(b)(6)

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]

DATE: MAR 0 4 2014 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:

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,

Michael T. Kelly

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center (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.

The petitioner, which describes itself as a four-employee commercial shrimping business established in 2001, seeks approval of this Petition for a Nonimmigrant Worker (Form I-129) so that it may employ the beneficiaries from May 16, 2013 until March 1, 2014 as H-2B 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 petitioner filed the instant petition for three positions to which it assigned the job title "Shrimp Headers" on the Form I-129. In support of this petition, the petitioner submitted a Temporary Labor Certification (TLC) certified for three job offers falling within the "Fishers and Related Fishing Workers" occupational category, SOC (O*NET/OES) Code 45-3011. The petitioner described the nature of its temporary need for the services of the beneficiaries as a seasonal one.

The director based her denial of the petition upon her determination that the evidence of record does not establish that the petitioners claimed temporary need for the services of the beneficiary is a seasonal one. For the reasons discussed below, the AAO concludes that her determination was correct. Accordingly, the petitioner's appeal will be dismissed, and this petition will be denied.

I. Procedural History

The petitioner filed the instant petition at the Vermont Service Center on June 3, 2013. The director issued a request for additional evidence (RFE) on June 17, 2013, and the petitioner submitted a timely response on June 24, 2013. The director denied the petition on July 5, 2013.

The petitioner filed a timely appeal on July 15, 2013, and submitted a letter and additional evidence. As the petitioner marked the box on the Form I-290B to indicate that no further evidence would be submitted, the AAO deems the record complete and ready for adjudication.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's 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.

As will be discussed below, the AAO finds that the evidence of record fails to overcome the director's ground for denying this petition. Consequently, the petitioner's appeal will be dismissed, and the petition will remain denied.

II. 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)—*
>
> (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 *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm'r 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.

III. The Petitioner and its Operations

As noted above, the petitioner described itself on the Form I-129 as a four-employee commercial shrimping business established in 2001. At page 2 of the TLC, the petitioner provided a North American Industry Classification System (NAICS) Code of 114112, "Shellfish Fishing."[1] The NAICS defines this industry code as follows:

[1] U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "114112 Shellfish Fishing," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited Feb. 19, 2014).

The U.S. Census Bureau's online glossary provides the following background information regarding the NAICS:

> A system of grouping establishments into industries based on the similarity of their production processes. This system is used by the United States, Canada and Mexico.
>
> NAICS classifies industries using 2-, 3-, 4-, 5-, and 6- digit levels of detail. Two-digit codes represent sectors, the broadest classifications. Six-digit codes represent individual industries

114112 Shellfish Fishing

This U.S. industry comprises establishments primarily engaged in the commercial catching or taking of shellfish (e.g., clams, crabs, lobsters, mussels, oysters, sea urchins, shrimp) from their natural habitat.

Cross-References.

- Establishments primarily engaged in farm raising shellfish are classified in U.S. Industry 112512, Shellfish Farming.

2002 NAICS	2007 NAICS	2012 NAICS	Corresponding Index Entries
114112	114112	114112	Clam digging
114112	114112	114112	Crabbing
114112	114112	114112	Crayfish fishing
114112	114112	114112	Fisheries, shellfish
114112	114112	114112	Lobster fishing
114112	114112	114112	Mussel fishing
114112	114112	114112	Octopus fishing
114112	114112	114112	Oyster dredging
114112	114112	114112	Scallop fishing
114112	114112	114112	Sea urchin fishing
114112	114112	114112	Shellfish fishing (e.g., clam, crab, oyster, shrimp)
114112	114112	114112	Shrimp fishing
114112	114112	114112	Squid fishing

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in the U.S. The North American Industry Classification System was developed by representatives from the United States, Canada, and Mexico, and replaces each country's separate classification system with one uniform system for classifying industries. In the United States, NAICS replaces the Standard Industrial Classification, a system that federal, state, and local governments, the business community, and the general public have used since the 1930s.

Id. at http://www.census.gov/glossary/#term_NorthAmericanIndustryClassificationSystemNAICS (last visited Feb 19, 2014).

IV. The Duties Proposed for the Beneficiaries

At page 3 of the TLC, the petitioner proposed the following duties for the beneficiaries:

> Preparation of shrimp boat for fishing activities, puting [sic] nets into water and retrieving them, sorting and heading the shrimp catch, storing, preserving, and off loading the catch. Assist captain and riggers as needed.

According to the petitioner, the beneficiaries would work forty hours each week.

V. The Petitioner's Claimed Need for the Services of the Beneficiaries

The petitioner stated on the Form I-129 that its need for the services of the beneficiaries is a temporary one, based upon a seasonal need lasting from May 16, 2013 until March 1, 2014, and described its claimed seasonal need as follows:

> At this time our shrimp industry is interested only to hire [sic] 3 temporary workers to perform the job as a shrimper/header. This job has been offered as a temporary one because like a harvest/crop it has its season. When that season is over there is no need for a lot of people. It causes extra hands to perform the job [sic]. The [s]hrimp season opens in July 15 [and lasts] through March 1st. This is when shrimp companies have a high demand for people. During this period there are expectation[s] of a great production, [which is the] reason[ ] why the owners of the boats are seeking . . . seasonal workers. When we ask[ed] for seasonal workers that is because workers in the United States do not want to perform this type of work because it is a tough job, they do not have benefits, there also taxed as a self employee which is the cause of not deduction of social security, they also have to leave their families when they travel offshore [sic].

The petitioner stated the following on the TLC:

> Our Shrimp Industry is interested to hire 3 temporary workers to perform the job as a Shrimper/header [sic]. This job has been offer as a temporary, because is when the shrimp season is open and is when there is more production, which cause to use extra hands to perform the job [sic].

The petitioner filed the Form I-129 with no documentary evidence to support its claimed need for the services of the beneficiaries, and the director requested such evidence in her June 17, 2013 RFE.

In response, the petitioner submitted documentation indicating that the National Oceanic and Atmospheric Administration Fisheries Service closed federal waters within 9 and 200 nautical miles of Texas to shrimp trawling during the following periods: (1) from May 15, 2010 until July 14, 2010; (2) from May 15, 2011 until July 14, 2011; (3) and from May 15, 2012 until July 14, 2012. The petitioner did not describe the significance of these documents or otherwise explain how they

supported its claimed need for the services of the beneficiaries between May 16, 2013 and March 1, 2014.

The petitioner also submitted information regarding its payroll and shrimp catch during the 2011-2012 and 2012-2013 shrimping seasons.

The petitioner provided the following information regarding the 2011-2012 season:

Time Period	Permanent Workers	Temporary Workers	Total Payroll
June 13, 2011 – July 5, 2011	4	0	$9,396.93
July 15, 2011 – July 29, 2011	6	0	$24,296.22
August 2, 2011 – August 15, 2011	4	0	$36,040.23
Sept. 29, 2011 – October 27, 2011	3	0	$14,778.22
Nov. 6, 2011 – Dec. 15, 2011	4	0	$16,435.68
Jan. 13, 2012 – March 16, 2012	4	0	$20,127.02

The petitioner provided the following information regarding the 2012-2013 season:

Time Period	Permanent Workers	Temporary Workers	Total Payroll
June 7, 2012 – July 10, 2012	8	4	$20,466.77
July 15, 2012 – July 25, 2012	7	3	$10,901.41
July 25, 2012 – August 21, 2012	4	2	$14,190.84
Aug. 29, 2012 – October 28, 2012	4	2	$43,210.01
Nov. 8, 2012 – Dec. 6, 2012	4	3	$11,214.79

In her July 5, 2013 decision denying the petition, the director found: (1) that the evidence of water closures in May and June is not consistent with the claimed period of temporary, seasonal need for the services of the beneficiaries (again, May 16, 2013 until March 1, 2014); and (2) that the evidence submitted by the petitioner indicating (a) that it did not employ any temporary shrimp headers between June 13, 2011 and March 26, 2012, and (b) that it employed two to four temporary shrimp headers June 7, 2012 until December 6, 2012 also failed to establish the petitioner's claimed temporary, seasonal need.

On appeal, the petitioner references H-2B petitions approved by USCIS in previous years, and claims that its boat "had some mechanical things that had to be taken care of" on December 5, 2012 and that consequently, "[t]he trip from January through March was loss [sic]. It also submitted invoices dated December 22 and 29, 2012, and receipts dated December 31, 2012 and January 11, 2013, which presumably relate to these claimed repairs.

With regard to the dates of its claimed seasonal need for the services of the beneficiaries, the petitioner states the following:

> The job has been offered as a temporary one because like a harvest/crop it has its season. When that season is over there is no need for a lot of people. It causes extra hands to perform the job. The Shrimp season opens [o]n July 15 [and] this is when shrimp companies have a high demand for people. During this season there are expectations of a great production[.]

The petitioner also stated the following:

> In your [decision] you mention that the dates for temporary needs do not match. We know that, we request[ed] the [H-2B visas] from May this year most[ly] because it usually takes time during the process an[d] in the past our workers were in the consulate the same day in which they have to departure [sic] to the trip.

The petitioner also referenced visa processing delays and preparation of the shrimping vessel.

VI. Review of the Director's Decision Denying the Petition

In order to establish that the nature of its need is a temporary one based upon a seasonal need pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*), the petitioner must: (1) 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; (2) specify the period(s) of time during each year in which it does not need the services or labor; and (3) demonstrate that 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.

As noted, the petitioner's claimed seasonal need for the temporary services of the beneficiaries as shrimp headers extends from May 16, 2013 through March 1, 2014. However, the petitioner also claims that the shrimping season actually begins on July 15. While the AAO acknowledges that the beneficiaries' job duties include preparing the shrimping vessel for launch – duties which could take place prior to July 15 – the evidence of record does not establish that the execution of those particular duties would require the beneficiaries' presence in the United States for two entire months prior to launching the vessel (again, the petitioner has requested a start date of May 16). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Further, we note that the petitioner's July 11, 2013 letter acknowledged that the petitioner specified a May need-

starting date in the petition "most[ly]" as an administrative measure to ensure the workers' arrival in time for the season.

Nor does the AAO find persuasive the petitioner's other explanations as to why it requires the beneficiaries' presence on May 16, when the shrimping season begins on July 15. While visa processing delays are acknowledged, the AAO notes (1) that petitioners are permitted to file an H-2B visa petition up to six months prior to the employment start date; and (2) that an H-2B visa holder is permitted to enter the United States up to ten days prior to the start date of employment. Nor is the petitioner's assertion that "every year is different" persuasive. Again, the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*) specifically states that "[t]he employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change."

Nor is the AAO persuaded by the evidence submitted on appeal in rebuttal to the director's observation that the record indicates no shrimping activity by the petitioner after December 6, 2012. As indicated implicitly by the director's statements, if the petitioner's annual seasonal need extends from May 16 through March 1, the petitioner should be able to produce documentation indicating shrimping activity for nearly three months after December 6, 2012. While the invoices submitted on appeal are acknowledged, the record of proceeding contains no evidence indicating how long these repairs took or otherwise explaining why the petitioner was unable to conduct its shrimping business for the remainder of that season. Again, 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. at 165.

For all of these reasons, the evidence of record does not satisfy the first element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*) for establishing that the nature of its need for the services of the beneficiaries is temporary, and based upon a seasonal need.

The evidence of record also fails to satisfy the third element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*), which requires the petitioner to demonstrate that 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. The petitioner's statement that "every year is different" indicates that its period of temporary need is in fact unpredictable or subject to change.

Accordingly, the evidence of record fails to satisfy the first and third elements described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*) for establishing that the nature of its need for the services of the beneficiaries is temporary, and based upon a seasonal need. Consequently, the appeal will be dismissed and the petition will be denied on this basis.

VII. Prior H-2B Approvals

We considered the petitioner's statements regarding prior H-2B approvals issued by USCIS. Copies of these approved petitions, however, were not included in the record. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself

and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5.

Again, the petitioner in this case failed to submit copies of these petitions and their respective approval notices. As the record of proceeding does not contain any evidence of the petitions to which the petition refers as approved in the past, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the allegedly approved petitions cited by the petitioner.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. 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. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that 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 the nonimmigrant petitions on behalf of the 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).

Finally, despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. ˆ 1361.

VIII. Conclusion and Order

As discussed above the petitioner failed to establish that it has a temporary need for the services of the beneficiaries based upon a seasonal need.[2] In this regard, the petitioner should note that we have not questioned the fact that there appears to be a shrimp season as evidenced by the that the petitioner submitted into the record. However, our consideration of the totality of the evidence in this record of proceeding does not persuade us that it is more likely than not that the petitioner would have an H-2B temporary-need for the beneficiaries during that season.

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. ˆ 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.

[2] As the petitioner has failed to satisfy the first element described at 8 C.F.R. ˆ 214.2(h)(6)(ii)(B)(2) for establishing that the nature of its need for the services of the beneficiaries is temporary, and based upon a seasonal need, the petition may not be approved. The AAO, therefore, will not address any additional issues it has identified on appeal.