and temporary workers in the designated occupation for the 2006 and 2007 calendar years. The report shows that workers were permanently employed by the petitioner from April through December of 2006 and January through November of 2007. The report also shows that workers were temporarily employed by the petitioner from April through December of 2006 and January through November of 2007. The petitioner has not shown that its need for the beneficiaries' services is tied to a particular pattern or event that recurs every year. The petitioner has not specified the periods of time during each year it does not need the beneficiaries' services. 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. The financial evidence submitted does not justify the petitioner's seasonal need for the beneficiaries' services, and therefore, this petition cannot be approved.

The AAO notes that, contrary to counsel's assertions in her Countervailing Evidence Statement, the petitioner did not provide "copies of contracts with Petitioner's clients." Also, such documents were not included in counsel's list of exhibits. The letter dated September 20, 2007 does not signify a contractual agreement between the petitioner and Signal.

The two redacted decisions submitted prior to the director's decision counsel misidentifies as AAO decisions. In fact, they are decisions from the service center that were certified to the AAO for review. The AAO also notes that, at page 4 of her Countervailing Evidence Statement, counsel misquotes the service center director's statement from the certification decision EAC 07 029 50868 as beginning with the words "The need for flux core welders." Actually the paragraph begins with the words "The petitioner has stated that the need." Thus, contrary to counsel's assertion, the paragraph is not from an AAO decision and is not a statement of policy, but is a service center director's summation of a portion of evidence presented by the petitioner in that particular case.

Counsel also submits a partially redacted copy of a March 4, 2008 AAO decision which approved, as a one-time occurrence, a petition filed by the petitioner on behalf of Signal International, Inc., for 196 welders and fitters for the period December 15, 2007 to July 31, 2008. The AAO notes that the partially redacted decision submitted by counsel involves a different worker assignment location (Pascagoula, Mississippi) than in the present petition. **Each nonimmigrant petition is a separate proceeding with a separate record.** See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding, see 8 C.F.R. § 103.2(b)(16)(ii), and the record presently before the AAO does not merit approval of the present petition in accordance with the regulations at 8 C.F.R. § 214.2(h)(6).

None of the decisions cited by counsel are precedent decisions, that is, decisions that have been designated and published as precedents in accordance with 8 C.F.R. §§ 103.3(c) and 103.9(a). While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 director's decision dated July 9, 2008 is withdrawn. The petition is denied.