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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 07 265 50791 Office: VERMONT SERVICE CENTER Date: NOV 20 2007

IN RE: Petitioner: [redacted]
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:

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.

for Marjorie H. Sergeant
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The petition was filed after the Department of Labor (DOL) decided to not issue a temporary labor certification, having determined that unique, complex, and persistent circumstances generated in the Gulf Region by Hurricanes Katrina and Rita made it impossible for DOL to determine whether the employer's need is temporary within the meaning of the Citizenship and Immigration Services (CIS) regulations on the H-2B program. The nonimmigrant visa petition was approved by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(*2*)(*ii*). The decision of the director will be withdrawn, and the matter will be remanded to him for further action and consideration.

The director determined that sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the DOL's employment policies have been observed, and that the need for the services to be performed is temporary. The AAO disagrees.

The AAO finds that, as presently constituted, the record of proceeding fails to establish (1) that there is a need for 400 ironworkers as asserted, and (2) that the asserted need satisfies one of the H-2B temporary need categories at 8 C.F.R. § 214.2(h)(6)(ii)(B) (that is, one-time occurrence, seasonal need, peakload need, or intermittent need). The AAO will remand the petition with instruction that the director issue a request for evidence (RFE) to afford the petitioner an opportunity to provide additional evidence to address the AAO's concerns addressed below.

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), 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)(6), *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*, provides, in part:

> (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 occurence.* 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 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.

This petition was filed on September 25, 2007. It was filed in order to classify 400 unnamed aliens as H-2B ironworkers in Louisiana for the period October 1, 2007 to August 31, 2008. According to the Form I-129 (Petition for Nonimmigrant Worker) the petitioner is a contractor that was established in 1985 and currently employs three (3) people. The Form I-129 states a gross annual income of $150,000 and a net annual income of $75,000. Page 8 of the Form I-129 Supplement H identifies the proposed employment as seasonal and recurrent annually.

The record's unsigned and undated Temporary Need Statement states that the petitioner "has been providing forestry services since 1984" and now "find[s] it necessary to branch out to help provide crews of ironworkers for the Disaster relief area, because of damage caused by Hurricane Katrina." The Temporary Need Statement indicates that the petitioner has not been involved previously with providing ironworkers, as it states that, because its past business "has been primarily forest work, "it has "no staffing chart to provide as to past temporary need workers [sic] for ironworkers."

In the following section the AAO will describe the evidentiary deficiencies that it finds in the record of proceedings. Because they are material deficiencies that preclude approval of the petition, the AAO will withdraw the director's decision. Because the deficiencies causing the withdrawal are not mentioned in the director's decision, the AAO will remand this matter to the director with instruction to issue an RFE that affords the petitioner an opportunity to address them. The petitioner should note that each deficiency is material to the disposition of the petition and, if not remedied by additional evidence in response to the RFE, will be a basis for denial of the petition.

EVIDENTIARY DEFICIENCIES

If the petitioner filed the petition in order to secure H-2B workers that it would employ on assignment to clients, the specific need underlying this petition belongs to those particular clients, for whom and at whose work locations the petitioner's H-2B employees would perform as ironworkers. In such case, it is incumbent upon the petitioner to submit to CIS sufficient documentation from each of these clients to establish that this client firm's particular need for temporary ironworkers qualifies as an H-2B temporary need in accordance with the regulation at 8 C.F.R § 214.2(h)(6). This the petitioner has not done.

As discussed below, the evidence of record fails to demonstrate that: (1) at the time the petition was filed, the clients identified in the record of proceedings had definite, as opposed to speculative, work requirements for temporary ironworkers in Louisiana from October 1, 2007 to August 31, 2008; (2) that these actual work requirements necessitated a total number of 400 temporary ironworkers; (3) at the time the petition was filed,

there were in place contractual arrangements that obligated the petitioner to provide, and its clients to use, 400 ironworkers for the period specified in the petition; and (4) that the labor needs upon which the petition is based satisfy the regulations on H-2B temporary need, at 8 C.F.R § 214.2(h)(6).

The evidence of record does not establish the particular labor needs and business obligations underlying this petition. The Temporary Need Statement asserts that the petitioner "has been contracted to raise, place and unite iron girders to form structural framework[s] for buildings that were destroyed by Hurricane Katrina," that "the work will begin in October 2007," and that "our contracts will end at the end of August of 2008." However, the record contains no copies of the contracts. The record's letters from the petitioner's clients do not remedy this deficiency.

None of the letters attest to the specific terms of any contractual obligations involving the petitioner, the client providing the letter, and the employment of H-2B temporary ironworkers. The Rustin Industries letter states that, except for supervisors and "most of the operators," all labor for its contract with FEMA to refurbish temporary trailer parks "will be furnished by [the Petitioner]." The letters from Compact Manifolds International, Coastal Production Systems, and Trinity Fabrications –whose language is almost identical – each assert confidence in the petitioner's "ability to produce quality employees for our company." The Viscardi Industries letter states that it will use the petitioner "for outside labor needs" for projects "expected to start off between October and November of 2007." This letter identifies neither the projects, the number of workers required, nor the dates that they will be needed. None of the letters specify a need for temporary ironworkers, and the Viscardi Industries letter excludes ironworkers, stating: "We will need welders, fitters, and general laborers as required." None of the letters specify the number of workers needed; none explains how its general description of labor needs qualifies under any of the four H-2B temporary-need categories at 8 C.F.R. § 214.2(h)(6)(iv), above; and none is accompanied by documentary evidence that establishes that the client that authored the letter has any type of temporary need described at 8 C.F.R. § 214.2(h)(6)(iv).

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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof.

While they illustrate the need for workers on the Gulf Coast of Louisiana, the record's documents about the ravages of Hurricane Katrina and the massive rebuilding efforts underway on the Gulf Coast are not evidence of the petitioner's clients particular needs for ironworkers at the time that the petition was filed.

The number of ironworkers sought in this petition – 400 - is remarkable for a petitioner that has three employees, has apparently no substantial experience outside the forestry services industry, and has not provided documents that substantiate the need for such a high number of ironworkers. It should be noted that an employment contractor may not use an H-2B petition to build or maintain a staff of temporary workers to be at the ready to fulfill clients' needs that have not been actualized at the time the petition was filed. *See, Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

Because they are unsigned and undated, the AAO accords no evidentiary weight to either (1) the Tentative Itinerary, or (2) the Temporary Need Statement. Without a signature attesting to their content, these documents appear, at best, to be the unendorsed drafts of an unknown author.

The AAO finds significant inconsistencies between the petition and client letters submitted in its support. The petition is for 400 temporary ironworkers. However, of the five client letters, one specifies only welders, fitters, and general laborers, and the other four do not specify ironworkers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

CONTENT OF THE RFE

The director should issue an RFE that provides the petitioner an opportunity to provide the following documentary evidence:

1. With regard to each of the five clients identified in the record of proceedings: copies of whatever work orders, memoranda of agreement, or other contractual documents that establish, as of September 25, 2007 (the date on which the petition was filed), the number of temporary ironworkers that the petitioner was obligated to provide that particular client, the period for which the workers would be provided, and the terms and conditions regarding the employment of the ironworkers.

2. From each of the five clients identified in the record of proceedings: tables summarizing monthly payroll and staffing reports, certified as true and accurate, that establish the numbers of temporary and permanent ironworkers that this particular firm employed during each month of the years 2005 and 2006 and during the period January 1, 2007 to October 1, 2007. The petitioner is to provide the original of each such document submitted by the clients.

3. From each of the five clients: copies of whatever contracts, memoranda of agreement, internal memoranda, or other documents from its business records that, by September 25, 2007, established the exact number of temporary ironworkers that it needed for the period October 1, 2007 to August 31, 2008.

4. From each of the five clients: an original signed letter, that explains why the following letters from them regarding their labor needs did not identify ironworkers as a needed type of worker: (a) Rustin Industries, LLC to the petitioner, dated September 10, 2007; (b) Compact Manifolds International, Inc., to whom it may concern, dated July 10, 2007; (c) Coastal Production Systems, LLC, to whom it may concern, dated July 10, 2007; (d) Trinity Fabrication, to whom it may concern, dated July 10, 2007; and (e) Viscardi Industries Inc., dated September 10, 2007.

5. From the petitioner itself: an original letter, on the petitioner's letterhead, and signed by an appropriate management official of the petitioner, that:

    a. Explains how the petitioner arrived at 400 as the number of temporary ironworkers for which it should petition for the period October 1, 2007 to August 31, 2008;
    b. Includes as enclosures copies of whatever documents from its business records corroborates how the petitioner arrived at 400 ironworkers for the period October 1, 2007 to August 31, 2008;
    c. Explains why no date and no signature appear on these documents that were submitted to support the petition: (1) the Temporary Need Statement and (2) the Tentative Itinerary. Though unsigned, both documents have a signature block for [redacted] as the petitioner's HR Director.
    d. Includes, if the petitioner wishes these documents to be considered, a signed resubmission of the Temporary Need Statement and the Tentative Itinerary. To be considered, the resubmissions must bear the original of the signature.

The director may also request any additional information or evidence that he deems necessary to adjudicate the matter at hand.

As discussed above, the director's decision will be withdrawn, and the matter will be remanded for the director to issue an RFE consistent with this decision's discussion of the documentation to be requested in the RFE. After consideration of whatever matters the petitioner submits in response to the RFE, the director will enter a new decision and certify it to the AAO for review.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of October 9, 2007 approving the petition is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. Upon completion, the director shall certify the decision to the AAO for review.