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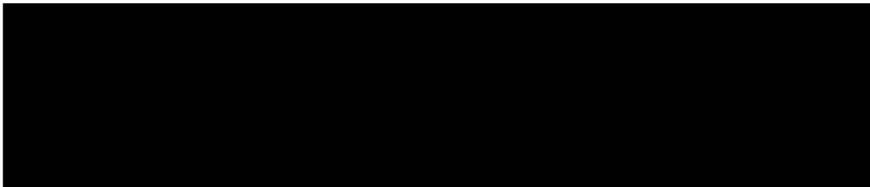
FILE: EAC 08 045 52906 Office: VERMONT SERVICE CENTER Date: **MAR 04 2008**

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.

Elizabeth O'Neil

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. In a subsequent motion to reconsider, the director approved the nonimmigrant visa petition and certified its decision 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 dated February 21, 2008 will be affirmed and the petition will be approved.

The petitioner is a shipbuilding company located in Louisiana. It desires to continue its employment of the beneficiaries as carpenters pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b) from December 1, 2007 through 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. Initially, the director had denied the petition, but after reconsideration, the director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition.

The director determined that sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the employment policies of the DOL have been observed, and that, based upon his analysis of the petitioner's contracts from the past three years, the petitioner's need for the services of the beneficiaries is a peakload need.

Section 101(a)(15)(H)(ii)(b) of 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 pertinent part, the following:

- (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 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.

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:

Fabricate, erect, install, and repair structures and fixtures of wood, plywood, wallboard, and all other such components related to the construction and completion of work aboard ships and in

shipyards facilities following blueprints, lay-out drawings, sketches, building plans, 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 carpenters 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 carpenters were temporarily employed by the petitioner in 2005. However, from May 2006 through August 2007, the 2006 and 2007 reports show that workers were continuously employed by the petitioner as carpenters. There is no time during that period (May 2006 through August 2007) where the petitioner did not employ carpenters. The petitioner has shown a permanent need for carpenters.

These documents establish that the nature of the petitioner's need is continuous and ongoing. The record establishes that these workers have become a part of the petitioner's operation and its need for them cannot, therefore, be considered a peakload need. However, the record does establish that the petitioner's need for these workers is a temporary event of short duration, caused by the extraordinary circumstances of the 2005 hurricane season.

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.

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 director's February 21, 2008 decision is affirmed. The petition is approved.