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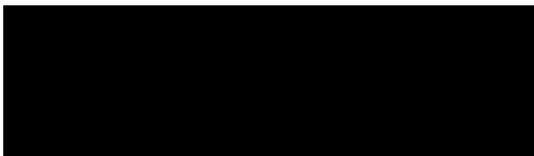
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DATE: **JAN 05 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:   
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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is engaged in the repair and maintenance of gasoline engines, and it seeks to employ the two beneficiaries as mechanics, pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b), for the period from January 25, 2011 until January 24, 2012. The Guam Department of Labor determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification.

The director denied the petition, concluding that the petitioner had not established a temporary need for the beneficiaries' services.

The Department of Homeland Security (DHS) published the H-2B Nonagricultural Temporary Worker Final Rule in the Federal Register on December 19, 2008. The final rule became effective on January 18, 2009. *See* 73 Fed. Reg. 78103. This final rule amended DHS regulations regarding temporary nonagricultural and agricultural workers, and their U.S. employers, within the H-2B and H-2A nonimmigrant visa classification. The current Petition was filed with United States Citizenship and Immigration Services (USCIS) on January 21, 2011, after the date the new regulations came into effect, thus the revised regulations will be applied to the current petition.

Section 101(a)(15)(H)(ii)(b) of 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) *Petition.* (A) H-2B nonagricultural temporary worker. An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform 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.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load 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.

In addition, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states the following:

The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a favorable labor certification determination as required by paragraph (h)(6)(iv) or (h)(6)(v) of this section.

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, but in the case of a one-time event could last up to 3 years. 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).

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 the letter of support, dated January 18, 2011, the petitioner explained the type of business and services it provides to include: “engage in the repair and maintenance of three and four cycle gasoline engines used to power equipment;” and, “wholesales small engine parts to the federal government and U.S. military as well as sells power equipment and various other types of equipment.” In addition, the petitioner is now; “the authorized service center on Guam for warranty work for small engines” made by various manufacturers, and is “negotiating with the U.S. Navy to service and repair small engines purchased at the Navy exchange.” Furthermore, the petitioner explained that it is “experiencing a peakload demand for its services as a result of the current construction boom on Guam,” that is “due to the U.S. military build-up of facilities and personnel on Guam as well as an increase in federally funded and private sector construction work on Guam.”

In response to the director’s request for evidence, the petitioner further explained its peakload need as follows:

As a result of this current construction boom and the temporary increase in both Department of Defense and civilian workers on Guam to undertake the U.S. military build-up, the Petitioner is currently experiencing a significant increase in its repair and maintenance business for the repair of gas powered mechanical equipment. Last year the company earned gross revenues of \$1,725,656.00 which is an increase over its gross evidences for 2009 of \$1,612,862.00 and the

Petitioner projects gross revenues of over \$2.2 million for this year based on an average gross receipts of \$185,000.00 per month.

The petitioner submitted several articles regarding the military build-up on Guam. The petitioner also submitted several authorized warranty services agreements between the petitioner and its customers, and documentation evidencing that the petitioner is an authorized dealer.

The petitioner has not documented a peakload need through data on its 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 did not submit sufficient documentation of its staffing, including a list of permanent and temporary employees, for the past years in order to document an actual temporary and peakload need. It is impossible to determine a peakload need without evidence of the petitioner's normal business operations. In addition, the service agreements and evidence of the petitioner as an authorized dealer do not have termination dates. On appeal, counsel for the petitioner states that the "contracts can be terminated on thirty days notice and/or at will and therefore, are temporary in nature." Although counsel is correct that the agreements can be canceled at any time, this does not establish a temporary need because the goal of the contract is to provide the services as indicated in the contract and termination of the contract should occur only if there is a problem.

In addition, the petitioner stated that it is "experiencing a peakload demand for its services as a result of the current construction boom on Guam," that is "due to the U.S. military build-up of facilities and personnel on Guam as well as an increase in federally funded and private sector construction work on Guam." However, the petitioner does not assert that the beneficiaries are directly working on projects tied to the military build up on Guam. The connection between the employment of the two named beneficiaries and the petitioner's peakload need with the U.S. military expansion on Guam is tenuous, at best. The record of proceeding does not establish that the petitioner is experiencing a temporary need to employ additional mechanics as a result of the U.S. military build-up.

Moreover, 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 its gross revenue from 2009 to 2010 has increased and the projected gross revenue for 2011 will be even higher. Even if the evidence indicated that there is an increase in projects in 2011, this is not sufficient evidence to establish a need for temporary workers. The petitioner failed to provide any evidence as to when the temporary need would end. The petitioner implies that it will end after the military relocation ends but there is no evidence to support this claim. The petitioner failed to provide evidence to indicate that the need is temporary in nature. 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 this instance, the petitioner has not documented a temporary need through data on its past contracts to indicate that the new contracts will create a short-term demand. The petitioner did

not submit any evidence to establish that the new contracts are a temporary event of short duration that the petitioner would not normally have. Instead, it appears that the petitioner's anticipated increase in revenue may just be a sign of long-term growth in the company.

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 mechanics to perform the duties described on the temporary labor certification, which is the nature of the petitioner's business, will always exist.

As always, 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 met that burden.

**ORDER:** The appeal is dismissed.