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



U.S. Citizenship
and Immigration
Services

DATE: DEC 01 2014

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:

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
for 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.

I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a 40-employee sprinkler system installation company¹ established in [REDACTED]. In order to employ the beneficiaries in what it designates as "Laborer" positions² from February 3, 2014 until December 1, 2014, 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 evidence of record does not establish a temporary need for the services of the beneficiary 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, we find that the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be 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)—

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 561730, "Landscaping Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "561730 Landscaping Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Nov. 3, 2014).

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 37-3011, and the associated Occupational Classification of "Landscaping and Groundskeeping Workers."

(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'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 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.

III. PERTINENT FACTS AND PROCEDURAL HISTORY

The petitioner filed the petition on December 17, 2013. As noted, it described itself on the Form I-129 as an 80-employee sprinkler system installation company established in [REDACTED] and claimed that it has a temporary need for the services of the beneficiaries as laborers from February 3, 2014 through December 1, 2014. The temporary labor certification (TLC) was certified for the same period of time.

In the statement of need attached to the Form I-129, the petitioner stated the following with regard to its claim peakload need for the services of the beneficiaries:

Due to the nature of our work we are unable to engage in much business during the winter months, of approximately December 1st to February 3rd, because the cold and wet weather is not conducive to sprinkler system installation. . . . When the weather does warm up, our demand for ready workers increases dramatically and almost immediately.

In his December 24, 2013 RFE, the director requested additional evidence to establish the petitioner's claimed peakload need for the services of the beneficiaries. In response, the petitioner submitted a brief letter, copies of quarterly tax returns, and payroll summaries.

The director found the petitioner's response insufficient, and denied the petition on January 10, 2014. In his decision denying the petition, the director stated that the payroll summaries submitted by the petition did not indicate that petitioner has a peakload need for workers at any point during the years for which the summaries were submitted.

IV. ANALYSIS

On appeal, counsel submits his own letter as well as another copy of the petitioner's letter submitted in response to the RFE. The documentary evidence before us on appeal, therefore, consists of the same evidence considered by the director when he made his decision to deny the petition; no new evidence has been submitted.

As noted, 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 addition to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

As the evidence of record establishes that the petitioner regularly employs permanent workers to perform the pertinent services or labor at the place of employment, the evidence of record satisfies the first element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The evidence of record, however, does not establish the second required element of the H-2B peakload criterion at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). To satisfy this element, the evidence of record must establish that the petitioner needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand. In this regard, the petitioner claims that its peakload demand, and associated need for the services of the beneficiaries as laborers, would extend from February 3, 2014 through December 1, 2014.

The quarterly tax returns submitted in response to the RFE indicate the following with regard to the petitioner's pattern of employment:

Year	Quarter	Number of Employees
2011	October, November, and December	39
2012	January, February, and March	38
2012	April, May, and June	32
2012	July, August, and September	37
2012	October, November, and December	36
2013	January, February, and March	40
2013	April, May, and June	34
2013	July, August, and September	41

We agree with the director that these figures do not indicate a peakload need for the services of the beneficiaries during the period of requested employment. Counsel's arguments on appeal consist of his repeating several of the petitioner's claims made below regarding the expected increase in the petitioner's business during the period of requested employment; noting the penalties for perjury;

stating that "[t]he temporary, peakload need for landscaping (sprinkler system installation) H-2B workers is well-established"; and observing that the H-2B process is expensive and time-consuming.

As noted above, it is the nature of the petitioner's need rather than the nature of the duties that controls. *Matter of Artee Corp.*, 18 I&N Dec. at 366. Even if the peakload need for temporary workers in a given industry were well-known, the record of proceeding must still establish that the petitioner *itself* has an actual need for such workers. 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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). In this regard, we note that the evidence of record does not establish that the petitioner had an H-2B definable "peakload" in the past and it is the petitioner's affirmative burden to establish that it would have such a need in the period claimed in the petition.

In response to the director's finding that the quarterly tax reports do not establish a peakload need for the services of the beneficiaries during the period of requested employment, counsel states that those tax reports "reflect years when [the] Petitioner had no H-2B workers." While we do not question the veracity of this claim, the fact remains that the record of proceeding contains no documentary evidence which supports the petitioner's claim that it requires the services of these beneficiaries during the claimed period of need. 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. The petitioner cannot argue, successfully, that its quarterly tax reports cannot be used to discount its claim without submitting evidence that affirmatively *does* support its claim of a peakload need.³

The documentary evidence submitted by the petitioner is simply not sufficient to support its claim 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, as required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), and the petitioner's testimonial evidence, which is generalized and lacking in detailed, probative information does not remedy that deficiency. 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.

The fact that the documentary history submitted by the petitioner with regard to its workload and associated hiring does not support an H-2B peakload need would not preclude us from reasonably and responsibly finding such an H-2B temporary need for the period claimed in the petition, if the petitioner had submitted credible and probative documentary evidence establishing such need. Here, however, we see that, although the petitioner claims that for the period requested it would have a "sudden and substantial need for peakload" sprinkler installation and repair laborers, it did not present evidence documenting the existence of that need.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or

³ The petitioner appears to acknowledge that the payroll summaries submitted in response to the RFE do not indicate a peakload need for the services of the beneficiaries between February 3, 2014 and December 1, 2014. We agree.

beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Once 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.

For all of these reasons, the evidence of record does not satisfy the second element of the peakload criterion at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The third element of 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) which the petitioner must establish is that "the temporary addition[] to staff will not become a part of the petitioner's regular operation." As neither counsel nor the petitioner addresses this portion of the regulation, the evidence of record does not satisfy this additional element of the peakload criterion at C.F.R. § 214.2(h)(6)(ii)(B)(3).

As the evidence of record does not satisfy each of the three essential elements of the peakload regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), it does not establish that the petitioner's claimed need for the services of the beneficiary 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).

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

V. CONCLUSION

As discussed above, we find that the evidence of record does not overcome the director's decision denying this petition.

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.