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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 13 2013 OFFICE: VERMONT 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for Michael T. Kelley
Ron Rosenberg
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 be denied.

On the Form I-129 visa petition, the petitioner describes itself as a 20-employee regional trucking company[1] established in 2012. In order to employ the beneficiaries in what it designates as "Service Technician" positions[2] from February 1, 2013 until November 30, 2013, the petitioner seeks to classify them as temporary nonagricultural workers 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 director denied the petition, concluding that the petitioner failed to establish 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.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. Law and Interpretation

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)—*

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[1] The petitioner provides a North American Industry Classification System (NAICS) Code of 484110, "General Freight Trucking, Local." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "484110 General Freight Trucking, Local," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Dec. 2, 2013).

[2] The ETA Form 9142, Application for Temporary Employment Certification, submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 53-6031, and the associated Occupational Classification of "Automotive and Watercraft Service Attendants."

(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 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 petitioner's need for the beneficiary's services 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.

II. Pertinent Facts and Procedural History

The petitioner filed the instant petition on January 10, 2013. In its January 9, 2013 statement of need, the petitioner described itself and its need for the services of the beneficiaries as follows:

> We are a truck service that hauls dirt, gravel, asphalt, concrete, rubble, rocks and base for highway construction companies. The road crews we do work for begin prepping and forming after the holidays each year – around the first part of January and they generally need their first dumps or haul offs the last beginning of February [sic]. We stay fairly busy until the week of Thanksgiving each year. Traditionally, road crews try to wind down on planned construction during the busiest part of holiday travel which begins the week of Thanksgiving or 4th week of November. Basically, our dump schedule will slow down the end of November and stays slow to the end of January because our client ceases their [sic] non-emergency work during mid[-]November and December due to heavy holiday traffic and increased risk of accidents along the roadways during this time. Since our business increases from February through November causing wear and tear on our trucks during this time we need the extra service technicians in order to keep them in operation and running correctly. Our business decreases by about 60% from December through January and [we] do not need as many service technicians during that period.
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> * * *
>
> We are unable to find a sufficient number of available, hard-working, dependable laborers for this period. This work can be monotonous and at times physically demanding.

> Temporary labor during the above described time is crucial, in fact – without this temporary labor the negative impact will not allow us to continue in business or retain the domestic help we now employ.

The petitioner proposed the following duties for the beneficiaries at section F of the ETA Form 9142:

> Wash, grease, change oil, and flat busting of vehicles, clean and stock shop and yard.

The director issued an RFE with regard to this petition on January 18, 2013 and requested additional evidence to support the petitioner's claimed peakload need for the services of the beneficiaries. The petitioner replied to the RFE on March 19, 2013. As evidence of its claimed peakload need for the services of the beneficiaries, the petitioner submitted payroll information, contracts, purchase orders, and letters of intent.

The petitioner submitted evidence indicating that since its founding in August 2012, it has employed five individuals as Service Technicians, of whom one is still employed by the company. Of those five Service Technicians, one was hired in August 2012, worked for two days, and quit. Two were hired in November 2012: one quit after working for five weeks, and one quit after working for seven weeks. One was hired in December 2012, worked for three weeks, and quit. The Service Technician who is still working for the petitioner was hired in December 2012.

The contract executed between the petitioner and [redacted] called for the petitioner to provide services to that company from April 2013 through June 2013, and the purchase order issued by [redacted] appears to have called for the petitioner to provide services to that company in August 2012.

Three of the purchase orders issued by the [redacted] appear to have called for the petitioner to provide services by August 10, 2012, and another provides a due date of October 12, 2012.

Three of the Requests for Statewide Contract Purchase issued by the [redacted] listed the "date material needed" as January 16, 2013. Another provided a date of January 17, 2013, and another provided a date of February 4, 2013. Although the "date material needed" field is left blank on a sixth request, the AAO notes that it was approved by the [redacted] Comptroller on January 16, 2013.

Finally, the petitioner submitted three identically-worded letters entitled "Letter of Intent." Each letter emphasized its non-binding nature, and contained the following statement:

> High demand deliverables for the period 2/1/2013 to 11/30/2013.

It is noted that although each letter was prepared in March 2013, more than a month after the claimed period of peakload need began on February 1, 2013, each letter stated that "the details still have to be finalized," which indicates that no services had yet been performed.

The director found this evidence insufficient, and denied the petition on March 22, 2013.

III. Discussion

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*).

Upon review, it is found that the record of proceeding does not establish that the petitioner has a temporary, peakload need for the services of the beneficiaries as Service Technicians.

A. The First Element of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*)

The petitioner has established that it regularly employs permanent workers to perform services or labor at the place of employment and has therefore satisfied the first element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiaries is a temporary one, based upon a peakload need. However, the petitioner has satisfied neither of the remaining two elements.

B. The Second Element of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*)

The second element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) which the petitioner must satisfy in order to establish that the nature of its need for the services of the beneficiaries is a temporary one based upon a peakload need requires the petitioner to demonstrate 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.

The documentation submitted by the petitioner as evidence that the nature of its need for the services of the beneficiaries is a temporary one, based upon a peakload need, was outlined above. The AAO agrees with the director that it does not satisfy the second element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

The petitioner submitted a total of twelve binding contracts, purchase orders, and related documentary evidence of services rendered, or to be rendered. However, five of those twelve documents – nearly half – relate to services that appear to have been rendered in January 2013, which is not indicative of a peakload need lasting from February 1, 2013 through November 30, 2013.

Nor do the three letters of intent submitted by the petitioner establish the petitioner's claimed peakload need for the services of the beneficiaries. As none of these letters provides any

meaningful information regarding any services expected to be provided by the petitioner, or the timeframe[3] during which such services would be performed, they are of little probative value.

Furthermore, these three letters are virtually identical to one another, which further limits their probative value. The petitioner's argument that letters of intent are normally considered acceptable supporting evidence is acknowledged. However, the fact that a document is considered to be acceptable supporting evidence does not necessarily mean that it will satisfy the petitioner's burden of proof.

The use of identical language and phrasing across the various letters suggest that the language in the letters is not the authors' own. *Cf. Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

Because the letters appear to have been drafted by someone other than the purported authors, the letters possess little credibility or probative value. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

For all of these reasons, the petitioner has failed to satisfy the second element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one, based upon a peakload need.

C. The Third Element of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*)

The third element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one based upon a peakload need requires the petitioner to demonstrate that the temporary addition to its staff will not become a part of its regular operation.

The AAO finds that the evidence submitted by the petitioner does not establish a definable end-date for the petitioner's need for additional Service Technicians to supplement its permanent staff of Service Technicians. Consequently, the petitioner has not demonstrated that the temporary additions will not be part of its regular operation. Again, although the petitioner claims that its

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[3] It is acknowledged that each letter contains the following statement:

> High demand deliverables for the period 2/1/2013 to 11/30/2013.

Although it does perfectly match the petitioner's claimed period of peakload need, this statement is not meaningful. When coupled with the fact that each letter was prepared more than one month after February 1, 2013, these letters' emphases on their non-binding nature indicate that the petitioner had not yet performed any services during the claimed period of peakload need. As such, these letters are not evidence of a peakload need beginning on February 1, 2013.

period of peakload need would end on November 30, 2013, five of the twelve contracts, purchase orders, and related documents – nearly half – relate to services which appear to have been rendered after that date.

For all of these reasons, the petitioner has failed to satisfy the third element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiaries is a temporary one, based upon a peakload need.

IV. Conclusion

As the evidence in the record of proceeding does not satisfy all three elements described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), it has failed to establish that the petitioner's 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)(i)(A).

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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