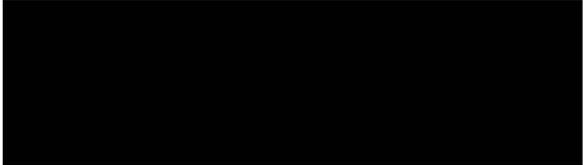


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FILE: EAC 08 030 52166 Office: VERMONT SERVICE CENTER Date: **MAR 04 2008**

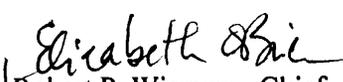
IN RE: Petitioner: 
Beneficiaries: 

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 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 affirmed and the petition will be approved for 196 of the 200 workers initially named in the petition, that is, for all the named workers except [REDACTED] and [REDACTED] who are removed from the petition for administrative reasons.

The petitioner is a general labor contractor. It desires to continue 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 December 15, 2007 to July 31, 2008. In accordance with the Application for Alien Employment Certification (Form ETA 750), the petitioner would employ and assign workers to work in [REDACTED]

The petitioner states that it has been contracted by [REDACTED], located in [REDACTED] to provide construction laborers to work in the shipyards and repair and maintenance yards.

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, Dennis and Wilma made it impossible for DOL to determine whether the employer's need is temporary. The petitioner then filed a petition with the Director, VSC, containing countervailing evidence to overcome the DOL's decision.

On November 15, 2007, the director issued a request for evidence (RFE) in which he requested the petitioner to submit contracts, work orders, memoranda of agreement, and other contractual documents to support its one-time need for the beneficiaries' services and evidence that the beneficiaries have passed a welding test. In response to the director's RFE, the petitioner submitted a letter from [REDACTED], a contract labor agreement between the petitioner and [REDACTED], its 2006 and 2007 monthly payroll reports and welding test records. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition. The director's decision to approve the petition is now before the AAO for review.

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.

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 one-time occurrence.

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).

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, for the purpose of repair and construction of ships. Employer provides tools.

The petitioner is a labor supplier that supplies workers to companies that are seeking laborers. The letter dated July 19, 2007, signed by [REDACTED] Vice-President of Production states that [REDACTED] (the petitioner) continues to provide Signal with skilled welders and fitters, and based on its current and projected workload through next year, it will require 200 welders and fitters from [REDACTED] (the petitioner) from October 1, 2007 through July 31, 2008 at its Mississippi facility.

The evidence establishes that the nature of the petitioner’s need is continuous and ongoing. The record also establishes the petitioner’s need for these workers is a temporary event of short duration, caused by the extraordinary circumstances of the 2005 hurricane season.

Upon review of the evidence contained in the record, the decision of the director is found to be correct. The totality of evidence establishes that the petitioner’s need for the workers is a one-time occurrence as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) and that extraordinary circumstances justify the beneficiaries’ H-2B employment in accordance with 8 C.F.R. § 214.2(h)(6)(ii)(B). The Vermont Service Center will issue the appropriate approval notice.

Further, the AAO removes [REDACTED], and [REDACTED] from the petition due to administrative reasons. The record, as it is presently constituted, does not establish their eligibility for H-2B classification.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The decision of the director is affirmed. The nonimmigrant visa petition is approved.

¹ Signal International provides marine and fabrication services to its customers in the Gulf of Mexico. <http://www.signal.int.com>.