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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

D4

[redacted]

FILE: EAC 07 117 51255 Office: VERMONT SERVICE CENTER Date: JUN 01 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]

PUBLIC COPY

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 denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner engages in the purchasing and processing of shrimp and seafood. It desires to employ the beneficiaries as fish cutters and trimmers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for ten months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that the need for the beneficiaries' services is temporary. The director also determined that the petitioner had not provided a list of the beneficiaries it wanted considered on the instant petition and denied the petition. The director states that it was unable to determine the number of beneficiaries the petitioner was requesting (25 and not 31 temporary workers), and that the names of the beneficiaries had been made a part of the record.

On appeal, counsel states that the petitioner filed for 25 named beneficiaries and never filed for 31 temporary workers as suggested by the director. The petition and other documentation contained in the record of proceeding reflect that the petitioner filed for 25 temporary workers. The record of proceeding as it is presently constituted does not indicate that the petitioner ever filed for 31 or amended the petition to include six more temporary workers. Therefore, this issue will not be further addressed in this proceeding. Counsel also states that the petitioner's need for workers is due to the seasonal nature of the shrimp industry.

Upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to deny the petition. As discussed below, the AAO finds that the petitioner has established a temporary need for the beneficiaries' services. The AAO will sustain the appeal.

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:
>
> *(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*).

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 seasonal 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*).

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

> Use hand tools to perform routine cutting and trimming of shrimp, fish and package them into containers.

In its final determination notice, the DOL stated that there is a contradiction between the dates of need stated on Form ETA 750 and the supporting documentation provided by the petitioner. The DOL stated that the dates of need on the Form ETA 750 are from April 15, 2007 through February 15, 2008. The DOL also determined that the supporting documentation provided by the petitioner showed a substantial increase in the number of temporary fish cutters and trimmers employed from June through March and this contradicts the dates of need of the Form ETA 750 (April 15, 2007 through February 15, 2008).

Counsel explains in his response to the director's request for additional evidence that in the 2006 calendar year, the temporary workers from Vietnam did not enter the United States until June because of the delay in receiving their visas. Counsel also provided copies of the previous temporary workers Form I-94's which shows that they entered the United States under the H-2B classification on June 9, 2006 to work for the petitioning entity, [redacted] until February 11, 2007. Therefore, the explanation given for the increase in temporary workers from June through March is reasonable and not contradictory as stated in the DOL's determination. The petitioner further explains that during the peak season the shrimp inventory accumulates beyond the petitioner's capacity to process it and therefore, a significant portion of the inventory is frozen. The petitioner also states that this inventory is not processed until January and February. Further, the petitioner states in its letter dated April 3, 2007 that between mid-February until early April, they do not employ shrimp cutters and trimmers.

In conclusion, the petitioner has shown that the beneficiaries' 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 has established that its need for beneficiaries' services is seasonal 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.