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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: SRC 05 024 53272 Office: TEXAS SERVICE CENTER Date: OCT 14 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a stone retaining wall construction company. It desires to employ the beneficiaries as stonemasons for ten months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the 20 unnamed beneficiaries. The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the objections of the DOL and denied the petition.

On appeal, the petitioner states that he needs the 20 stonemasons to help him complete a job.

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 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 shall 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 that 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 Application for Alien Employment Certification (Form ETA 750) reads:

> Build stone structures, such as piers, walls, and abutments. Lay walks, curbstones, or special types of masonry for vats, tanks and floors.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

The petitioner explains in his letter dated November 2, 2004 that the company received an unusually high number of projects for Stone Retaining Wall Construction. The petitioner states that normally, it has projects that are performed by its four regular workers; however, the current projects cannot be performed without additional stonemasons to supplement its permanent staff.

The U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states in pertinent part: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project . . ." Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business.

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload in the construction business. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload position will be engaged in different duties or has different specialty skills than the workers currently employed by the company. The petitioner has not provided evidence of its permanent staff and the projects for Stone Wall Construction showing a clear termination date. Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

The petition cannot be approved for another reason. The regulation at 8 C.F.R. § 214.2(h)(2)(iii) states in pertinent part:

> *Named beneficiaries.* Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Service's Headquarters . . . .

The petitioner has not presented an emergent situation or clearly described its business reasons as to why the beneficiaries are unnamed. The petitioner has not presented an emergent situation that would allow the director to waive the names of the temporary nonagricultural workers at the time of filing. For this additional reason, the petition may not be approved.

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

ORDER: The appeal is dismissed.