U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 03 210 52600 Office: NEBRASKA SERVICE CENTER Date: SEP 16 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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:

SELF-REPRESENTED

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, Director
Administrative Appeals Office

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DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an oilfield-consulting firm that provides geologic, mudlogging and supervision services to the oil industry. It desires to employ the beneficiary as a mudlogger for 10 months. The Department of Labor (DOL) certified the application for temporary alien employment. The director determined that the petitioner had not established that the beneficiary had the requisite education and training specified on the Application for Alien Employment Certification (Form ETA 750).

On appeal, the petitioner states that the minimum qualifications stated on the Form ETA 750 were a mistake and misunderstanding.

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)(6)(vi) states:

> (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 Form ETA 750 at Part A indicates that the minimum amount of education and training required to perform satisfactorily the job duties is two years of high school education and one month of training as a mudlogger helper.

On July 8, 2003, Citizenship and Immigration Services requested that the petitioner submit evidence that the beneficiary obtained the required education, experience and/or training as indicated on Form ETA 750. The record of proceeding does not contain evidence of a response to this request from the petitioner.

On appeal, the petitioner admits that it was its mistake that it stated the minimum qualifications needed were two years of high school and one month of training. The petitioner explains that it did not mean to state that it was a pre-requisite for the job as mudlogger. In fact, considering the job responsibilities of a mudlogger, the petitioner states that it does not need any type of education and training to perform the duties. On appeal, the petitioner states that it would like to restate and correct the mistake. After a certification has been issued, any amendments to be made to the job requirements on the ETA 750, must be addressed to the Department of Labor. Neither the statute nor the regulations allows for a change in the terms and conditions of employment during this proceeding.

The petitioner has not provided documentation that the beneficiary qualifies for the job offer as specified on the ETA 750. Absent documentation to establish that the beneficiary has two years of high school education and one month of training as a mudlogger helper, as specified on the labor certification, the petition may not be approved.

This petition may not be approved for an additional reason. The petitioner has not shown the need for the beneficiary's services is temporary. 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. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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 must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is peakload and the temporary need is unpredictable.

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 nontechnical description of the job on the Form ETA 750 reads:

> Mudlogger: position requires data collection while drilling oil wells. Individual collects drill cuttings, washes them, catalogues cuttings, and evaluates under a microscope. This data is entered into a specialized mudlog software program. Data is collected from gas detection equipment. The job is primarily lab work with technical data. There is also the responsibility of maintaining gas detection equipment, located on the drilling rig, and in the work command center.

In a letter, dated February 19, 2003, the petitioner explains that contract individuals are hired to perform the needed tasks. In addition to contract workers, the petitioner states it employs one person who serves as its president and on the board of directors.

The petitioner also indicates in its supplement to Form I-129, that the increased activity in the oil industry led to an increased demand for geological/logging personnel. The petitioner states that after running an advertisement in the newspapers and enquiring through Job Service, North Dakota, that the two or three people who came forward either did not meet the requirements, or feel suited for the load and nature of the work and quit.

Therefore, the petitioner has not shown that it regularly employs permanent workers to perform the services or labor, 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. The petitioner has not established that the temporary addition to its staff will not become a part of the petitioner's regular operation. The petitioner's need for a mudlogger to

perform the duties described on Form ETA 750, which is an integral part of the petitioner's business, will always exist. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Consequently, the petitioner has not established that its need for the beneficiary's services is peakload and temporary.

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 appeal is dismissed.