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

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U.S. Citizenship and Immigration Services

DL

[redacted]

FILE: EAC 08 048 51917 Office: VERMONT SERVICE CENTER Date: JUL 08 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 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 The decision of the director will be withdrawn and the petition will be denied.

The petitioner is a shipbuilding company located in Panama City, Florida. Its principal business is to build commercial vessels for the offshore oil industry operating in the Gulf of Mexico. It desires to continue to employ the beneficiaries as welders 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 October 1, 2007 to September 30, 2008. The beneficiaries will be working at the Eastern Shipbuilding Group Allanton Facility in Panama City, Florida. 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 petitioner then filed a petition with the director 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 recommending the approval of the petition for the 65 workers named in the petition is now before the AAO for review.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. 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 director's decision to approve the petition. Accordingly, the 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.

The petitioner seeks 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*).

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:

> Welding sheet metal, specifically steel, for the purposes of building boats/ships in the shipyard of Eastern Shipbuilding Group, Inc. Basic training provided.

In its final determination notice dated October 19, 2007, the DOL states that the employer did not adequately explain the nature of the temporary need based on the employer's business operations in accordance with *DOL Policy or Procedure Reference*: TEGLI 21-06, Change 1, Attachment A, Section III.D.3. The DOL states in its decision that the employer must include a detailed statement explaining (a) why the job opportunity and number of workers being requested reflect a temporary need, and (b) how the employer's request for services or labor meet one of the standards of a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

The DOL's final determination notice states that the employer's letter dated September 10, 2007 defines its peakload period of need from October 2007 to October 2008. The ETA 750 also lists the dates of need from October 1, 2007 to September 30, 2008. The DOL states that an employer's seasonal or peakload need of longer than 10 months, which is of a recurring nature, will not be accepted (TEGLI 21-06, Change 1, Attachment A, Section II.C). Further, the DOL states that the employer's temporary need letter states that "the shipbuilding business traditionally has peaked in cyclical patterns. Although historically these periods run in five-year intervals, the devastation of the 2004 hurricane season accelerated the cycle." The DOL states that this length of time to construct a vessel does not constitute a temporary need.

The DOL also states in its determination notice that the employer did not enclose a payroll report that supports the dates of need (October 1, 2007 to September 30, 2008) listed on Form ETA 750, Part A. Further, the 2006 Calendar Year Payroll Summary Report included in the application for welders does not demonstrate a year-round peakload, but instead a peakload from April through December. The DOL states that this period (April through December) does not correspond to the dates of need requested on Form ETA 750.

Furthermore, the DOL finds that the contracts and other documentation submitted do not establish a temporary peakload need. As such, DOL concludes that the petitioner does not establish a need for temporary alien workers under the H-2B program.

In rebuttal to the DOL's finding, the petitioner provided copies of its Articles of Incorporation, its 2005 United States Income Tax Return for an S Corporation, its recruitment documentation, the petitioner's order book and contractual obligations, its 2006 monthly payroll report and articles from industry periodicals and a study performed by Dr. J. Antonio Villamil of today's labor workers in the shipbuilding industry.

Counsel states that with other Gulf Coast shipyards crippled by storm damage and struggling to rebuild, the petitioner has found itself in the enviable position of having an intact infrastructure and a healthy order book for construction of new vessels. Counsel states that the petitioner has an unusually large volume of shipbuilding

orders despite attempts to recruit and hire local workers. The petitioner has submitted evidence of its recruitment report, newspaper ads, and notice of job availability. Counsel explains that recently, the company finalized contracts worth over $200 million with 11 different clients to construct 29 new ships. Counsel states that the petitioner has a temporary peakload need for workers to complete the construction of these vessels for a period not to exceed one year. The Form ETA 750 and the petition state that the intended period of employment is from October 1, 2007 to September 30, 2008. Although this time period does not establish a seasonal or peakload need under DOL guidance, CIS regulations state that 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. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Counsel states that the petitioner needs to supplement its permanent staff on a temporary basis due to a short-term demand. Counsel states that the temporary additions to the staff will not become a part of the petitioner's regular operation, and are only required at this time due to the current contractual demands. Counsel states that due to Hurricane Katrina and high oil prices, the demand for shipbuilding has recently risen significantly, while the labor supply has decreased. Counsel explains that the shipbuilding business traditionally has peaked in cyclical patterns and although historically these periods run in five-year intervals, the devastation of the 2004 hurricane season accelerated the cycle.

Upon review, the record of proceeding does not establish that the petitioner's need for welders is due to a seasonal or short-term demand, caused by the extraordinary circumstances of the 2004 hurricane season, Hurricane Katrina and high oil prices. As previously stated, the petitioner has current contracts with 11 different clients to construct 29 new ships. The petitioner has not shown that its current contractual obligations are a result of hurricane storm damage, and therefore, might possibly be viewed as a "short-term" demand. The petitioner states in its letter dated September 10, 2007 that it needs to supplement its permanent staff on a temporary basis due to the short-term demand created by the new contracts scheduled for delivery at the end of 2008 or with the majority of manpower required before the end of 2008. In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services thereby creating a "peakload need" that is different from its ordinary workload in the shipbuilding business. 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)).

Further, counsel states that the DOL erroneously concluded that the 2006 monthly payroll report did not support the dates of need listed on the Form ETA 750. In the final determination notice, the DOL states that the monthly payroll report does not demonstrate a year-round peakload need, but instead a peakload from April through December. Counsel explains that the monthly payroll report only shows temporary workers during April through December because the petitioner was only able to obtain H-2B certification beginning at that point in 2006, but the company's current needs are for the entire October 2007-September 2008 fiscal year, based on its current contractual demands. The record establishes that the petitioner has a permanent need for welders. The documents provided establish that the nature of the petitioner's need is continuous and ongoing. The petitioner's need for these workers is not a "one-time occurrence" where a temporary event of short duration has created a need for a temporary worker or a "peakload" need where the petitioner needs to supplement its staff due to a short-term demand. The contracts and accompanying letters of options for further vessels extend from 2008 into June of

2010. The petitioner has established that the beneficiaries' services are needed in order to fulfill its continuing business obligations with its clients. The record establishes that these workers have become a part of the petitioner's operation and the petitioner's need for the beneficiaries' services cannot be considered a peakload need. Some of the workers named in this petition have been employed by the petitioner since December of 2006.

The petitioner also submitted a study *An Analysis of Eastern Shipbuilding Group's Labor Market: Temporary Labor Shortages Continue* by Dr. J. Antonio Villamil. Counsel states that the study focuses on the following crucial points: scarcity of labor to meet the petitioner's shipbuilding projects; a labor market analysis of the recruitment area that revealed full employment of the labor force, including the type of workers required by the petitioner to fulfill its contracts and that 75 percent of the workers are not available for hire by the petitioner. The petitioner stated in its letter of September 10, 2007 that it could not anticipate the severe labor shortages with which it is faced. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

The petitioner also makes reference to several petitions that have been approved for similar positions with the same employer. However, each nonimmigrant proceeding is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d).

In summation, the nature of the asserted need appears to be continuous and ongoing. The countervailing evidence provided with the petition does not establish the petitioner's temporary peakload need for the beneficiaries' welding services. Contrary to the petitioner's assertions, the evidence of record does not establish a seasonal or short-term demand for welders and that the temporary addition to the staff will not become a part of the petitioner's regular operation. 8 C.F.R. §§ 214.2(h)(6)(ii)(B)(*3*).

Counsel states that 36 of the 65 beneficiaries named on the current petition should be considered in status until October 10, 2007. The beneficiaries' eligibility to extend their nonimmigrant status is an issue that may not be appealed. The issue of whether the 65 beneficiaries named in this petition are eligible for an extension of status is exclusively before the director.

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 not been met.

ORDER: The decision of the director dated May 8, 2008 is withdrawn. The nonimmigrant visa petition is denied.