



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: AUG 11 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiaries: [REDACTED]

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:

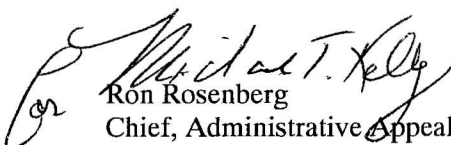
SELF-REPRESENTED

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,


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 and the petition will be denied, noting that the matter is moot due to the passage of time.

On the Form I-129 visa petition, the petitioner describes itself as a hotel and resort management and consulting company, established in 2006. In order to employ the beneficiaries in what it designates as “Maids and Housekeeper” positions¹ from May 15, 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).

On October 28, 2013, the director denied the petition, concluding that the petitioner failed to submit an original certified ETA Form 9142, Application for Temporary Employment Certification. The director also concluded that the petitioner failed to establish a temporary need for the services of the beneficiaries.

The record of proceeding 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, we find that the evidence of record has sufficiently addressed the issue regarding the provision of the original ETA Form 9142. Accordingly, that basis for denial is withdrawn.

However, upon review of the entire record of proceeding, including the submissions on appeal, we also conclude that the director’s determination to deny the petition for failure to establish its claimed H-2B temporary seasonal need for the beneficiaries was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. STANDARD OF PROOF

As a preliminary matter, in the exercise of its appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

¹ The ETA Form 9142, Application for Temporary Employment Certification, submitted by the petitioner in support of the petition was partially certified for the SOC (O*NET/OES) Code 37-2012 and the associated Occupational Classification of “Maids and Housekeeping Cleaners.”

* * *

The “preponderance of the evidence” of “truth” is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, the evidence in the record of proceeding does not support counsel’s contention that the evidence of record requires that the petition be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we concur with both of the director’s grounds for denying this petition. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner’s claim is “more likely than not” or “probably” true.

In addition, we note the appeal’s emphasis upon the evidence of previous H-2B approvals that have been granted to the petitioner through the years. In this regard, the petitioner should note that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep’t of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at *6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the “record of proceeding” in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, then, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

We accept the H-2B petition-approval notices submitted on appeal as sufficient evidence to establish that the H-2B petitions specified on the approval-notice forms were approved, and approved for the number of persons listed in those notices, for the periods of employment specified in those notices. However, that evidence does not establish that those approvals were based upon substantially the same evidentiary record as now before us on appeal. Moreover, and most importantly, nothing in the record of proceeding before us establishes that the prior approvals referenced by the petitioner were correctly decided.

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 benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.² Accordingly, the director was not required to request and obtain a copy of the prior H-2B petitions.

The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. 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. We are 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, our 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

² USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, 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.

nonimmigrant petitions on behalf of the petitioner, we 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). In fact, prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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.

* * *

(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.

* * *

The regulation at 8 C.F.R. § 214.2(h)(6)(iii) states in pertinent part:

(C) 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 . . . within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv). . . .

The regulations stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a temporary labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

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.

III. ANALYSIS

The petitioner filed the instant petition on May 22, 2013. In its May 21, 2013 support letter, the petitioner explained that it is "one of the [redacted] leading hotel and resort management & consulting company [owns] and operates several hotel properties though out [the] United States."

The petitioner also described its need for the services of the beneficiaries as follows:

The [redacted] area is completely dependent on the tourism industry and hosts over 15 million visitors annually. With an average of 215 sunny days, our coast has been voted in the [redacted]

In the past three years, our neighbors to the north in [redacted] have had a growth spurt with many small hotels being transformed into giant full-service resorts, adding between 8,000 and 10,000 additional vacation rental options.

How does this all this [sic] impact us at our resorts? Traditionally our season starts gearing up in February, hosting the early golfers who are ready to leave the cold and snow behind and catch some of our warm rays of sun. As we move into March – April, we embrace our Canadian friends from the north during the two week [redacted] as well as visitors taking their first "spring" break during Easter. Between May and September, we start preparing for our busy season and welcome the families who fill our hotel rooms, restaurants and make themselves at home on our beach.

As we head towards fall, once again we play host to the golfers who find themselves at the [redacted] during one of the most beautiful times of the year with its cool morning and evening temperatures and bright sunny afternoons. By reviewing the

Seasonality Statistic on Occupancy and Revenues, it is evident that our business is truly seasonal during the months of February – November.

With the addition of vacation rental options in [REDACTED] as well as small hotels transformed into towering resorts in [REDACTED] we all find ourselves competing for hospitality workers in all aspects of our properties with an emphasis on the housekeeping department. By far our largest department covering public areas, room attendants, linen attendants, and house persons; we have to quickly grow and train our staff from base levels to approximately 500 works in a mere 90 days. The attached Seasonality Statistic on the Housekeeping Department workers details the number of employees, total hours worked and payroll expenses for 2009 and year-to-date 2010.

Currently and historically we continue to face challenges in hiring employees for the housekeeping department, which leads [to] our employee turnover rates at a staggering 81%. Documented reasons for turnover are dislike of labor-intensive job requirements, lack of transportation to workplace, failure to pass pre-employment drug screenings and background checks and other seasonal job opportunities. Lastly and in some cases the main reason of turnover is that the majority of our housekeeping department workers commute between 30-50 miles one way and due to hardships of the current economy and gas prices, choose to accept work closer to home or rely on federal and state benefits.

Due to the large number of family visit[s], spring breakers, and the golfers, especially during vacation season, [the petitioner], has a seasonal need for additional Housekeeping staff. In order to meet the high demand of tourism, [the petitioner] requires approximately Eighty four (84) housekeepers during the months of February through December. [The petitioner] is offered the wage of \$9.10 per hour for the position of housekeeper.

The petitioner specified the following duties for the beneficiaries, at the Job Duties segment of Section F (Job Offer Information) of the ETA Form 9142, Application for Temporary Employment Certification:

Responsibilities include obtaining the list of vacant rooms which need[s] to be cleaned immediately and list of prospective check outs or discharges, cleaning rooms, empty wastebaskets, empty and clean ashtrays, and transport other trash and waster to disposal areas. Sweep, scrub, wax, and or polish floors, using brooms, mops, clean bathrooms & kitchen. Vacuuming and dusting, removing the old linens and taking them to laundry, providing new linen and towels for rooms.

Advising manager, desk clerk or administrative personal [sic] of rooms ready for occupancy. Replenish supplies such as drinking glasses, linens, writing supplies, and bathroom items. Clean windows, walls, ceilings, and woodwork, waxing and

polishing as necessary. Hang draperies, and dust window blinds. Investigating complaints regarding housekeeping service and equipment and taking corrective actions, examining room, halls and lobbies to determine need for repair and placement of furniture or equipment and making recommendations to management.

Observe precautions required to protect hotel and guest property, and report damage, theft, and found articles to supervisors. High school diploma or equivalent[.] [W]orking shifts. 7am - 3pm, 3pm - 11pm, 11pm - 7am[.]

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. 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; and (2) specify the period(s) of time during each year in which it does not need the services or labor. USCIS does not consider the employment seasonal if the period during which the services or labor is not needed is unpredictable, subject to change, or is considered a vacation period for the petitioner's permanent employees. *Id.*

As indicated, the first element of 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) requires the petitioner to 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. In this case, the petitioner's claimed seasonal need for the temporary services of the beneficiaries as maids and housekeeper, as noted on the Form I-129, extends from May 15, 2013 through November 30, 2013. However, upon review of the statement of the petitioner as noted above, the petitioner indicated that the seasonal need runs from February to November. The petitioner does not explain why the support letter claims the seasonal need is from February until November but the requested employment dates run from May until November. 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).

Furthermore, the petitioner explained that it is a hotel and resort management consulting company that owns and operates several hotel properties. The petitioner claims that it provides staffing to the hotels and resorts that it manages. However, the petitioner did not submit any documentation to corroborate this claim, for example, current contracts with hotels and resorts located in [REDACTED] South Carolina that outline the services of the petitioner, including providing housekeeping personnel to the clients. Nor does the evidence of record otherwise establish the petitioner's clients and where exactly where the beneficiaries will be placed. 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)).

In addition, if the petitioner is a consulting company, it appears that the need to provide personnel to its hotel properties is a year-round need. The petitioner does not provide sufficient evidence to indicate that the need to provide personnel to the hotels and resorts it manages is not year-round when it manages hotels and resorts through the entire United States in areas that may have different temporary needs. The petitioner did not submit any contracts or agreements with clients to evidence a seasonal need for maids and housekeeping staff from May to November. Absent supporting documentation, the petitioner has not shown that its need for the beneficiaries' services is tied to a seasonal trend or a particular event that recurs every year. Again, simply 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.

Moreover, the regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The 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).

On July 12, 2013, the director sent an RFE to the petitioner requesting, among other things, a spreadsheet of all temporary labor certifications filed by the petitioner over the least three years for all positions. The RFE requested that the spreadsheet contain the certification number; whether the certification was granted; the position certified; the number of workers certified; and the certified validity period. The RFE also specifies that the spreadsheet include the receipt number of each I-129 petition filed against each ETA Form -9142 and the number of aliens that were approved for H-2 status from the I-129 petition. The director also requested a list of the petitioner's permanent staff in the position of maids and housekeeping, including the dates of employment and a Form W-2 for each of the permanent maids and housekeepers.

We find that that, in the context of the record of proceeding as it existed at the time the RFE was issued, the RFE request for additional evidence was appropriate under the above cited regulations, in that the items sought addressed the petition's absence of documentary evidence substantiating the petitioner's claim that its actual need for the named H-2B workers was based upon a need that is both "temporary" and "seasonal," as defined by the pertinent H-2B regulations, and its own, as claimed in the petition.

In response to the RFE, the petitioner did not submit any of this 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).

On appeal, the petitioner submits a spreadsheet that does not indicate the categories that were requested in the RFE. Instead, the spreadsheet generally lists the number of temporary and permanent housekeeping employees located in [REDACTED] South Carolina, for each month in

2011 and 2012. It appears that this spreadsheet does not list every housekeeping employee of the petitioner, even in areas outside of [REDACTED] South Carolina. In addition, the spreadsheet does not have the certification information as requested in the RFE. In addition, the petitioner did not provide a Form W-2 for each of the permanent employees listed on the spreadsheet. 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.

Accordingly, for all of the reasons discussed above, the petitioner has failed to 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. Consequently, the appeal will be dismissed and the petition will be denied on this basis. It is also noted that the petitioner requested the beneficiary's services from May 13, 2013 until November 30, 2013. Therefore, the period of requested employment has passed.

IV. CONCLUSION

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, although the matter is now moot due to passage of time.