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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D4

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 0 2 2010

IN RE: Petitioner:
Beneficiaries: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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 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 and the petition will be denied.

The petitioner is a roofing company that seeks to employ the beneficiaries as roofers, 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 18, 2010 to November 18, 2010. The Department of Labor (DOL) certified the petitioner's temporary labor certification (Form ETA-9142), for 8 roofers for employment from January 18, 2010 until November 18, 2010.

On February 2, 2010, the director denied the petition concluding that the petitioner had not established a temporary need for the beneficiaries' services. The director also denied the petition based on the fact that the petitioner failed to submit evidence requested by the director.

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) 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. [redacted] 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 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.

On the Form I-129, the petitioner explained that it had not been able to hire enough U.S. workers to fill the required position of roofer.

On December 11, 2009, the director requested further information regarding the petitioner's temporary need. The director also requested financial evidence to support the petitioner's peakload need such as copies of payroll records and quarterly payroll tax returns for the past 24 months to include the position of roofer.

In its response letter, dated January 18, 2010, counsel for the petitioner contends that the "Client [the petitioner] has received DOL "certification" which required them to comply with established H-2B statues and regulations for supervised recruitment that demonstrated that there were not sufficient ready, willing and able U.S. workers for the temporary and peak load positions." Furthermore, counsel explained the peakload need as follows:

> Our client has a temporary and peak load need to supplement its staffing on a temporary basis for the positions, because of the seasonal peak nature of construction business and customer/market demand for such services. During the time period from mid-January to mid-November, generally land developers, general contractors and builders slow their work on projects due to slower customer and market demand, as well as inclement seasonal-weather conditions and less daylight during the day; and, the trickle down effect of such slow down is that all construction related businesses also see a drop in their workload. Adverse weather conditions include rain and cold temperatures which impede certain work (demolition, leveling, concrete form/pour, framing, etc.), which affects all construction related work. If concrete cannot be poured, then all other trades which must follow have to adhere to the same peakload timelines in the construction trades.

Counsel also stated that in order for the petitioner "to serve its customers' needs and plan for the upcoming year, our Client [the petitioner] has to base its staffing levels on existing projects, new

projects, signed contracts, outstanding proposals and projections, customer demand, and prior history to remain competitive in the roofing and construction industry."

The petitioner submitted a certified temporary labor certification for eight roofers from January 18, 2008 until November 18, 2008. The petitioner also submitted a list of clients for whom the petitioner expects to provide services in 2010. In addition, the petitioner submitted four letters from companies that confirm they will hire the petitioner for projects in 2010. Furthermore, the petitioner submitted several invoices with dates from every month in 2009.

In addition, on appeal, the petitioner submits a chart of the permanent and temporary staff employed in 2009 from January until November. The chart does not include December 2009. The petitioner employed permanent staff from January until November 2009, and temporary staff from March to November 2009. The petitioner notes that in January and February 2009, "due to the economy we were conservative with getting temporary workers."

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload need for roofers. The petitioner has not carefully documented the peakload 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. Although the director specifically requested documentation evidencing the petitioner's staffing, the petitioner did not provide that documentation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Only on appeal did the petitioner submit a staffing chart for 2009; however, the chart failed to submit the staffing for December. Without information about staffing in December, it is impossible to determine if the peakload need runs from January until November and drops in December. In addition, according to the staffing chart submitted by the petitioner, the petitioner did not employ temporary workers in January and February of 2009 even though they claim the peakload need begins in mid-January. The petitioner notes that "due to the economy we were conservative with getting temporary workers in January-February." Thus, the evidence on record does not substantiate the claim that the petitioner has a peakload need from mid-January until mid-November. 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 copies of invoices prepared in 2009. The dates on the invoices run from January until December. From mid-November until mid-January, the petitioner had 19 invoices. The evidence does not support the claim that the workload drops from mid-November until mid-January. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Although the petitioner stated the peakload need of the company runs from mid-January to mid-November, the statement has not been substantiated by financial or other documentary evidence, such as income for each month, complete staffing charts of permanent and temporary roofers

employed by the petitioner for every month of the year for the past two years, quarterly tax returns, or work contracts and invoices that confirm the accuracy of the information given in the statement and establish that the petitioner's business activity has formed a need for temporary workers for a certain time period and will recur next year at the same time. Absent supporting documentation, the petitioner has not shown that its need for the beneficiaries' services is tied to a trend or a particular event that recurs every year. 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.

Further, 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 roofers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist. As noted above, the petitioner submitted invoices from 2009 and it appears that the projects run all year round.

In addition, on appeal, counsel for the petitioner stated that the DOL specifically monitors the recruitment efforts during the Labor Certification process and requires a report establishing that the recruitment was sufficient to justify a peak load need. The regulations at 8 C.F.R. § 214.2(h)(6)(iii)(A) states that "the labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." Thus, the certified labor certification by DOL is solely "advice" as to whether U.S. workers are available to fill the temporary position and is not a determination of the petitioner's temporary and peakload need for additional workers.

The director also denied the petition because the petitioner failed to submit all documentation requested by the director. The director requested additional information due to inconsistencies in the record. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In addition, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

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