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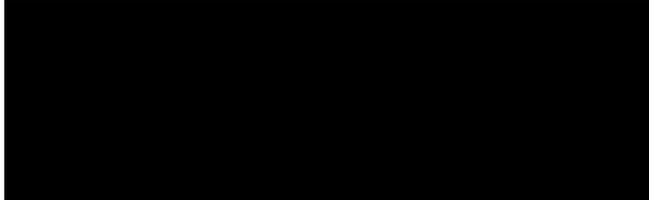
U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship
and Immigration
Services

24



FILE: EAC 08 045 52596 Office: VERMONT SERVICE CENTER Date: JAN 29 2008

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:
[Redacted]

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, 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 The decision of the director will be withdrawn and the petition will be denied.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 shipbuilding company located in Louisiana. It desires to continue to employ the beneficiaries as shipfitters 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 December 1, 2007 to September 1, 2008 (see the dates of intended employment specified at item 8 of Part 5 of the Form I-129 (Petition for a Nonimmigrant Worker)). The Department of Labor (DOL) determined that unique, complex, and persistent circumstances generated in the Gulf Region by Hurricanes Katrina and Rita made it impossible to determine whether a temporary labor certification should be issued in the present case. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition.

On December 18, 2007, counsel advised the AAO that he specifically waives the 30-day period in which to submit a statement to the AAO. Therefore, the record is considered complete.

As discussed below, 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:

(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 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 positions as a peakload need.

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 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 and fabricate structural parts such as plates, bulkheads, and frames, and brace them in position during construction of vessel or ship for welding. Lay out and cut parts for assembly working from blueprints, templates, or oral instructions.

In rebuttal to the DOL's finding, the petitioner provided copies of its monthly payroll reports for its permanent and temporary workers in the designated occupation for 2005, 2006 and January through August of 2007. The reports show that workers were permanently employed by the petitioner from January through December of 2005, 2006, and January through August of 2007. The 2005 report shows that no workers were temporarily employed by the petitioner from January through December of 2005. However, from May 2006 through August 2007, the 2006 and 2007 reports show that temporary workers were continuously employed by the petitioner as shipfitters. There is no time during that period (May 2006 through August 2007) where the petitioner does not employ temporary workers in the proffered positions. Therefore, the petitioner has shown a permanent need for shipfitters.

The petitioner also submitted copies of four contracts. One of the contracts is between [REDACTED] and I [REDACTED] (Owner), and the other three contracts are between [REDACTED] and [REDACTED]. The petitioner states in its letter of September 10, 2007 that it is the subsidiary and payroll employer for [REDACTED]. However, the record contains no documentary evidence to substantiate this assertion. 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)). Absent documentary evidence, the petitioner has not established that a subsidiary relationship exists between itself and [REDACTED] and that it will be involved in the building of the vessels referred to in these contracts.

Upon review, the nature of the asserted need appears to be continuous and ongoing. The countervailing evidence provided with the petition does not establish the petitioner's temporary peakload need for the beneficiaries' services. Contrary to the petitioner's assertions, the evidence of record does not establish a seasonal or short-term demand for shipfitters 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).

In its November 20, 2007 letter, the petitioner states that there is a shortage of workers who are willing and able to perform the work of its company's required skilled trades. The fact that the petitioner is unable to locate and secure United States or permanent resident workers to perform the job of shipfitters does not justify the petitioner's extension request for 77 temporary H-2B workers to continue to work for the petitioner as shipfitters. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

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 December 13, 2007 is withdrawn. The petition is denied.