

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **AUG 30 2013**

OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
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:

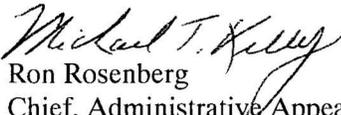
[REDACTED]

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,

*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. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a two-employee construction company<sup>1</sup> established in 1992. In order to employ the beneficiaries in what it designates as “Electrical Line Installer” positions<sup>2</sup> from May 23, 2012<sup>3</sup> until January 31, 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).

The director denied the petition, concluding that the petitioner failed to establish: (1) that any of the beneficiaries satisfy the minimum job requirements described by the petitioner on the certified ETA Form 9142, Application for Temporary Employment Certification; and (2) that it has a temporary need for the services of the beneficiaries based upon a seasonal need.<sup>4</sup>

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, the AAO finds that the petitioner has failed to overcome the director’s grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

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<sup>1</sup> The petitioner provides a North American Industry Classification System (NAICS) Code of 238210, “Electrical Contractors and Other Wiring Installation Contractors.” U.S. Dep’t of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, “238210 Electrical Contractors and Other Wiring Installation Contractors,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Aug. 29, 2013).

<sup>2</sup> 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 49-9051 and the associated Occupational Classification of “Electrical Power-Line Installers and Repairers.”

<sup>3</sup> It is noted that the instant petition was not filed until October 4, 2012.

<sup>4</sup> In addition to denying the petition, the director also denied the extension of stay requests filed on behalf of nine of the beneficiaries. That portion of the director’s decision, however, is not before the AAO.

Although petitioners are currently permitted to request both approval of a petition and extension of a beneficiary’s stay on the Form I-129, they are still separate determinations governed by separate bodies of law. The regulation at 8 C.F.R. § 214.1(c), which relates to extension of stay requests, states that “[t]here is no appeal from the denial of an application for extension of stay filed on Form I-129[.]”

As the director’s denial of these extension of stay requests cannot be appealed, the AAO has no jurisdiction over the matter, and it will not address this portion of the director’s decision.

## I. Standard of Proof

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows 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.

\* \* \*

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.*

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that 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*, the AAO concurs with both of the director's

grounds for denying this petition.<sup>5</sup> Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claims (1) that the beneficiaries of this petition satisfy the minimum job requirements described by the petitioner on the certified ETA Form 9142, and (2) that it has a temporary need for the services of the beneficiaries based upon a seasonal need, are “more likely than not” or “probably” true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner’s claim is “more likely than not” or “probably” true.

## 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.

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<sup>5</sup> Again, that portion of the director’s decision denying the extension of stay requests filed on behalf of nine of the beneficiaries is not before the AAO on appeal.

(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.

\* \* \*

(vi) *Evidence for H-2B petitions.* An H-2B petition shall be accompanied by:

\* \* \*

- (C) *Alien's qualifications.* In petitions where the temporary labor certification application requires certain education, training, experience, or special requirements of the beneficiary who is present in the United States, documentation that the alien qualifies for the job offer as specified in the application for such temporary labor certification. This requirement also applies to the named beneficiary who is abroad on the basis of special provisions stated in paragraph (h)(2)(iii) of this section. . . .

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. The Petitioner’s Claimed Need for the Services of the Beneficiaries

The petitioner filed the instant petition on October 4, 2012. In its September 6, 2012 statement of need, the petitioner described itself and its need for the services of the beneficiaries as follows:

[The petitioner] has had a dry spell of work since I took over in August of 2008. However, we have entered into the high voltage transmission power line project sector of the industry. Job openings fluctuate depending on weather conditions and contract patterns, therefore, requiring temporary workers. [The petitioner] is contracted to supply journeyman lineman with at least two years of in-field experience which encompasses all aspects in the support and construction of high voltage transmission power line grids and all duties required by industry standards for the skill levels we are asking for on this particular project.

In our sector of the industry, safety is paramount . . . [The beneficiaries] are required to have at least two years of in-field experience as journeyman lineman. Have at least two years of in-field experience as a journeyman lineman better assures us that the employee hired truly understands, follows[,] and values the reasons for safety guidelines and practices in this field of work.

Now with the current project under contract, we are having a difficult time finding journeyman linemen with at least two years of experience as there is a shortage in the industry of these qualified individuals and we have had a hard time finding those who are qualified that are willing to work away from home for an extended period of time. . . .

Weather conditions and contract patterns can cause certain projects in our industry to have seasonal needs on a recurring basis annually. Our industry of work and the nature of the work we do, which is outdoors, [are] effected greatly by weather conditions, especially wind and rain. Therefore, depending on the severity of the

weather and for the safety of our employees there are times we will put a stop on production . . . Our seasonal work is usually from approximately May to January and our off-season time is approximately February to April, this time line has been consistent since I have been in operation with the company. Our industry of work and the nature of the work we do, which is outdoors, [are] effected greatly by weather conditions, especially wind and rain. Because of the area in which we are now contracted to work, these particular items have the greatest impact on the ability to safely complete the required work assigned to us.

The record indicates that the above-mentioned contract refers to the one referenced in the March 28, 2012 letter from Irby Construction to the U.S. Department of Labor, "Subject: Contract to provide crews" and "REF: [REDACTED]" (the petitioner in this matter). In pertinent part, this letter states the following:

This is a letter of assurance to inform you that [the petitioner] is currently under contract with [REDACTED] to provide crews in high voltage transmission power projects. The transmission power projects, being the bulk of their work this year, have temporary needs due to various factors including whether and contract permits.

Our use of [the petitioner's] transmission power service this year in our western division covers the peak season at its height namely May 21 2012 through January 30, 2012. Our tentative itinerary is in [REDACTED]. As usual, [the petitioner] will supply [REDACTED] with crews knowledgeable of the duties required of a journeyman lineman with a minimum of two (2) years of in-field experience. [REDACTED] has put [the petitioner] under contract instead of a passive agreement to provide a minimum of forty (40) people during the time period requested . . . .

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:

Duties: Erect and work from wood, concrete, or steel poles and lattice steel transmission towers. String, sleeve, sag clip, [and] dead-end bundle transmission conductors. Work energized high voltage distribution and transmission lines. Must not be sensitive to high power areas.

As required employment experience, at subsections F b.4a. and F b.4b of the ETA Form 9142, the petitioner specified 24 months as an entry-level journeyman lineman.

**IV. Minimum Job Requirements**

The first ground of the director's decision denying the petition was his determination that the petitioner failed to establish that any of the beneficiaries satisfy the minimum job requirements as

described by the petitioner on the ETA Form 9142. Again, the petitioner stated on the ETA Form 9142 that it requires 24 months of experience as an entry-level journeyman lineman.

In its October 3, 2012 letter, the petitioner stated the following:

[A]ll individuals we hire are very closely vetted. [The petitioner] has its own resources that question any potential employee to make sure that they have at least two years of in-field experience necessary to safely and efficiently perform the tasks and duties required.

As evidence that each beneficiary possesses the requisite 24 months of entry-level journeyman lineman experience, the record contains: (1) copies of resumes in which the beneficiaries describe their foreign work experience; (2) payroll documents covering the beneficiaries' prior H-2B employment for another construction company; and (3) a chart prepared by the petitioner summarizing each beneficiary's work experience. According to this information, each beneficiary possesses between 23 and 48 months of foreign work experience, and between 12 and 17 months of work experience in the United States.

This evidence, however, does not establish that the beneficiaries possess the 24 months of entry-level journeyman lineman experience mandated by the petitioner on the ETA Form 9142.

With regard to the beneficiaries' foreign work experience, it must be noted that a resume carries insignificant evidentiary weight. A resume represents a claim made by its preparer rather than evidence to support that claim, and the record lacks documentary evidence to establish or corroborate the claims made in the resumes submitted by the petitioner. 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)). As the record contains no other evidence substantiating any of the beneficiaries' claimed foreign work experience, the petitioner has not established that any of that claimed experience should be credited toward satisfying the 24-month period of entry-level journeyman lineman experience mandated by the petitioner on the ETA Form 9142.

Nor does the information submitted with regard to the beneficiaries' prior H-2B employment in the United States establish that they possess the 24 months of entry-level journeyman lineman experience mandated by the petitioner on the ETA Form 9142. First and foremost, the petitioner does not claim that any of the beneficiaries have accrued at least 24 months of such experience in the United States. To the contrary, the petitioner does not assert that any of the beneficiaries have gained more than 17 months of such experience while working in H-2B status in the United States. 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. 158 at 165.

For all of these reasons, the petitioner has failed to establish that the beneficiaries satisfy the requirements mandated by the petitioner on the ETA Form 9142, as required by

8 C.F.R. § 214.2(h)(6)(vi)(C). Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

#### V. Temporary Need for Services of Beneficiaries Based on Claimed Seasonal Need

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 entry-level journeyman linemen extends from May 23, 2012 through January 31, 2013. As noted above, the petitioner states that the beneficiaries' work is sensitive to "weather conditions, especially wind and rain."

However, as noted by the director in his November 9, 2012 decision denying the petition, the beneficiaries were granted H-2B status to work as electrical linemen from January 5, 2012 through October 31, 2012. The director stated the following:

As [the prior H-2B employer's] petition was approved during your claimed off-peak period of employment for the same services to be performed in the same area, it is not clear how your temporary need qualifies as a seasonal [one].

Counsel does not address this issue directly on appeal. Instead of explaining how the petitioner's need for entry-level journeyman linemen can reasonably be described as being "traditionally tied to a season of the year by an event or pattern and is of a recurring nature" when the beneficiaries have apparently been working in such a capacity throughout the year in H-2B status, counsel argues that the "construction" industry, as a whole, "is traditionally connected to a season or time of year." However, the petitioner filed this position for entry-level journeyman linemen, not general construction workers. If the petitioner in this case is to establish that its claimed need for the services of the beneficiaries as *entry-level journeyman linemen* is in fact tied to a season of the year by an event or pattern, and is of a recurring nature, as the first element of 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) requires, it must address the fact that such positions appear to be readily available on a year-round basis in Texas, the location of its claimed seasonal need. Also, as the proffered work is to be performed outside and essentially without shelter from the elements, the AAO does not dispute that it may be affected by "weather conditions, especially wind and rain," as the petitioner claims. However, the petitioner has not provided documentary evidence substantiating that such work is seasonal by nature, as counsel appears to argue. In fact, the U.S.

Department of Labor's *Occupational Outlook Handbook's* pertinent chapter, naturally entitled "Line Installers and Repairers," includes this contrary statement in its subsection entitled "Duties":

Storms and other natural disasters can cause extensive damage to networks of power lines. When a connection goes out, line repairers must work quickly to restore service to customers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Line Installers and Repairers," <http://www.bls.gov/ooh/installation-maintenance-and-repair/line-installers-and-repairers.htm#tab-2> (accessed Aug. 29, 2013).

Also, that same chapter's "Work Environment" subsection includes the following statements that materially conflict with the concept that the type of work for which this petition was filed is inherently seasonal (emphasis added):

The work of line installers and repairers can be physically demanding. Line installers must be comfortable working at great heights and in confined spaces. Despite the help of bucket trucks, all line workers must be able to climb utility poles and transmission towers and balance while working on them. *Their work often requires that they drive utility vehicles, travel long distances, and work outdoors in poor weather.*

*They often must work under challenging weather conditions, including in snow, wind, rain, and extreme heat and cold, to keep electricity flowing.*<sup>6</sup>

*Id.* at <http://www.bls.gov/ooh/installation-maintenance-and-repair/line-installers-and-repairers.htm#tab-3> (accessed Aug. 29, 2013).

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<sup>6</sup> In this same vein, the AAO notes the following information from the "Working Weather" section of the "Journeyman Lineman Job Description" at the National Joint Apprenticeship and Training Committee's Internet site for its Northwest Line Outside Electrical Apprenticeship (Oregon, Washington, and Idaho).

#### **WORKING WEATHER**

Being an outside lineman requires toughness and grit.

Climbing high on outside electrical towers and poles during all seasons and weather is required to get the job done.

At times power lines fail or become inoperable due to bad weather and storms. This is when the outside electrical industry performs critical duties.

Northwest Line Joint Apprenticeship Training Committee, *Outside Lineman Apprenticeship, Heavy Equipment, "Working Weather,"* <http://www.nwlinejatc.com/templates/template2/?page=45> (accessed Aug. 29, 2013).

Further, the AAO finds that the issue of the actual employer for which the above-mentioned H-2B petitioner was approved for electrical linemen from January 5, 2012 through October 31, 2012 is not material. The decisive fact is that petition was filed and approved for the same type of job as is the subject of the present petition and for the period of the year that the petitioner argues as being outside the season that it asserts in the petition.

Additionally, the AAO regards the earlier quoted language from the Irby Construction letter as countervailing evidence against the petitioner's claim of an H-2B seasonal need. As the letter states that [REDACTED] entered its contract with the petitioner for services from May 23, 2012 through January 31, 2013 to "cover[] the peak season at its height," it clearly implies that the type of work for which it contracted with the petitioner would also be performed by Irby even after its so-called "peak season."

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.

## VI. Conclusion

As discussed above the petitioner failed to establish: (1) that any of the beneficiaries satisfy the minimum job requirements described by the petitioner on the certified ETA Form 9142, Application for Temporary Employment Certification; and (2) that it has a temporary need for the services of the beneficiaries based upon a seasonal need.

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. § 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.