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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

D3

[redacted]

FILE: EAC 08 028 00189 Office: VERMONT SERVICE CENTER Date: MAY 27 2008

IN RE: Petitioner:
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:

[redacted]

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 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was recommended to be 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 three of the four named workers, specifically, [redacted] and [redacted]

The petitioner is a Mississippi Limited Liability Company supplying labor and industrial services for the marine and petroleum/chemical industries in the Mississippi Gulf Coast area. It desires 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)(H)(ii)(b), from November 1, 2007 to August 31, 2008. The beneficiaries will be working in the Mississippi Gulf Coast area, specifically, Pascagoula, Mississippi for Performance Contractors, Inc. 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 recommending approval of the petition is now before the AAO for review.

The petition was initially filed for the employment of 30 H-2B workers. In response to the director's request for evidence (RFE), counsel states that the petitioner requested a change in the number of requested workers to four (4) named workers, specifically, those named in the director's decision.

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.

On certification, the AAO found that one of the workers was ineligible for the status sought as the record, as it is presently constituted, does not establish his eligibility for H-2B classification. The petitioner has not established that [redacted] possesses the requisite two years of experience stipulated on Form ETA 750. Such evidence was requested from the petitioner in the director's RFE dated February 19, 2008. Absent documentary evidence of the beneficiary's two years of experience in the job being offered, [redacted] is found to be ineligible for temporary H-2B status and will not be considered in this petition.

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:

(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 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*).

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:

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

In a letter dated October 29, 2007, the petitioner states that the rigs, platforms, vessels, ports and other related facilities were damaged during Hurricane Katrina. The petitioner explains that the company is behind in its committed schedules for the marine and petrol/chemical sectors' construction, service and repair. In summation, the petitioner contends that its current need is a peakload need and estimates within the coming year that the workforce should normalize following the post-storm cleanup, repair and reconstruction cycle.

The evidence establishes that the nature of the petitioner's need is specific to Performance Contractors, Inc. who in a letter acknowledged that they will award the petitioner a purchase order for performance of a contract that requires the temporary services of four (4) fitters. The letter states that the temporary job will be performed by the petitioner's employees in Pascagoula and that the work is expected to be completed on or before September 1, 2008.

Upon review of the evidence contained in the record, the decision of the director is found to be correct. The petitioner's need for these workers is a temporary event of short duration, namely, a contract awarded to the petitioner by Performance Contractors, Inc. required by the extraordinary damage of the 2005 hurricane season. The petitioner's operation and its need for them cannot, therefore, be considered a peakload need. 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 decision of the director is affirmed. The nonimmigrant visa petition is approved for three of the four named workers, specifically, [redacted] and [redacted].