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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**

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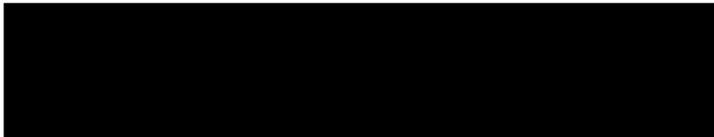


FILE: WAC 09 060 51483 Office: CALIFORNIA SERVICE CENTER Date: **APR 08 2010**

IN RE: Petitioner:   
Beneficiaries: 

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:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California 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 engaged in construction, and it seeks to employ the beneficiaries as construction workers, 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 of April 1, 2009 to October 31, 2009. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner failed to submit evidence to establish the petitioner's temporary need.

The director determined that the petitioner had not established a temporary need for the beneficiaries' services. In addition, the director denied the petition based on the fact that the petitioner failed to submit evidence requested by the director.

On appeal, counsel for the petitioner states that the petitioner provided sufficient evidence to establish eligibility for H-2B classification. Counsel also states that the petitioner was previously approved for H-2B classification and thus, has established a pattern that is recurring in nature.

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 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) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing 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.* 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:

(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)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and

industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner seeks approval of the proffered position as a peakload need. 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).

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, 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).

On the Form I-129, the petitioner explained that it has been impossible to hire enough U.S. workers to fill the required positions of construction workers. The petitioner explained that the reasons for not finding sufficient U.S. workers are the following:

In the past, when we have had the need to hire temporary workers, it has proven to be very difficult to find U.S. citizens to hire. There seem to be two main reasons for this. First, these workers always want permanent positions, but I do not have enough work to be able to offer them year-round employment. Second, many of them find the work to be too difficult. They show up for the first couple of days but do not last much longer.

On January 7, 2009, the director requested further information regarding the petitioner's peakload temporary need and evidence regarding the petitioner.

In its response, the petitioner submitted a letter from the petitioner, dated September 24, 2008, that states "from January through October, our company is going to see an increase in its

business operations.” The petitioner also submitted the Weekly Labor Report for each week in 2008. In addition, the petitioner submitted the Form I-797, Approval Notice, granted to the petitioner for the H-2B classification of 100 individuals for employment from April 1, 2008 until November 30, 2008. Moreover, in a letter prepared by counsel for the petitioner, dated February 3, 2009, counsel submitted a graph of the number of employees hired by the petitioner for each month of the year for 2007 and 2008. The graph indicates an increased number of employees from March through November, and almost double the number of employees from 2007 to 2008. The wage reports and the graph submitted by counsel, does not differentiate the different job positions employed by the company and does not indicate who is a full-time employee and who is a temporary employee. The petitioner did not indicate the temporary and permanent employees who solely filled the position of construction worker for 2007 and 2008. In addition, the petitioner has not explained how in one year from 2007 to 2008, the petitioner employed more than double the amount of individuals.

The petitioner has not documented its claimed 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. As noted above, the petitioner failed to provide a chart of the temporary and permanent employees for the position of construction workers only, and therefore it is impossible to determine if the petitioner has a peakload need for construction workers. In addition, the petitioner stated in a support letter that it is “going to see an increase in its business operations” from January through October, but it did not provide contracts or invoices to indicate this increase. In addition, the petitioner never explained how the company grew over 50% in one year, and why last year it requested 100 temporary employees and in only one year, it increased that amount to 200. 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)).

Although the petitioner submitted a statement stating the peakload needs of the company during the months of January through October, the statement has not been substantiated by financial or other documentary evidence, such as staffing charts of permanent and temporary construction workers employed by the petitioner for each month of the year, or work contracts for 2008 and for the upcoming year, or 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. In addition, the petitioner's support letter, dated September 24, 2008, stated that it will experience an increase in work from January through October, however, the Form I-129 stated that the peakload is from April through October. The petitioner's support letter does not coincide with the employment dates on the petition. In addition, the petitioner has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or will have different specialty skills than the other workers currently employed by the company. The petitioner has not provided evidence of contracts for work to be performed in the next year showing a clear termination date. The petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are

traditionally tied to a season of the year and will recur next year on the same cycle. 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.

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 construction workers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

The petitioner noted that United States Citizenship and Immigration Services (USCIS) approved other petitions that had been previously filed on behalf of the petitioner for the same peakload need and thus, is sufficient evidence to establish the current petition. 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 approval 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. 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).

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).

It is also noted that the petitioner requested the beneficiary's services from April 1, 2009 until October 31, 2009. Therefore, the period of requested employment has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of 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, although the matter is now moot due to the passage of time.