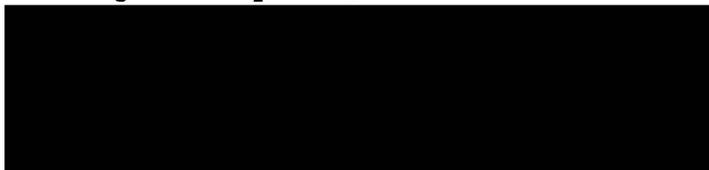


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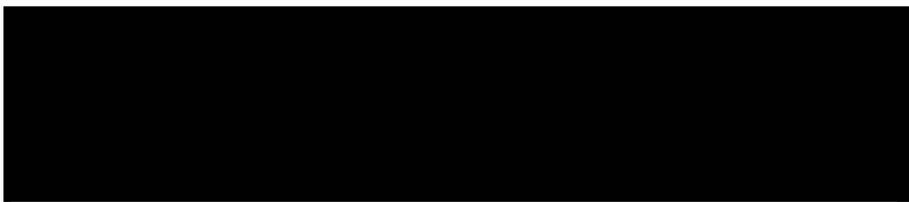
FILE: EAC 07 244 51863 Office: VERMONT SERVICE CENTER Date: MAR 13 2008

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 in part and the petition will be approved for 118 of the 121 workers initially named in the petition, that is, for all the named workers except [REDACTED] and [REDACTED].

The petitioner is a marine and fabrication company located along the Gulf of Mexico that provides offshore drilling rig overhaul, repair, upgrade and conversion. The petitioner also provides subcontract marine construction and fabrication for the United States Navy. The petitioner desires to continue to employ the beneficiaries as fitters pursuant to 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) from August 1, 2007 until June 1, 2008. 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 petitioner then filed a petition with the Director, VSC, containing countervailing evidence to overcome the DOL's decision. 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.

In the instant petition, the petitioner requested the continuation of employment for 122 workers. However, the petitioner provided the names for only 121 workers; therefore, the AAO will issue a decision that will take into consideration the eligibility of 121 named workers.

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 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:

Layout position of parts and metal, working from blueprints and templates using a scribe and hand tools. Align parts in relation to each other using jacks, come-a-longs, turnbuckles, clips, wedges and mauls. Tack weld clips and brackets into place prior to permanent welding.

The petitioner provided copies of its monthly payroll reports for its permanent and temporary workers in the designated occupation for 2005, 2006 and 2007. The reports show that welders were permanently employed by the petitioner from January through December of 2005 and 2006 and from January through October of 2007. The 2005 report shows that no fitters were temporarily employed by the petitioner in 2005. However, from November through December of 2006 and January through October of 2007, the 2006 and 2007 reports show that workers were continuously employed by the petitioner as fitters.

In a letter dated July 26, 2007, the petitioner states that the rigs, platforms, vessels, ports and other related facilities were damaged or destroyed during Hurricanes Katrina and Rita. The petitioner explains that the company is behind in its committed schedules for oil field construction service and repair and that the hurricane has caused a tremendous shortage of laborers. The petitioner states further that the company has to take on more of a workload, thereby requiring more internal labor, which is not available in southeast Louisiana. In summation, the petitioner contends that its current need is a peakload need.

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 for all the named workers except**

and

The regulation at 8 C.F.R. § 214.2(h)(6)(vi) requires the petitioner to submit:

- (C) *Alien's qualifications.* Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary.

The regulation at 8 C.F.R. § 103.2(b) states:

- (3) *Translations.* Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The Application for Alien Employment Certification (Form ETA 750) at Part A, item 14 indicates that the minimum amount of experience needed to perform satisfactorily the job duties is two years of experience in the job being offered.

The record of proceeding contains letters attesting to the beneficiaries' experience. Upon careful review of the entire record of proceeding, the AAO finds that the record contains sufficient evidence to establish that 118 of the beneficiaries possess the minimum amount of experience, specifically, two years of experience in the proffered position to perform satisfactorily the job duties described on Form ETA 750. However, the record, as it is presently constituted, does not contain any evidence to establish that [REDACTED]

[REDACTED] and [REDACTED] have two years of experience in the proffered position. Absent evidence to establish that [REDACTED]

[REDACTED] and [REDACTED] possess two years of experience in the proffered position, they are ineligible to continue the previously approved H-2B employment.

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 for 118 of the beneficiaries named in this petition.

ORDER: The decision of the director is affirmed in part and the nonimmigrant visa petition is approved for all the workers originally named in the petition except [REDACTED] and [REDACTED]