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

PUBLIC COPY

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

b4

[redacted]

FILE: EAC 07 160 54683 Office: VERMONT SERVICE CENTER Date: AUG 06 2007

IN RE: Petitioner: [redacted]
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:

[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 Michael T. Kelly
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 The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is a roofing contractor. It desires to employ the beneficiaries as sheet metal workers for seven and one-half months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiaries' services.

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 the need for the services to be performed is peakload and temporary. The director's decision to approve the petition has now been certified to the AAO for review.

Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record does not support the director's decision to approve the petition. The record of proceeding does not contain sufficient evidence to establish the petitioner's temporary need for the beneficiaries' services. Further, the petitioner has not established that the beneficiaries possess the minimum amount of training or experience to perform satisfactorily the job duties described in the proffered position. Accordingly, the case will be remanded.

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) 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 Application for Alien Employment Certification (Form ETA 750) at Part A, item 14 indicates that the minimum amount of training or experience needed to perform satisfactorily the job duties is three months of vocational school training or three months of experience in the job being offered.

Upon review, the record, as it is presently constituted, does not contain evidence that the beneficiaries have three months of vocational school training or three months of experience in the proffered position. The record contains a list of the beneficiaries named in the petition that indicates the number of years each of

the beneficiaries has been in H-2B status. However, the record does not contain evidence of the beneficiaries' vocational training or experience. Moreover, the record does not contain evidence (copies of the beneficiaries' passports, H-2B nonimmigrant visa(s) and I-94's (Arrival/Departure documents), or a letter from their previous employer) of the beneficiaries being previously employed by the petitioner or another employer as sheet metal workers for a period of three months. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner needs to present evidence of the beneficiaries having three months of vocational school training or three months of experience in the proffered position. Absent evidence of the beneficiaries' training or work experience, the petition may not be approved.

The petition cannot be approved for another reason. The petitioner has not established its temporary need for the beneficiaries' services.

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:
>
> *(2) Seasonal need.* The petitioner must establish that the services or labor are traditionally tied to a season of the year by an event or pattern and are of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is

> unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*).
>
> *(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 states that it seeks approval of the proffered position as a seasonal need, due to the seasonality of the work as well as the company's peakload need.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*).

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, assemble, install and repair sheet metal products and equipment, such as ducts, control boxes, drainpipes and furnace casing. Work may involve any of the following: setting up and operating fabricating machines to cut, bend and straighten sheet metal, shaping metal over anvils, blocks or forms using hammer operating, operating, soldering and welding equipment to join metal parts; inspecting, assembling and smoothing seams and joints of burred surfaces.

In its final determination notice, the DOL stated that the petitioner failed to provide supporting documentation to support its peakload need.

In this instant case, the petitioner has not provided evidence of having a permanent staff and has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload. For example, the petitioner's total payroll for 2006 continually fluctuates. The payroll increases from March ($134,616) to April ($152,873) through May ($224,721). It drops drastically in June ($146, 839), rises again in July ($186,211), drops again in August and September ($101,902; $120,715), rises in October ($164,262) and drops again in November ($121,853). The petitioner has not established a peak period. The petitioner has also submitted its Profit and Loss Statement from January 2006 through December 2006 and its Sales by Item Summary for 2005 and 2006. Upon review, the financial documentation submitted does not show that between April and December (peakload period) there was a significant increase and gradual decrease in the petitioning entity's overall payroll income, company income, sales, salary, or staffing when comparing it to its asserted nonpeak period. Further, the contract and subcontractual agreements submitted did not demonstrate that the petitioning entity's services are tied to a particular season of the year by an event or pattern and are of a recurring nature.

Since these deficiencies were not mentioned in the director's decision, this case will be remanded to the director in order to give the petitioner an opportunity to submit (1) proof of the beneficiaries' training or experience and (2) evidence that petitioner's need for the beneficiaries' labor or services is temporary. The director may also request any additional information or evidence that he deems necessary to adjudicate the matter at hand.

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 director's decision of May 21, 2007 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. Upon completion, the director shall certify the decision to the AAO for review.