U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 08 184 52398 Office: VERMONT SERVICE CENTER Date: AUG 20 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Acting 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 The decision of the acting director will be withdrawn and the petition will be denied.

The petitioner describes itself as a multi-service vessel design, construction, and repair facility. It desires to employ the beneficiaries as painters from October 1, 2008 to April 1, 2009. The Department of Labor (DOL) 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 DOL also determined that the petitioner had not submitted supporting documentation to justify its temporary need for the beneficiaries' services. The DOL determined that the petitioner had failed to comply with the DOL's recruitment requirements. Finally, the DOL determined that the application contains unduly restrictive job requirements. The petitioner then filed the current petition containing countervailing evidence to overcome the DOL's decision. The acting director determined that the petitioner had submitted sufficient countervailing evidence to overcome the concerns of the DOL and recommended the approval of the petition. The acting director's decision recommending the approval of the petition for five unnamed painters is now before the AAO for review.

On notice of certification, counsel advised the AAO in a letter dated August 12, 2008 that the petitioner agrees with the acting director's recommendation that the petition be approved and waives the 30-day period to submit a statement to the AAO. Therefore, the record is considered complete.

As discussed below, upon careful review of the entire record of proceeding, the evidence of record does not support the acting director's decision to approve the petition. Accordingly, the acting director's decision will be withdrawn and the petition will be denied.

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 pertinent part, the following:

(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 that 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.

In the petition, the petitioner requests approval of the proffered positions 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 section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

> Prepare wood, fiberglass, and metal surfaces for painting, and painting parts, equipment, interior, exteriors of ships, boats, and shipyard and marina building, using brushes, spray guns and rollers.

The DOL denied the petitioner's temporary labor certification on four grounds:

(1) Failure to establish that the nature of the employer's need for the services or labor to be performed is temporary;
(2) Failure to submit supporting documentation that justifies any one of the regulatory standards of temporary need;
(3) Failure to comply with DOL recruitment requirements; and
(4) The application contains unduly restrictive job requirements.

Counsel submitted a letter dated May 29, 2008 signed by the manager of the petitioning entity that addresses the issues raised by the DOL in its denial of the petitioner's temporary labor certification application. The petitioner also provided its monthly payroll reports for permanent and temporary painters for 2006, 2007 and January of 2008 and its recruitment results.

The first basis for DOL's denial is that the DOL was unable to determine the employer's need is based on a one-time occurrence, seasonal, peakload, or intermittent need and temporary. The DOL in its review of the petitioner's past and present filing activity found that the petitioner has applied for three temporary labor certifications for painters in the aggregate time period from October 27, 2006 through April 1, 2009. The DOL concluded that the petitioner's filing activity establishes a pattern that demonstrates that its need for the services or labor to be performed is permanent; not temporary.

In rebuttal, the petitioner states in its letter dated May 29, 2008 that it currently has three large-scale yachts (a 42-foot vessel, a 68-foot vessel and a 90-foot vessel) under construction. The petitioner explains that due to vendor delays in obtaining specialized components such as gears, engines, generators and z-drives and the customer's demand for vessel completion by spring of next year, it has a temporary, peakload need for labor during the requested period. The petitioner states that the temporary workers will aid in its meeting customer commitments and construction schedules. The petitioner also states that the delivery delays extended the amount of time needed to complete these projects and should any of these vessels not be completed in a timely manner, it would be in breach of contract and suffer severe legal and financial penalties. Additionally, the petitioner states that it has expanded its facility for boat hull out, vessel storage and maintenance and repair services which requires additional labor during the upcoming hurricane season followed by the peak fall and winter demand.

Upon review, the petitioner has not provided evidence to establish that it currently has three large-scale yachts under construction. The petitioner has not shown through contractual evidence that the vessel construction schedule, delivery date(s) and the petitioner's need for five additional painters establishes a temporary, "peakload" need during the requested period of employment and necessitates the use of five additional temporary H-2B painters from October 1, 2008 through April 1, 2009. 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)).

As stated in the DOL's denial, the record reflects that the petitioner has applied for three temporary labor certifications for painters in the aggregate time period from October 27, 2006 through April 1, 2009. The AAO agrees with the DOL that the petitioner's need for painters is continuous and year-round, and is not a peakload need to end April 1, 2009.

The second basis for the DOL's denial is the petitioner's lack of supporting documentation justifying any one of the regulatory standards of temporary need. The DOL stated in its decision that it certified the petitioner's application for 15 temporary painters from October 27, 2006 through July 31, 2007; and subsequently denied the petitioner's two applications each for 15 temporary painters covering the aggregate period August 1, 2007 through April 1, 2009. The petitioner's payroll documentation indicates that it did not employ any temporary painters from January 2006 through April 2007. The DOL stated that the petitioner failed to explain the differences/discrepancies in its payroll records with its previous certification history for 15 painters and that the documentation did not provide sufficient information under any one of the regulatory standards of temporary need.

The petitioner explains in its letter dated May 29, 2008 that although its application was approved for 15 temporary painters from October 27, 2006 through July 31, 2007, the delays in the processing resulted in the temporary painters not arriving until April 2007. The AAO finds this information does not adequately explain the discrepancies when comparing the petitioner's payroll records with its previous certification history.

In the current case, the petitioner is seeking approval for five unnamed painters for a peakload need. A temporary labor certification application was approved and certified for 15 painters from October 27, 2006 through July 31, 2007. The reports do not show that the petitioner utilized 15 painters during this intended period of employment. The petitioner only utilized its temporary painters for three months, from May 2007 through July 31, 2007. The petitioner's monthly payroll reports indicate that it did not employ any temporary painters from January 2006 through April 2007; that it employed between 12 to 14 temporary painters from May 2007 through December 2007; and that it employed three temporary painters in January 2008. The petitioner has not shown through documentary evidence such as copies of the beneficiaries' nonimmigrant visas and arrival/departure documents (Forms I-94) that its delay in obtaining temporary painters was due to delays in visa processing.

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. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by its current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or have different specialty skills than the 113 workers currently shown to be employed by the petitioner on the petition. The petitioner has not provided evidence of the contracts showing a clear termination date. The petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Consequently, the petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

In its final determination notice dated April 21, 2008, the DOL states that its third basis for denying the certification was that the employer failed to comply with the DOL's requirements to recruit United States workers

for the positions. TEGL 21-06, Change 1, section IV.F, states that the employer "shall document that union and other recruitment sources, appropriate for the occupation and customary in the industry, were contacted and either unable to refer qualified United States workers or non-responsive to the employer's request."

The record of proceeding contains a copy of the petitioner's recruitment report dated March 24, 2008 that states that a letter was sent to the local union advertising the job openings. The recruitment report also states that there were three (3) applicants for the position. One applicant was interviewed via telephone on March 18, 2008 and was not hired due to lack of experience, another applicant was interviewed via telephone on March 18, 2008 and was not hired due to lack of experience in painting boats, and the last applicant was interviewed via telephone on March 18, 2008 and was not hired due to inexperience as a painter. Although the DOL states that the employer rejected two of the applicants for other than a lawful job-related reason, the AAO finds the job advertisements and the ETA 750 specifically require one year of experience in the job offered which is painting parts, equipment, exteriors and interiors of boats. None of the applicant's resumes indicate experience painting boats. Therefore, the AAO finds that the petitioner provided a sufficient a reason for not hiring the applicants and did not reject the applicants for other than a job-related reason.

The recruitment report also states that the local union was non-responsive. The petitioner states in its rebuttal letter dated May 29, 2008 that since March 24, 2008, it sent a certified letter to the local union and received no response after 60 days had passed. However, DOL states in its decision that according to the track and confirm function at www.usps.com , the certified letter sent to the union was delivered on March 24, 2008, which was the same date as the date of the petitioner's letter revealing its results of its recruitment and informing the DOL that it had not heard back from the union. The petitioner has not shown that it allowed a sufficient amount of time for the union to refer qualified United States workers for the position and that it engaged in good faith recruitment. The petitioner has not provided the appropriate evidence to prove that it complied with this aspect of DOL's recruitment requirements.

Finally, the DOL states that the employer's application contains unduly restrictive job requirements. Specifically, the employer is requiring that all workers possess one year of experience in the occupation. The Foreign Labor Certification On-line Wage Library states that '[s]ome previous work-related skill, knowledge, or experience may be helpful in these occupations, but usually is not needed.'

The petitioner explains in its rebuttal letter that a one-year requisite work experience is not unduly restrictive, but a necessary safeguard in protecting the quality of work. The petitioner explains that the painting of fiberglass hulls is highly specialized, as it requires extensive prep methods and alternative paint application not required in commercial and residential painting. The petitioner also states that the industry standard for painting vessel hulls is $1,000-$1,500 per foot. However, the petitioner has not provided any evidence to substantiate these assertions. 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*. The petitioner has not provided evidence to show that it is an industry standard and hiring criteria of its company for all of its painters engaged in the preparation of wood, fiberglass, and metal surfaces for painting, and painting parts, equipment, interior, exteriors of ships, and boats to have at least one year of experience. Accordingly, the AAO finds that the petitioner has not shown that the proposed job offer does not contain unduly restrictive job requirements.

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 acting director's decision of August 6, 2008 approving the petition is withdrawn. The petition is denied.