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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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APR 06 2010

FILE: EAC 08 065 52009 Office: VERMONT SERVICE CENTER Date:

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.

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 a staffing company, and it seeks to employ the beneficiaries as welder-fitters 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 December 15, 2007 until 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, counsel for the petitioner states that the petitioner is a staffing company and it has "both year-round and peakload workers who are placed at various sites throughout the Gulf Coast." Counsel further states that the temporary need is "based on the fact that there is a drastic shortage of workers in the Gulf Coast's shipbuilding industry due to the housing shortage caused by the Katrina and Rita hurricanes."

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)(2009) 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*:
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> > (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)(2009) 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 a one-time occurrence and that the temporary need is unpredictable.

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

> Lay out, fit, and fabricate metal components to assemble structural forms, such as machinery frames, and pressure vessels, for the purpose of repair and construction of ships.

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 an unpredictable and one-time occurrence. In the petitioner's letter of support, dated December 12, 2007, it stated that the need for the beneficiaries' services is for the following reasons:

> Since Hurricane Katrina, the demand for labor has increased at least three-fold. This is due to the fact that there is an overall demand and also because there is a shortage, companies are seeking labor from labor suppliers such as our company. Previous to Hurricane Katrina, labor suppliers have been able to meet most of the

> demand through the local workforce. Never have any of the companies that I have been involved in previously utilized the H2B program.
>
> The need for skilled construction laborers will always exist. But myself and others in the industry predict that as the rebuilding efforts progress, so will there be an increase in the number of workers. Once the rebuilding efforts are completed, skilled workers will return to the area and the demand for construction workers will subside leaving these workers to enter other jobs, such as shipbuilding.

The petitioner also explained that the "general trend is not to hire outside contractors during the time of year when shipbuilders much reduce their workforce due to storms, which are most common and most severe in the late summer and early fall."

On March 28, 2008, the director sent a request for further information. The director requested copies of relevant contracts, along with a description of the number of employees needed to complete the work.

In response to the director's request for evidence, the petitioner submitted a letter from Conrad Industries, Inc., the company where the beneficiaries will be working for during the H-2B employment. The letter, dated August 2, 2007, states that the petitioner "has supplied and currently supplies contract personnel to several of our Shipbuilding and ship repair yards." The letter also stated that it has contracted the petitioner for "100 temporary employees (Welders and Fitters) for October 1, 2007 through July 31, 2008."

The petitioner also submitted a chart of its permanent and temporary employees that fill the position of welders-fitters or related services from April to December 2006 and from January to November 2007. The chart indicates that temporary employees were employed in every month that was reported in the chart.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

In order for the petitioner's need to be 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. The petitioner contends that the affects of Hurricane Katrina and Rita have created a one-time occurrence where it will need workers to perform labor during the recovery stages. The petitioner also explained that it has a contract with [redacted]. However,

the petitioner never submitted the contract between the petitioner and [redacted], as requested by the director. Instead, the petitioner submitted a letter by [redacted] that stated that it "has established an excellent working relationship with [the petitioner] who provides quality, reliable hardworking Welders and Fitters to our workplace." The letter also stated that [redacted] has contracted the petitioner for 100 temporary employees from October 1, 2007 until July 31, 2008. The letter indicated that the petitioner has an on-going relationship with [redacted] and had provided personnel to them in the past and will continue to provide personnel, and thus, it is not clear that there is a one-time occurrence for temporary employees. The petitioner is a staffing company and the nature of its business is to always provide workers to companies and therefore the demand for workers is not a one-time occurrence.

In this instance, the petitioner has not carefully documented the temporary 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 temporary 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. 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)).

In addition, the petitioner submitted a staffing chart with the petitioner's permanent employees and temporary employees for April through December 2006, and January through November 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 one-time occurrence. 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. The table of permanent employees and temporary employees do not show a one-time occurrence need but rather a need for temporary employers all year round. 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.

Moreover, the U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states in pertinent part: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project . . ." Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business. 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 December 15, 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.