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U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 07 223 51244 Office: VERMONT SERVICE CENTER Date: MAR 18 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).

John F. Grissom, Acting 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 a roofing company, and it seeks 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) for the period from October 1, 2007 to July 31, 2008. The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor. The director determined that the countervailing evidence submitted by the petitioner was insufficient to overcome the DOL's decision.

On appeal, the petitioner states that "our company does need permanent workers," however, is unable to find local workers and thus utilizes H-2B visa workers. The petitioner further states that it tries to recertify the workers "after they have worked for us for ten months because they have experience in what kind of work is required and can get right back to work when the H-2B visa is renewed." The petitioner also states that it has obtained contracts for $8 million dollars of work for the next six to eight months.

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 occurence.* 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.
>
> (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 petition indicates that the employment is seasonal.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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. 8 C.F.R.§ 214.2(h)(6)(ii)(B)(*2*).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads in pertinent part:

> Duties to include loading and unloading and moving of roofing materials at jobsites, picking up debris, and cleaning up jobsites.

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 seasonal. In the Form I-129, the petitioner explained its temporary need for the alien's services as follows:

> [The petitioner] is a roofing contractor. Attached are copies of pending contracts/letters of intent. The majority of this $6M+ work will begin in the fall of 2007. We are continuing to have difficulty finding reliable and willing

> employees to perform roofing work. Roofing work is typically manu[a]l labor and has proven unappealing to many applicants. For this specific application, we had three applicants –two did not show up for their interviews and the third was not looking for this type of work. We have followed all of the specified requirements and have been unsuccessful in finding workers. We need these workers to fulfill our contracts.

On August 8, 2007, the director sent a request for further information. The director noted that the petitioner indicated that temporary workers have been needed continuously for the occupation of Roofer since February of 2007 and it appears that the petitioner has a permanent need rather than a temporary need.

In the petitioner's response letter, dated August 10, 2007, the petitioner indicated that "your statement that [the petitioner] has a year-round need for workers is correct . . . We are in dire need of workers and cannot find any locally." The petitioner also explained that they have seven permanent employees and they will "not have an adequate workforce on each job without these H-2B workers."

In this instance, the petitioner has not carefully documented the seasonal 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 seasonal positions will be engaged in different duties or had 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. The petitioner stated that it needs permanent workers. In addition, 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. 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)).

Upon filing the instant petition, the petitioner indicated that its need is seasonal. The petitioner submitted a list of projects for August through December; six contracts and one letter of intent for upcoming projects in 2007; and, a staffing chart with the petitioner's permanent employees and temporary employees for June through December 2006, and January through May 2007. The chart indicated that the petitioner hired temporary employees for every single month listed on the chart. Each month displays changes in the number of permanent and temporary employees; however, the changes are not significant, change on a monthly basis, and do not evidence a peak or seasonal need. 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 and will recur next year at the same time. The documentation submitted by the petitioner does not demonstrate

a recurrent seasonal need. The table of permanent employees and temporary employees do not show a season need but rather a need for temporary employers all year round. This is further evidenced by the petitioner's response letter, dated August 10, 2007, where the petitioner asserted; "your statement that [the petitioner] has a year-round need for workers is correct." Thus, the petitioner has not shown that its need for the beneficiaries' services is tied to a seasonal trend or a particular event that recurs every year. 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, 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 construction workers 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, 2007 until July 31, 2008. 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.