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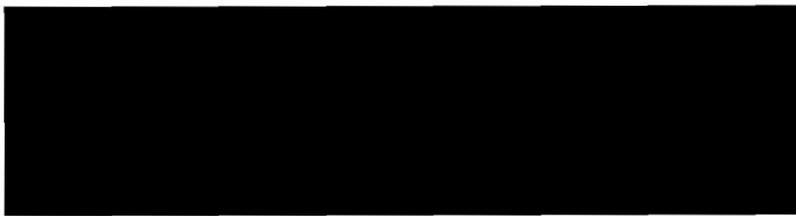


FILE: EAC 08 127 51814 Office: VERMONT SERVICE CENTER Date: JUN 12 2008

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:



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 The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is a subcontractor. It desires to employ the beneficiaries as welders 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 July 12, 2008 to January 10, 2009. The beneficiaries will be working at LaFourche, Terrebonne and St. Mary's Parish, Louisiana. 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 based on the evidence submitted, the petitioner had established a temporary need and approved the petition. The director's decision to approve the petition has now been certified to the AAO for review.

Upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to approve the petition. The petitioner has not established that its need for the beneficiaries' services is temporary. Accordingly, the director's decision will be withdrawn and the case will be remanded for further action.

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 are traditionally tied to a season of the year by an event or pattern and are 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).

(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 director states in his decision that the employer/petitioner, Dixie Shipyard & Supply, Inc., is claiming that Hurricane Katrina impacted the shipbuilding market and the effects of the hurricane have created a shortage of workers as well as an increase in demand for its product. The record of proceedings, however, does not contain such a statement by the petitioner. To the contrary, in a letter dated November 26, 2007, the petitioner states that as a result of an increase in its workload, it has a temporary need for additional labor to supplement its normal

operations. The petitioner states that it has an H-2B peakload need resulting from the work and services to be performed during the dates of need specified on the Form I-129 (Petition for Nonimmigrant Worker) and, therefore, it is requesting assistance to participate in the H-2B work visa program. The petitioner explains that it intends to use the H-2B work visa to fill the temporary increased demand on its labor supply. The petitioner seeks approval of the proffered position 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).

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are 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 Part A, section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Use knowledge of welding and engineering to position, fit, and assemble metal parts to make structural forms.

In its request for evidence (RFE) dated April 11, 2008, the director requested the petitioner to submit evidence or documentation to show that it had sufficient work to employ 200 beneficiaries. The director also stated that such evidence should consist of work contracts or work orders. In addition, the director requested the petitioner to submit a detailed outline of its pending work, along with a completion date.

In response to the director's RFE, the petitioner, via facsimile, responded with its letter dated April 28, 2008, a letter from Allied Shipyard, Inc., and a letter from MiSWACO.

In the letter dated April 28, 2008, the petitioner states that, above and beyond its normal vessel repair and maintenance operations, it has been awarded a contract to build new construction barges and has secured additional vessel repair agreements. The letter states that the barge construction will require an additional 50 welders and that the increase in vessel repair will require an additional 35 welders. In addition, the petitioner states that it has reached a contract with Allied Shipyards, Inc. to provide 75 welders for vessel repair and maintenance from May 1, 2008 through January 10, 2009.

The petitioner provided a copy of a letter from MiSWACO signed by [REDACTED], Manager Marine Operations. The letter states that it "shall serve as written notice that Dixie Shipyard has been awarded the seven (7) new barge construction package recently bid by your company. . . In addition to the new barges beginning in February, we have a full schedule of maintenance work to be performed in 2008 on our boats and barges and expect to have your dry-dock 100 percent utilized for the year. . . ."

The petitioner also provided a copy of a letter from Allied Shipyard, Inc. signed by [REDACTED]. The letter states that it “shall serve as written notice of the agreement request of services of Dixie Shipyard & Supply for the purposes of repair and maintenance of vessels. As a result, we will need 75 welders for vessel repair and maintenance during the period of May 1, 2008 through January 10, 2009.”

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary’s services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

The petitioner asserts that it is experiencing an H-2B peakload need, and it has submitted evidence of its contractual obligations during the period of requested employment. However, the petitioner has not submitted documentary evidence that establishes that the asserted need for H-2B welders is generated by a demand that is either seasonal or by a demand that is short-term, 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).

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. The Form I-129 indicates at item 12 that the petitioner currently has 80 employees. In this instant case, the petitioner has not provided evidence of having a permanent staff and has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload. The petitioner has not carefully documented the asserted peakload situation through data such as monthly payroll records for a two-year period showing the number of permanent and temporary employees employed throughout the year in the proffered occupation, staffing records, sales tax records, Employer’s Quarterly Federal tax returns, and any other documentation that might show its usual workload and staffing needs, and the special needs created by the agreements with MiSWACO, Allied Shipyard, Inc and any other company. The petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner’s regular operation.

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. Based upon the current evidence in the record of proceedings, the petitioner appears to have a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business. The petitioner has not submitted its contractual history and/or financial evidence to demonstrate that its business activity has formed a pattern where its needs for workers are traditionally tied to a season of the year and will recur next year at the same time. 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)).

Since these deficiencies were not mentioned in the director’s RFE and later decision, this case will be remanded to the director in order to give the petitioner an opportunity to submit proof of its temporary peakload need for the beneficiaries’ services. The director should issue an RFE that requests the petitioner to provide the type of documentation discussed in the two paragraphs immediately above. The director may also request any additional

information or evidence that he deems necessary to adjudicate the matter at hand. At a minimum, the petitioner should be directed to provide: (1) monthly payroll report and staffing tables – signed and certified as true and accurate by an appropriate officer of the petitioner – that summarize *for each month* of the two years preceding the employment period specified in the petition: (a) the number of welders the petitioner employed, divided into separate columns for (a) permanently employed welders; (b) temporarily hired U.S. welders; and (c) H-2B welders; (2) copies of the petitioner's Employer's Quarterly Federal tax returns and records of Federal Unemployment (FUTA) Deposits and Filings, for the two years preceding the date that the petition was filed; and (3) any other documents that demonstrate that the labor or services sought in the petition constitute the type of H-2B temporary need asserted there.

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 director's decision of May 16, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. Upon completion, the director shall certify the decision to the AAO for review.