U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D4

FILE: EAC 08 186 50708 Office: VERMONT SERVICE CENTER Date: DEC 0 1 2009

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 dismissed. The petition will be denied, although the matter is moot due to the passage of time.

The petitioner is engaged in the "repair and refurbishment of tanks, and hull preservation." The petitioner seeks to employ the beneficiaries as welder helpers 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 the period from October 1, 2008 to April 30, 2009. The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification. The director determined that the countervailing evidence submitted by the petitioner was insufficient to overcome the DOL's decision.

The director denied the petition on July 14 2008, concluding that the petitioner did not establish that its need for the beneficiary's temporary services or labor is peakload in nature.

On appeal, the petitioner states that the type of services it provides is affected by weather conditions and thus, "we are always busy throughout the fall, winter, and spring and our slow season always occurs during hot weather." The petitioner states that its busy season "starts in October and lasts about 10 months followed by the slow season that lasts about 2 months consistently falling during hot weather months." The petitioner also discussed the issues raised in the director's denial.

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.
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> (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.

(*2*) *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is 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.

(*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.

(*4*) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

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.
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> **(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.

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. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioner indicates in its statement of temporary need that the employment is peakload.

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 AAO finds that the petitioner has not established the type of H-2B temporary need asserted in the petition.

Upon filing the instant petition, the petitioner indicated that its need is peakload. The petitioner discussed the previous filings it made for H-2B workers which show a consistent temporary need during the fall, winter and spring, with a break in the summer months. The petitioner also submitted a master service agreement between the petitioner and [redacted] and a letter of intent from [redacted] The agreement states that the petitioner will work for [redacted] on a project from July 2008 until April 2009. The petitioner also submitted its quarterly wage reports for 2008.

In this instance, the petitioner has not carefully documented the peakload need through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the 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 skills than the workers currently employed by the company. 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. 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)).

DOL did not certify the petitioner's temporary labor certification, in part, because it stated that the petitioner's past filings showed that the petitioner had a permanent need for workers, as illustrated by the petitioner's having employed H-2B workers 900 days during the past three years. The petitioner explained that it received two separate temporary labor certifications for the employment dates of October 2006 through July 2007, then from October 2007 until July 2008. Both labor certifications were for periods of ten months with a two month low season.

The petitioner states that its recurrent peakload need occurs in the fall, winter and spring months, and the low season in the summer months. However, in reviewing the current filing, the petitioner submitted a temporary labor certification for the employment dates of July 2008 through April 2009. As the petitioner previously obtained a temporary labor certification for the employment dates of October 2007 through July 2008, and is now requesting employment dates of July 2008 through April 2009, the purported temporary need will last for a continuous period of 18 months. In addition, the employment dates requested by the petitioner for the temporary labor certification are not consistent with its peakload demands as stated in this filing. The petitioner repeatedly states that its peakload lasts about ten months in the fall, winter and spring and the low season is two months in the summer. However, the petitioner requested a temporary labor certification for July 2008 through April 2009, which would include the summer months of July and August and contradict the peakload need as stated by the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the petitioner submits a master service agreement and a work order between the petitioner and [redacted]. stating that the petitioner will provide services to [redacted] for a project that will begin in July 2008 and end in April 2009. Again, this contract does not substantiate the petitioner's claim that it experiences a low season in the summer months.

The petitioner repeatedly asserts that the type of services that it provides are affected by the weather and thus the low season occurs in the summer months. However, the petitioner has not

explained why the heat will affect its business in providing the services indicated on the temporary labor certification application, such as "clean debris from work and move materials, tools and supplies into place and return to storage after work is completed;" "use brush, scraper or chemical to remove erosion, rust and grease from area to be welded;" "connect and disconnect hose or cable;" "start and stop engine or other equipment;" and, "remove slag with hand too." In addition, on appeal, the petitioner states that "with increased consumption of fuel during the hot months, our oil and gas industries, and those supporting them, are under tremendous pressure." Finally, the contract submitted by the petitioner is for work to be performed in the summer until April 2009. Again, the evidence of record does not corroborate with the petitioner's peakload need.

The petitioner also submitted a staffing chart of full-time employees and temporary employees for the year of 2007, and for January through March of 2008. The chart indicated that the petitioner employed temporary workers for the entire year of 2007, except for May and June. The chart also indicated that the number of temporary employees used in 2007 changed every single month. The use of temporary workers runs from 57 to 119. The petitioner was approved for H-2B classification on behalf of 125 beneficiaries for the 2007 peakload need; however, it appears that the petitioner did not consistently employ the same amount of beneficiaries from month to month. It is not clear what the beneficiaries did when they were not working for the petitioner for certain months out of the year.

The petitioner also submitted payroll records of welder helpers for 2007. The payroll records do not list the date of the year, thus, it appears to be missing information. In addition, the petitioner used handwritten notes to indicate which employees were H-2B workers. In reviewing the salaries of the H-2B workers, the wages are completely inconsistent. The salaries paid to the H-2B workers ranged from approximately $3,000 to $37,000. It is not clear why each H-2B worker received a different salary. It appears that several H-2B workers were not employed for the entire time allotted to them in H-2B classification.

The petitioner did not establish that its business activity has formed a pattern where its need for temporary workers is for a certain time period. Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Further, on the Form ETA-750A submitted to the DOL, the petitioner indicated the employment dates as July 1, 2008 until April 30, 2009. These dates do not coincide with the peakload dates the petitioner indicated on the Form I-129 as October 1, 2008 until April 30, 2009. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for welder

helpers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

It is noted that the petitioner requested the beneficiary's services from October 1, 2008 until April 30, 2009. Therefore, the period of requested employment has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied although the matter is moot due to the passage of time.