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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B4

DATE: JUL 18 2012 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 (the 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 petition will remain denied.

The petitioner described itself on the Form I-129 as a passenger bus transportation company with 150 employees. It seeks to employ the beneficiaries in positions it designates as bus drivers from October 5, 2011 until August 5, 2012 pursuant to 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). The U.S. Department of Labor issued a temporary labor certification. The director denied the petition on the basis of his determination that the petitioner had failed to demonstrate a temporary need for the services of the beneficiaries, based upon a peakload need.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find the petitioner has failed to overcome the director's ground for denying this petition.

*Applicable Law*

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, in pertinent part, as follows:

> [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)(6) states, in pertinent part, the following:

> *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.
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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.* 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 accordance with the precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), the test for determining whether an alien is coming "temporarily" to the United States in order to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. Accordingly, pursuant to *Matter of Artee* it is the nature of the petitioner's need rather than the nature of the duties that controls.

*The Petitioner Has Not Established That Its Need for the Services of the Beneficiaries is a Temporary One, Based Upon a Peakload Need*

The petitioner stated on the Form I-129 that its need for the services of the beneficiaries is a temporary one, based upon a peakload need. In order to establish that the nature of its need is a temporary one based upon a peakload need pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), the petitioner must demonstrate the following: (1) that it regularly employs permanent workers to perform the services or labor at the place of employment; (2) 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 (3) 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 its September 13, 2011 letter of support, the petitioner described itself as a passenger bus transportation company and claimed to have bus terminals in Houston, San Antonio, Austin, Dallas, Garland, Fort Worth, McAllen, and Laredo, Texas. It explained that although many of its customers are vacationers, it also serves migrant and other agricultural workers and their families who work throughout Texas, Georgia, North Carolina, South Carolina, and Illinois. With regard to its temporary need for the services of the beneficiaries, the petitioner stated the following:

> [The petitioner's] customer base includes migrant/agricultural workers who work seasonal jobs throughout Texas and the mid-west. Passengers traveling to and from certain states only pass through certain Texas terminals. For example, passengers traveling to and from Illinois only pass through our Dallas terminal [en] route to Laredo, the Mexico border via Laredo, and other Texas cities. Due to winter seasonal work available in Illinois, Laredo International experiences a recurring peak load which begins in October of each year continuing through the end of July. This recurring peak load is caused by migrant workers traveling from Mexico to Illinois for this winter seasonal work as well as winter vacationers traveling to and from Dallas via Laredo. The peak load continues through the end of July due to returning migrant workers, spring break, and summer vacation travelers.

The petitioner stated that it experiences an annual shortage of bus drivers from October until July as a result of this claimed peakload. According to the petitioner, it must supplement its permanent staff with H-2B workers in order to meet the demands of its customers. The petitioner submitted, *inter alia*, information regarding passenger ticket sales at its Dallas terminal as well as information regarding its payroll. The ETA Form 9142, Application for Temporary Employment Certification, states that the beneficiaries the petitioner seeks to hire through this petition would drive buses on the petitioner's Dallas to Houston route.

In his October 13, 2011 RFE the director requested additional evidence regarding the petitioner's claimed peakload need. While the director acknowledged the information submitted by the petitioner at the time it filed the petition, he requested that the petitioner submit evidence pertaining to its entire operation rather than just to one particular aspect of it.

In its October 27, 2011 letter submitted in response to the RFE, the petitioner repeated many of its earlier assertions, including those we quoted earlier, and added that different terminals experience different recurring peakload needs because each city has unique passenger requirements, and it presented the differing needs of its Houston, Austin, and Dallas terminals as examples of this. According to the petitioner, passengers traveling to and from Georgia, North Carolina, and South Carolina pass through its Houston terminal, and that its Houston route experiences a significant increase in passenger traffic from April through August, and from September through February. The petitioner claimed that its Dallas and Austin terminals experience different peakloads because passengers traveling to and from Illinois use the routes served by those terminals and they experience a temporary peakload need beginning in October of each year and ending by the following August. The petitioner also claimed that it successfully petitioned for H-2B workers between 2007 and 2010, and that its four-year pattern of successful H-2B petitions "should in itself serve as sufficient evidence of our peak load need." The director found the petitioner's assertions unpersuasive, and denied the petition on November 29, 2011.

On appeal, counsel contends that the director erred in denying the petition and argues that the petitioner's need should be evaluated based upon its need for bus drivers at each particular terminal, rather than its overall need across the entire organization. However, "temporary services or labor" in the H-2B context refers to any job in which the petitioner's need for the services to be performed is temporary, regardless of whether the underlying job can be described as temporary. *See Matter of Artee Corp.*, 18 I&N Dec. at 366. The petitioner in *Artee* was an employment agency that provided temporary employee leasing services on a continuous basis. The Board of Immigration Appeals (BIA) found that "it is not the nature or the duties of the position which must be examined to determine temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the positions." *Id.* The BIA concluded that since the petitioner required a permanent cadre of employees to refer to its customers it had a permanent need for them, even if the particular job it was staffing for a customer was temporary in nature and duration. *Id.*

To ascertain whether the petitioner's claimed need is a temporary one, based upon a peakload need, we cannot evaluate its need for the services of the beneficiaries on a terminal-by-terminal basis. We must take into consideration all terminals and routes when evaluating the petitioner's need for temporary workers in accordance with the BIA's holding in *Artee*. For our purposes, the petitioner's need for the services of the beneficiaries as bus drivers is not dependent upon one peakload season at one particular terminal but is instead based upon its entire need across all terminals and routes.

The evidence submitted by the petitioner does not establish that its entire business has a temporary, peakload need for the services of the beneficiaries. While the payroll records indicate that its Austin terminal experienced a drop in the total number of employees between August and September in 2009 and 2010, not all terminals experienced such a drop. Furthermore, as noted by

the director in his decision denying the petition, the petitioner's 2009 and 2010 quarterly wage reports submitted when it filed the petition do not support the petitioner's claim of a peakload need lasting from October 5 through August 5. Those reports do not indicate a drop in demand for employees between August 6 and October 6 in either year because they do not indicate drops in the number of employees during the third quarter of either year. To the contrary, in 2010 the petitioner had its highest number of employees during the third quarter and in 2009 had its second-highest number of employees during that quarter. This evidence indicates that the petitioner will continually need bus drivers to perform the duties described on the Form ETA 750.

Counsel's argument made on appeal that we should only take into account the needs of the petitioner's Dallas terminal when ascertaining whether its need for the services of the beneficiaries is a temporary one based upon a peakload need is not persuasive. In making this argument, counsel contends that the "place of employment" language contained in 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) "takes into account companies with multiple locations," such as the petitioner. Under counsel's alternate reading of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), we would only need to determine whether its Austin terminal has a temporary need for the services of the beneficiaries, based upon a peakload need. However, counsel's reading of the regulation is incompatible with *Artee*, and he makes no attempt to reconcile his reading of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) with *Artee*, which is binding precedent.

Nor are counsel's arguments regarding prior approvals granted to the petitioner persuasive. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. It would be absurd to suggest that U.S. Citizenship and Immigration Services (USCIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

This relevant evidence indicates that the petitioner will continually need bus drivers to perform the duties described on the Form ETA 750, that this need is in the very nature of its business, and that it will always exist. The petitioner has therefore failed to demonstrate that its need for the services of the beneficiaries is a temporary one, based upon a peakload need, as required by section 101(a)(15)(H)(ii)(b) of the Act and 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

*Conclusion*

The petitioner has failed to overcome the director's ground for denial of the petition and failed to establish that its need for the services of the beneficiaries is a temporary one, based upon a peakload need. Accordingly, the beneficiaries are ineligible for nonimmigrant classification under section 101(a)(15)(H)(ii)(b) of the Act and this petition must remain denied.

In these proceedings, the petitioner bears the burden of proof to establish its eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). It has not met that burden and the appeal will be dismissed.

**ORDER:** The appeal is dismissed. The petition remains denied.