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FILE: EAC 08 095 51467 Office: VERMONT SERVICE CENTER

Date: APR 24 2008

IN RE: Petitioner:
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:

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
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.

The petitioner is a construction company. It desires to continue to employ the beneficiaries as construction workers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from February 1, 2008 to November 30, 2008. 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 to approve the petition is now before the AAO for review.

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:

(1) *One-time occurrence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

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 one-time occurrence.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

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

Performs any combination of following duties on construction projects, usually working in utility capacity, by transferring from one task to another where demands require worker. Measures distances from grade stakes, drives stakes and stretches tight line. Bolts, nails, aligns forms. Levels earth to fine grade specifications, using pick and shovel. Performs variety of

tasks involving use of hands and tools and dismantling forms. Work is usually performed with other workers. Works under close supervision.

The evidence establishes that the nature of the petitioner's need is specific to the Harvey Canal Project, a contract awarded to the petitioner by the Department of the Army, United States Army Corps of Engineers (USACE), on November 9, 2006, for floodwalls and structures within the New Orleans district (a copy of the Amendment of Solicitation/Modification of Contract is contained in the record of proceeding). The project's focus is to rebuild the crucial levees in order to reduce the potential of future flood damage to the City of New Orleans, its residents and surrounding area. The petitioner desires the workers named on the current petition to remain in the United States to continue the construction of the protective barriers which is vital to the flood protection system for the entire New Orleans area. The petitioner planned for the project to be completed by January 2008. Notice of Action (Form I-797B) shows that the petitioner's previous petition (EAC 07-105-51323) was approved for 62 unnamed workers, with a validity period from July 10, 2007 to January 31, 2008. The petitioner states that it believed the initial period of authorized stay would have been sufficient for the work that needed to be done for the Harvey Canal Project, but unfortunately, this has proven to not be the case (See: The Times-Picayune, October 18, 2007). The petitioner states that it currently employs company wide approximately 180 construction workers and that the portion of the work that requires temporary workers will be completed on or about November 30, 2008. The petitioner enclosed a copy of its Notice to Proceed from the USACE dated February 11, 2008. This letter makes reference to the petitioner's contract (No. [REDACTED], Task Order # [REDACTED]) for [REDACTED], West Bank Vicinity, Hurricane Protection Project West of Algiers Canal, Contract 1-Sector Gate to Boomtown Casino, East of Harvey Canal Floodwall, Jefferson Parish, LA. The letters states that the petitioner is to commence work within ten days after the date of receipt of the Notice to Proceed.

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, USACE's hurricane-protection project required by the extraordinary damage of the 2005 hurricane season. 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.