(b)(6)

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

U.S. Citizenship and Immigration Services

MAY 3 1 2013

DATE: OFFICE: CALIFORNIA 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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Ron Rosenberg
Acting 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, although the matter is moot due to the passage of time.

On the Form I-129 visa petition, the petitioner describes itself as a four-employee H-2 placement agency[1] established in 2001. In order to employ the beneficiary in what it designates as an employment, recruitment, and placement assistant position[2] from February 9, 2012 until September 30, 2012, the petitioner seeks to classify her as a temporary nonagricultural worker 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 had failed to 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 notice of intent to deny (NOID) the petition; (5) the petitioner's response to the NOID; (6) the director's decision denying the petition; and (7) 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 ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, the petitioner's failure, given that the beneficiary is a national of a country which was not designated as an H-2B participating country by the Secretary of Homeland Security at the time this petition was filed, to establish that approval of the petition would nonetheless be in the national interest of the United States.[3]

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[1] The petitioner provided a North American Industry Classification System (NAICS) Code of 541990, "All Other Professional, Scientific, and Technical Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541990 All Other Professional, Scientific, and Technical Services," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Feb. 22, 2013).

[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 43-4161, and the associated Occupational Classification of "Human Resources Assistants, Except Payroll and Timekeeping."

[3] The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

I. Law and Interpretations

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.
>
> * * *
>
> (E) *Eligible countries.*
>
> (*1*) H–2B petitions may be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries, with the concurrence of the Secretary of State, in a notice published in the Federal Register, taking into account factors, including but not limited to:
>
> (*i*) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;
>
> (*ii*) The number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;
>
> (*iii*) The number of orders of removal executed against citizens, subjects, nationals and residents of that country; and

(*iv*) Such other factors as may serve the U.S. interest.

(*2*) A national from a country not on the list described in paragraph (h)(6)(i)(E)(*1*) of this section may be a beneficiary of an approved H–2B petition upon the request of a petitioner or potential H–2B petitioner, if the Secretary of Homeland Security, in [her] sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(*i*) Evidence from the petitioner demonstrating that a worker with the required skills is not available from among foreign workers from a country currently on the list described in paragraph (h)(6)(i)(E)(*1*) of this section;

(*ii*) Evidence that the beneficiary has been admitted to the United States previously in H–2B status;

(*iii*) The potential for abuse, fraud, or other harm to the integrity of the H-2B visa program through the potential admission of a beneficiary from a country not currently on the list; and

(*iv*) Such other factors as may serve the U.S. interest.

(*3*) Once published, any designation of participating countries pursuant to paragraph (h)(6)(i)(E)(*1*) of this section shall be effective for one year after the date of publication in the Federal Register and shall be without effect at the end of that one-year period.

* * *

(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. 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.

II. Pertinent Facts and Procedural History

The petitioner filed the instant petition on April 17, 2012. As noted above, it described itself on the Form I-129 as a four-employee H-2 placement agency established in 2001, and claimed that it has a temporary need for the services of the beneficiary as an employment, recruitment, and placement assistant from February 9, 2012 through September 30, 2012.

The evidence of record indicates that the beneficiary was granted a J-1 visa on June 15, 2010 in order to perform services for the petitioner as a trainee, and that she entered the United States in J-1 nonimmigrant status on June 18, 2010. Her J-1 visa was valid through December 17, 2011.[4] The evidence of record indicates that during this time the beneficiary worked for the petitioner in a capacity similar to that proposed here. The petitioner then filed an H-1B petition on behalf of the beneficiary for additional employment in a similar capacity to that proposed here.[5] However, the H-1B petition was denied.[6] As of the date on which the instant petition was filed, the beneficiary was in the United States in B-2 visitor status.[7]

The director issued the RFE on April 27, 2012 and the NOID on June 20, 2012, and the petitioner submitted timely responses to both notices. The director denied the petition on August 16, 2012.

As noted above, the director denied the petition on a single basis – her conclusion that that the petitioner failed to establish a temporary need for the services of the beneficiary based upon a peakload need. However, as was also noted above, the AAO finds additionally that the petitioner failed to establish that approval of the petition would be in the national interest of the United States, given the fact that the beneficiary is a national of a country which was not designated as an H-2B participating country by the Secretary of Homeland Security at the time this petition was filed. As the AAO deems the latter issue to be the more important matter in this proceeding, it will address that subject first. Only then will the AAO address the director's sole ground for denying this petition.

Because it bears upon the issue of the petition's credibility, and was so noted in the director's decision, the AAO first wishes to note an entry on the petitioner's Form I-129 which, at minimum, reflects unfavorably upon the attention to detail and degree of regard paid by the petitioner to ensuring accuracy in its statements. As noted by the director, the petitioner checked the "No" box to the question (at Page 4, Part 4, Item 9 of the Form I-129) "Have you ever previously filed a petition for this beneficiary?" As the director noted, this attestation is untrue, as the petitioner had

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[4] The beneficiary's J-1 nonimmigrant status was designated as valid for the duration of her status (so annotated as "D/S" on her I-94 Card).

[5] *See* Form I-129, filed June 28, 2011, denied December 14, 2011.

[6] *Id.*

[7] *See* Form I-539, filed December 22, 2011 and approved March 15, 2012, with validity through April 17, 2012. It is noted that the beneficiary listed the petitioner's business address as her address on the Form I-539.

in fact previously filed an H-1B petition on her behalf. This is significant, because, regardless of the petitioner's intent, this incorrect answer served as an omission of a fact that is both relevant to the petition's adjudication and that, pursuant to the express language of the item in question, required an explanation at page 7, part 9 of the form - which also was not given. In fact, the petitioner not only made the misleading entry at item 9 but also entered, at Part 9 (Explanation Page) of the form, "N/A" thereby affirmatively attesting that there was no aspect of the petition requiring explanation.

As already indicated in this decision, the petitioner had in fact filed an H-1B petition on behalf of the beneficiary less than one year prior to making this claim, and it is noted that the petitioner signed the Form I-129 under penalty of perjury.

Further, as noted above, the petitioner claims to be an "H-2 placement agency" that has been in existence since 2001 (per item 12 on page 5 of the Form I-129). In light of the petitioner's business centering upon H petitions and its claimed business practice of assisting other companies file H-2A and H-2B petitions, it is reasonable to assume that the petitioner has at least a passing familiarity with the Form I-129. Although the petitioner claimed in its July 19, 2012 letter that its failure to disclose its prior filing history on behalf of the beneficiary "was not done purposefully" and was merely a typographical error, and argued that typographical errors are human in nature, the AAO is not persuaded. To the contrary, the AAO finds that the petitioner's failure to disclose its prior filing history significantly diminishes the probative value of any statements, assertions, and arguments made by the petitioner in support of this petition that are not corroborated by persuasive documentation. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.[8] *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Having made this initial observation, the AAO will next address the matter of whether approval of this petition would be in the national interest of the United States in spite of the fact that the beneficiary is a national of a country which was not designated as an H-2B participating country by the Secretary of Homeland Security at the time this petition was filed.

III. H-2B Designated Countries and U.S. National Interest

The beneficiary is a national of Paraguay. On January 18, 2012, the Department of Homeland Security (DHS), with concurrence by the Secretary of State, published a notice in the Federal Register designating the countries whose nationals are eligible to participate in the H-2B visa program. *See* 77 Fed. Reg. 2558 (Jan. 18, 2012). Paraguay was not one of the listed countries. *Id.* An individual who is a national of an unlisted country may only be granted nonimmigrant status under section 101(a)(15)(H)(ii)(b) of the Act if the Secretary of Homeland Security determines, in her sole and unreviewable discretion, that granting such status would be in the national interest of the United States. 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*).

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[8] Furthermore, an inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

U.S. Citizenship and Immigration Services (USCIS) has issued policy guidance discussing the evidence required to satisfy the U.S. interest requirement for beneficiaries from countries not listed by the Secretary as among those whose nationals are eligible to participate in the H-2B visa program. *See* Memorandum from Barbara Q. Velarde, Chief, Service Center Operations, *Clarification of evidence required to satisfy the U.S. interest requirement for beneficiaries from countries not listed on the H-2A or H-2B Eligible Countries List* (Jun. 1, 2009) (Velarde memo). The Velarde memo states, in pertinent part, the following:

> Each request for a U.S. interest exception is fact-dependent, and therefore must be considered on a case-by-case basis. Although USCIS will consider any evidence submitted to address each factor, USCIS has determined that it is not necessary for a petitioner to satisfy each and every factor. Instead, a determination will be made based on the totality of circumstances. For factor no. 3, USCIS will take into consideration, among other things, whether the alien is from a country that cooperates with the repatriation of its nationals. For factor no. 4, circumstances that are given weight, but are not binding, include evidence substantiating the degree of harm that a particular U.S. employer, U.S. industry, and/or U.S. government entity might suffer without the services of H-2A or H-2B workers from non-eligible countries.

The AAO takes notice of the strong countervailing U.S. interest in denying Paraguayan nationals eligibility to participate in the H-2B visa program. DHS has published the list designating the countries whose nationals are eligible to participate in the H-2B visa program on five occasions since the implementation of 8 C.F.R. § 214.2(h)(6)(E) – in 2008,[9] 2010,[10] 2011,[11] 2012,[12] and 2013[13] – and Paraguay has never been listed by the Secretary of Homeland Security as among those counties whose nationals are eligible for participation in the H-2B program. Although countries have been added and removed since formulation of the first listing in 2008,[14] the Secretary of Homeland Security has never deemed it appropriate to add Paraguay to this list. The AAO assigns heavy weight to the statements and intent of the Secretary of Homeland Security.

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[9] 73 Fed. Reg. 77729 (Dec. 19, 2008).

[10] 75 Fed. Reg. 2879 (Jan. 19, 2010).

[11] 76 Fed. Reg. 2915 (Jan. 18, 2011).

[12] 77 Fed. Reg. 2558 (Jan. 18, 2012).

[13] 78 Fed. Reg. 4154 (Jan. 18, 2013). As the instant petition was filed on April 17, 2012, the AAO includes this citation for reference purposes only.

[14] The original list contained 28 countries. *See* 73 Fed. Reg. 77729 (Dec. 19, 2008). In 2010, eleven countries were added. *See* 75 Fed. Reg. 2879 (Jan. 19, 2010). In 2011, fifteen countries were added and one was removed. See 76 Fed. Reg. 2915 (Jan. 18, 2011). In 2012, five countries were added. *See* 77 Fed. Reg. 2558 (Jan. 18, 2012). In 2013, one country was added. *See* 78 Fed. Reg. 4154 (Jan. 18, 2013). In other words, this has never been a static list. Countries have been added and removed as warranted by conditions.

As indicated above, the regulation at 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*)(*i*)-(*iv*) lists four factors which may be taken into account when determining whether it is in the national interest of the United States to approve a petition filed on behalf of an alien who is a national of a country not listed by the Secretary of Homeland Security as one whose nationals are eligible to participate in the H-2B visa program. The AAO shall address each factor separately.

The first factor, which is described at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*), requires the petitioner to demonstrate that a worker with the requisite skills is not available from a country whose nationals are eligible for participation in the H-2B program. In its April 16, 2012 letter submitted below, the petitioner noted that, as stated on the TLC, it requires an individual possessing both: (1) written and spoken fluency in the Spanish language; and (2) six months of similar work experience. The petitioner noted that only 15 Spanish-speaking countries appeared on the 2012 list of designated countries and, referencing its own business activities, argued as follows:

> [W]e know with firsthand experience that it is nearly impossible to find individuals that are fully fluent in both English and Spanish in any Latin American or Spanish speaking nation . . . Simply put, we are one of the largest agencies in the world that recruits H-2A and H-2B workers from any nation, and therefore we are an absolute authority on the subject. As such, we know better than anyone, and our judgment should be trusted, that securing a candidate for this position from any nation on the approved H-2A and H-2B country list is simply not plausible . . . To our knowledge [the beneficiary] is the only person on the planet that meets all the criteria of this temporary position. . . .

In its June 6, 2012 letter, the petitioner claimed that it had contacted recruitment companies in Spanish-speaking countries on the list of designated countries, and that those companies "diligently attempted to find candidates for the petitioner's temporary need but were unable to do so." As evidence of this search, the petitioner submitted letters from who works for a company located in Mexico known as from who works for a company located in Mexico known as and from , who works for a company located in Nicaragua known as

In his May 22, 2012 letter, stated that his company recruits workers from countries named on the DHS list of designated countries whose nationals are eligible for participation in the H-2B program, and that although his agency attempted to locate an appropriately-skilled individual for the petitioner, it was unable to do so. claimed that it is very difficult to locate workers who are fluent in both English and Spanish, and that it has been impossible to find such a person who also possesses the appropriate work experience.

In his May 31, 2012 letter, stated that his company recruits workers from all Spanish-speaking countries named on the DHS list of designated countries whose nationals are eligible for participation in the H-2B program, and that although his agency attempted to locate an

appropriately-skilled individual for the petitioner, it was unable to do so. claimed that only 4.55% of the Mexican populace is fluent in the English language, and claimed further that "[u]nfortunately, this is the highest English speaking percentage of any Spanish speaking nation on the H-2A and H-2B approved countries list." He also made the following assertion:

> In Spanish speaking nations anyone who can speak English is very successful and has an excellent job already. Such people are generally not interested in positions in the U.S., which also make[s] this task next to impossible.

In his May 20, 2012 letter, also stated that his company recruits workers from all Spanish-speaking countries named on the DHS list of designated countries whose nationals are eligible for participation in the H-2B program, and that although his agency attempted to locate an appropriately-skilled individual for the petitioner, it was unable to do so.

Upon review, the AAO finds that the evidence submitted by the petitioner fails to demonstrate that no workers with the requisite skills are available from any of the countries on the DHS list of countries whose nationals are eligible for nonimmigrant status under section 101(a)(15)(H)(ii)(b) of the Act when the petition was filed and the petitioner submits none on appeal. In this regard, the AAO finds first that the letters from and do not constitute probative evidence toward satisfying this criterion, as no documentary evidence was provided to support any of the assertions made by any of these authors. The record contains no evidence regarding the business activities of any of these companies, no evidence regarding their recruitment activities in each of the thirteen Spanish-speaking countries on the 2012 list of designated countries,[15] and no evidence regarding their recruitment activities on behalf of the petitioner for the specific petition proposed in this petition. In fact, the petitioner failed to support any of the assertions made by these authors with documentary evidence. 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)).

Even if these letters did constitute probative evidence, they would still not satisfy the petitioner's burden toward demonstrating that a worker with the requisite skills is not available from a country whose nationals are eligible for participation in the H-2B program. First, as noted above, no documentary evidence was provided to support any of the assertions made by any of these authors. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, the AAO notes factual errors made by at least one of these authors. In his letter, stated that, at 4.55%, Mexico has the highest percentage of English speakers of any Spanish speaking nation on the H-2A and H-2B

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[15] The Spanish-speaking countries on the 2012 designated list included Argentina, Chile, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Peru, Spain, and Uruguay. 77 Fed. Reg. 2558 (Jan. 18, 2012). The record contains no evidence that these companies conducted recruitment in all thirteen of these countries, as claimed. 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.

approved countries list.[16] However, a simple web search reveals that, according to the European Commission, at least 22% of the population of Spain reports being able to speak the English language,[17] which contradicts contention that no more than 4.55% of the population in any of the Spanish-speaking countries appearing on the 2012 designated list speak English. Furthermore, the petitioner provided no evidence to support claim that *all* English speakers, in *all* Spanish-speaking countries did not limit this claim to the countries on the 2012 designated list) are already "very successful," and already have "excellent" jobs. 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. 158 at 165.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

The petitioner has failed to demonstrate that a worker with the requisite skills is not available from a country whose nationals are eligible for participation in the H-2B program. The evidence submitted by the petitioner in satisfaction of this first factor for establishing U.S. national interest described at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*) consisted mainly of its own testimony and the testimony of three agents in Latin American that it purports to have worked with.[18] However, it did not support the assertions made in those letters with documentary evidence. The petitioner, therefore, has failed to satisfy 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*).

The second factor, which is set forth at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*ii*), requires the petitioner to submit evidence that the beneficiary was previously admitted to the United States in H-2B status. As the beneficiary was not previously admitted to the United States in H-2B status,[19] the petitioner has not satisfied 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*ii*).

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[16] It is noted that did not provide a citation for this statistic. 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.

[17] *See* European Union, European Commission, Directorate-General for Education and Culture, Directorate-General for Translation, and Directorate-General for Interpretation, *Special Eurobarometer 386: Europeans and their Languages*, 21 (June 2012) (available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_386_en.pdf).

[18] The AAO does not consider local newspaper advertisements and a job order placed with the South Dakota Department of Labor and Regulation to have been particularly useful for recruiting workers from the countries listed on the 2012 list of designated countries.

[19] The petitioner's argument made in its April 16, 2012 letter that this "is obviously the least important factor listed by the Service in in regards to determining U.S. national interest" will not be addressed. Neither the statute nor the regulations grant the AAO any authority to determine the relative merits of the immigration laws of the United States.

The third factor, which is set forth at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iii*), requires the petitioner to demonstrate that the potential for abuse, fraud, or other harm to the integrity of the H-2B visa program could not occur if the beneficiary is admitted. In its April 16, 2012 letter, the petitioner stated that it is one of the largest and most accountable H-2 placement agencies in the United States and that, as such, it knows the immigration and labor laws "as well as or better than any entity out there, whether private or public." This argument is not persuasive. Beyond the specific practices of the petitioner, the H-2B regulations and the Secretary of Homeland Security's annual list of eligible countries specifically link the integrity of the H-2B program with the practices of certain countries. While the petitioner and beneficiary may not have histories of noncompliance issues, the petitioner has simply not provided sufficient evidence to overcome the Secretary of Homeland Security's concern that Paraguay is not meeting the standards set out in the H-2B regulations, which has prevented it from being placed on that list.[20] The petitioner has not satisfied 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iii*).

Finally, the fourth factor, which is described at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iv*), requires the petitioner to submit evidence establishing "other factors" which may serve the U.S. national interest. In determining whether a petitioner has satisfied the fourth factor, circumstances which are to be given weight, but are not binding, include evidence substantiating the degree of harm that a particular U.S. employer, U.S. industry, and/or U.S. government entity might suffer without the services of H-2B workers from non-eligible countries. *See* Velarde memo at 2. In its April 16, 2012 letter the petitioner claimed that, as an H-2 placement agency, "the outcome of [its] actions on the U.S. market [have] an impacting affect [sic] on the U.S. economy on a national level." However, while the petitioner named several of the companies for whom it has assisted in the filing of H-2 petitions, it did not explain why, let alone submit evidence to establish that, other H-2 placement agencies cannot provide the same service to those companies if this particular petition is denied. Nor did the petitioner provide any evidence substantiating the degree of harm it might itself suffer without the services of the beneficiary. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iv*).

When considered in the aggregate, the relevant evidence does not establish that approval of the petition would be in the national interest of the United States despite DHS's decision not to include Paraguay on the list of H-2B eligible countries. As stated previously, the AAO assigns heavy weight to the statements and intent of DHS in keeping Paraguay from the list, and upon consideration of the factors enumerated at 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*)(*i*)-(*iv*) in their totality, the AAO finds that the petitioner has failed to establish that its employment of the beneficiary is essential to or would materially advance any other U.S. interest.

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[20] As noted above, the factors listed at 8 C.F.R. § 214.2(h)(6)(i)(E)(*i*) as among those taken into account by the DHS Secretary, with concurrence by the Secretary of State, when formulating the list include: (1) the country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals and residents of that country; and (4) such other factors as may serve the U.S. interest. The petitioner does not address any of these factors.

Upon consideration of the totality of factors appropriate for consideration by USCIS under 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*)(*i*)-(*iv*), the relevant evidence fails to establish that the beneficiary is eligible for nonimmigrant status pursuant section 101(a)(15)(H)(ii)(b) of the Act as a national of Paraguay, a country not listed by the DHS Secretary pursuant to her authority provided at 8 C.F.R. § 214.2(h)(6)(i)(E)(*1*), as one whose nationals are eligible for such status.[21] Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which is not the case), the petition could still not be approved.

IV. Peakload Need for Services of the Beneficiary

As noted above, the petitioner stated on the Form I-129 that its need for the services of the beneficiary 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*).

Upon review, the AAO finds that the record of proceeding does not establish that the petitioner has a temporary, peakload need for the services of the beneficiary as an employment, recruitment, and placement assistant.

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 petitioner has satisfied one of the elements of proof at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) which must all be met to establish an H-2B peakload need. However, as will now be discussed, the petitioner has not established the other elements of a peakload need.

To satisfy the second required element of the H-2B peakload criterion at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), the petitioner must establish 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. In this regard, the petitioner claims that its need for the services of the beneficiary as an employment, recruitment, and placement assistant would extend from February 9, 2012 through September 30, 2012. In the January 10, 2012 letter it submitted to the U.S. Department of Labor, the petitioner stated the following:

> We assist employer clients in maneuvering through the H-2A and H-2B visa programs. We also actively recruit H2 workers in various nations and link them up with the U.S. employers, after their final authorization is obtained from all regulatory agencies. Once the workers arrived in the country and are working for their pre-selected employer, we serve as a source for both parties to answer regulatory questions and ensure compliance [with] the programs['] requirements.

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[21] As noted above, this determination is not subject to review. *See* 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*).

The petitioner explained that virtually all of its clients need their H-2 workers to arrive sometime between January 1 and October 1, with the highest percentage arriving between January 1 and April 30. The second highest percentage begins working between April 30 and July 1. Finally, according to the petitioner, a significant number of workers begin working between July 31 and October 1. The petitioner reported that none of its clients need workers to arrive between October 2 and December 31, and only a few will need replacement workers during this period of time.

The petitioner explained further that it conducts 95% of its recruitment each year between December 1 and September 30. The remaining recruitment (five percent), which takes place during the months of October and November, is for replacement workers.

The petitioner claimed that, as a result of these factors, it has a "built in peak load need" for employment, recruitment, and placement assistants. The petitioner claimed that it experienced a 40% growth rate in 2011, and that it expects similar growth in 2012. As noted by the petitioner, "[w]e do not need permanent labor for this position but rather 2 temporary workers[22] to make sure our operation is properly staffed during our peak period when almost all recruitment and placement activities are completed."

The director's August 16, 2012 decision denying the petition on this criterion rested on several factors. First, the director noted that according to the petitioner's quarterly state wage reports, the petitioner employed one individual between January 2011 and April 2011, and two employees between May 2011 and March 2012. Furthermore, the petitioner paid the most wages to its employees between October 1, 2011 and March 31, 2012. The director found that this employment history failed to demonstrate the existence of a peakload need between February and September.

The director also found the invoices submitted by the petitioner insufficient to demonstrate that its claimed temporary need for the services of the beneficiary is a temporary one. The petitioner submitted several invoices it issued in 2011, with the following monthly breakdown:

Month	Number of Invoices
January 2011	2 invoices
February 2011	2 invoices
March 2011	2 invoices
April 2011	3 invoices
May 2011	4 invoices
June 2011	3 invoices
July 2011	4 invoices
August 2011	3 invoices
September 2011	3 invoices
October 2011	None
November 2011	None

[22] Although the TLC was filed and certified for two workers, the petitioner filed the instant petition with USCIS for one named beneficiary.

December 2011	4 invoices

According to the director, the invoices from January and December match, or exceed, those from the claimed peakload period of February 9 to September 30.

The director was similarly unconvinced by the petitioner's spreadsheets showing the numbers of H-2 cases handled by the petitioner and its overseas affiliate:

Month	Number of Cases Processed: Petitioner's Permanent Staff	Number of Cases Processed: Petitioner's Overseas Affiliate
January 2011	6	None reported
February 2011	9	None reported
March 2011	7	55
April 2011	21	11
May 2011	43	20
June 2011	18	21
July 2011	11	3
August 2011	21	13
September 2011	9	26
October 2011	2	2
November 2011	2	None reported
December 2011	None reported	None reported

According to the director, the number of cases processed by the petitioner's full-time staff in the United States in January 2011 (6) was "almost identical" to the number processed in March 2011 (7), and "not significantly less" than the numbers processed in February 2011 (9),[23] September 2011 (9), and July 2011 (11). As such, the evidence was not sufficient.

On appeal, the petitioner argues that the director erred in several areas. The petitioner argues first, with regard to its 2011staffing levels, that payroll data is not always necessarily a relevant way to ascertain a peakload need because in a "unique" case such as this, "a new need [has] created the peakload need," and that the new need "was not evident in the payroll data because we were not temporary workers needed for this peakload need, thus causing us to turn to the H-2B program." As argued by the petitioner, "[i]f a small employer cannot find qualified workers for its peakload need then payroll data is not going to evidence any peakload need." While the AAO does not dispute any of these statements, the fact remains that the petitioner has failed to submit sufficient documentary evidence regarding the claimed increase in business it is expecting. The petitioner cannot argue, successfully, that its payroll cannot be used to discount its claim without submitting evidence that affirmatively *does* support its claim of a peakload need.

[23] With regard to February, it is noted that the petitioner's claimed peakload need begins on February 9, a date by which one-third of the month would have already passed. Thus, it is not clear that all of the invoices from February 2011 should even be considered.

With regard to the invoices and H-2 cases discussed by the director, the petitioner argued that the dates used by the director were in fact the dates on which various beneficiaries of H-2 petitions were interviewed, and that most of the work on those beneficiaries' cases was completed "weeks and even months" before the interviews occurred. Again, the AAO finds this explanation plausible. However, the fact that these invoices do not necessarily detract from the petitioner's claim does not mean that they *support* it. If the petitioner is going to claim that these invoices and case figures support its claim of a peakload need, and then insist that the dates contained on them cannot be used, it is up to the petitioner to submit a more detailed explanation as to the actual work it performs on these types of cases, including timelines, beyond general statements.

Although it is not determinative or necessary for its conclusion regarding this element, there is another finding that the AAO wishes to make which weighs negatively in the consideration of this particular element, and that is the aforementioned filing of the H-1B petition for the beneficiary to perform the same type of services specified in this petition. In the absence of persuasive evidence that the employment situation and vacancies were as stated by the petitioner, and in the light of and in conjunction with the inconclusive nature of the evidence submitted in support of a peakload need, the AAO finds that the H-1B attempt suggests that this H-2B petition's need for the services of an employment, recruitment, and placement assistant is not peakload but ongoing and permanent.

In sum, the petitioner's arguments made on appeal do establish why the evidence submitted to the service center does not detract from its claim of establishing the second element of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*). However, a petitioner's mere establishment that its evidence fails to affirmatively *harm* its case is not sufficient to satisfy its burden of proof. Even if the AAO has no doubts regarding the credibility of a petitioner's evidence, that petitioner is still required to make an affirmative case under 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*). Here, the petitioner has failed to do so. 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 plug that hole. 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 petitioner has failed to 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."

In that portion of her denial addressing this requirement of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), the director noted that the beneficiary has worked for the petitioner in J-1 status, and that the petitioner subsequently filed an H-1B petition on her behalf.

On appeal, the petitioner claims that it filed an H-1B petition on behalf of the beneficiary because a permanent position opened, and that "[i]t was our hope that the beneficiary would be able to take

that spot," and that it was only after the H-1B petition was denied that it turned to the H-2B program. The petitioner argues that it has two permanent positions and two temporary ones and, implicitly, that the beneficiary was going to fill one of the permanent ones in H-1B status, but now that the H-1B petition has been denied, she will simply fill one of the temporary positions in H-2B status.

Next, the AAO notes an additional aspect of this petition, namely, the fact, reflected in the record, that, prior to the filing of this H-2B petition, the petitioner had already unsuccessfully attempted to secure the beneficiary's employment as an H-1B temporary worker – a nonimmigrant classification that is not constrained by employment-approval periods as short as that allowed for the H-2B nonimmigrant classification.

In the light of the total evidentiary context of this particular H-2B petition - which includes its unpersuasive evidence of a genuine peakload need and also what the AAO finds to be an unsubstantiated and unpersuasive explanation of its H-1B endeavor for this beneficiary – the AAO finds that the petitioner has not established that the type of temporary addition to its staff sought in this this particular H-2B petition would not become part of its regular operation. In this regard, the AAO underscores that, per the wording of the regulation, this element is one that the petitioner must affirmatively establish. Here, the petitioner has not met that burden.

The beneficiary performed duties similar to those proposed in this position for the petitioner for 18 months in J-1 status. The petitioner then sought to employ her on a full-time basis in H-1B status, and it was only after that petition was denied that it sought to employ her on a temporary basis in H-2B status.[24] This fact pattern is not indicative of an employment situation that will not become a part of the petitioner's regular operations, and, as already noted, the AAO is not persuaded by the petitioner's explanation. Accordingly, the petitioner has also failed to satisfy the third element of the peakload criterion at C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

As the petitioner has not satisfied all of the essential elements of the peakload regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), and it has consequently failed to establish that its 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 set forth above, the petitioner has failed to overcome the director's determination that the petitioner had failed to establish a temporary need for the services of the beneficiary based upon a peakload need. Beyond the decision of the director, the AAO finds additionally that the petitioner has failed to establish that approval of this petition would be in the national interest of the United States, given

[24] It is worth noting again that the petitioner is also required to establish that its need for the services of the beneficiary "will end in the near, definable future," as required by 8 C.F.R. § 214.2(h)(6)(ii)(B).

that the beneficiary is a national of a country which was not designated as an H-2B participating country by the Secretary at the time this petition was filed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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