U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-C-D- CORP.

DATE: JULY 18, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a construction company, seeks to extend the Beneficiaries' employment as cement masons under the H-2B nonimmigrant classification for temporary nonagricultural services or labor. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The H-2B program allows a qualified U.S. employer to bring certain foreign nationals to the United States to fill temporary nonagricultural jobs. The Petitioner's service or labor need must be a one-time occurrence, seasonal, peakload, or intermittent.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner had not established an H-2B temporary peakload need for the Beneficiaries' services.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director's decision was erroneous and that the evidence in the record of proceedings is sufficient to establish its claim.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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:

> [A]n 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)(i)(A) largely restates this statutory definition, but adds that employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The scope of employment within the H-2B category is addressed at 8 C.F.R. § 214.2(h)(6)(ii):

> *(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.

II. TEMPORARY NEED

In the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it is a 43-employee construction company in The Petitioner indicated that it specializes in the construction of single-family residences. The Petitioner claimed a temporary, peakload need and seeks to extend the Beneficiaries' current H-2B classification.

The Petitioner stated ' is currently experiencing a significant increase in U.S. military related construction from the build-up of U.S. military facilities and other federally funded projects on ' The Petitioner further provided:

> The U.S. military build-up bears a direct and causative relationship to the current increase in the Petitioner's construction business. In order to carry-out that build-up, will experience a short duration increase of temporary [Department of Defense] and civilian personnel along with their dependents. This increase in population related to military build-up is driving a demand for additional housing. In response to this need for new housing, [the Petitioner] is currently providing construction services for seven single family residences [as referenced in contractual documents submitted with the petition.]

The Petitioner also indicated that secondary market driver, tourism, is also currently on an upswing.

III. ANALYSIS

Upon review of the record in its totality and for the reasons explained below, we conclude that the Petitioner has not established that its need for the Beneficiaries' services qualifies as an H-2B temporary peakload need.

We will first address the Petitioner's contention that the Director's decision is inconsistent with what it sees as the flexibility that U.S. Citizenship and Immigration Services (USCIS) expects its officers to apply when evaluating claims of an H-2B temporary need.

Referring to an excerpt from the *Federal Register* that it submits as an appellate exhibit, the Petitioner frames the claimed error as follows:

> [T]he Petitioner appeals this Decision on the grounds that the Service's factual determination that the Petitioner did not satisfy it had a temporary need for the Beneficiaries under 8 CFR [§] 214.2(h)(6)(ii)(B)(3) was in error. USCIS in its comments to 73 FR 78104 amending 8 CFR [§] 214.2(h)(6)(ii)(A) to provide a more flexible definition of temporary need, indicated that "this more flexible definition of 'temporary' will allow U.S. employers and eligible foreign workers the maximum

> flexibility allowed under this program to complete projects with a definable end that require H-2B workers when U.S. workers are otherwise unavailable. . . ."

The Petitioner's quotation and excerpt are from section 10, "Temporary Need," of the supplementary information to the final rule amending the regulations regarding the H-2B program, which was published in the *Federal Register* on December 19, 2008. *See* 73 Fed. Reg. 78104, 78118–78120 (Dec. 19, 2008.) The quotation relates to the final rule's modification of a particular sentence in the main paragraph at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*Nature of a Petitioner's Need*). Prior to the final rule, the regulation stated, "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 rule modified that sentence to read, "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 three years."

In this regard, we note that the supplementary-information statement upon which the Petitioner focuses merely explains that the modification is a "more flexible definition of 'temporary' [that] will allow U.S. employers and eligible foreign workers the maximum flexibility allowed under [the H-2B] program to complete projects with a definable end that require H-2B workers when U.S. workers are not otherwise available. Thus, the quoted statement merely highlights that the final rule modified the regulatory language to embody the maximum flexibility that the H-2B program will allow. The statement does not exhort USCIS officers to adopt any temporary-need standard other than those codified in the regulation.

As we shall discuss below, the Petitioner has not established that the Director's decision incorrectly applied the H-2B "temporary need" standards to the facts of this case. The Petitioner has not demonstrated that the Director's ultimate determination to deny the petition was erroneous. We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). In evaluating the evidence, it directs us - and the Director - to determine the truth not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating this appeal, we have examined and weighed 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.

A. General Time Limit for Temporary Need

A petitioning employer must establish that its need is temporary in that it "will end in the near, definable future," generally "limited to one year or less." 8 C.F.R. § 214.2(h)(6)(ii)(B). The record reflects that the Petitioner had three previously approved H-2B petitions for the Beneficiaries. The initial petition was approved in November of 2012 and was subsequently extended on two occasions, in July 2013 and July 2014, respectively. The Petitioner filed the present petition to retain 16 of those workers from July 2015 to May 2016.[1] Thus, the record indicates that its need for the Beneficiaries' masonry services encompasses a continuous period of approximately 42 months.

[1] The instant petition was filed on behalf of 17 Beneficiaries. Since the filing of the petition, the Petitioner requested that

Thus, the evidence of record establishes that the Petitioner's need for the cement masons is for a continuous period that exceeds the regulation's year-or-less general limitation to qualify as "temporary" within the meaning of the H-2B program. Additionally, the record's information regarding the extension of the "Substantial Completion Date" of a number of its projects to December 31, 2016, a date beyond the requested validity period, is not consistent with a need for cement masons to supplement the Petitioner's staff that "will end in the near definable future."

B. Peakload Need

To establish a peakload need, the record must satisfy all three prongs of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*): (1) that the Petitioner 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 its staff will not become a part of the Petitioner's regular operation. The record does not satisfy any of these prongs.

1. Regular Employment of Permanent Workers for the Services or Labor

The Petitioner has not established that it regularly employs permanent workers to perform cement masonry labor. In the H-2B petition, the Petitioner indicated that it has 43 employees. In support of this assertion, the Petitioner provided copies of its Forms [redacted] Department of Revenue and Taxation Employer Quarterly State Wage Reports, for the period from October 1, 2013, through June 30, 2015. While these reports demonstrate that the Petitioner employed between 28 and 42 persons during this period, including the Beneficiaries, there is no evidence that any of the other individuals on the Petitioner's payroll are employed as cement masons.

Although these reports contain individuals' social security numbers, they do not provide information about whether the individuals are currently employed by the Petitioner, how long they have been so employed, or what their positions are. The Petitioner has not supplemented the record with copies of common business documents such as payroll, timekeeping records, or employment contracts to establish the workers' positions and their employment periods.

Although the Petitioner also submitted copies of recent paystubs for its employees, these documents are likewise devoid of information identifying the positions held by these individuals. In the absence of regularly maintained business records or other independent documentation confirming the Petitioner's assertions about its employment of permanent workers as cement masons, we find that the preponderance of the evidence does not establish that the Petitioner regularly employs permanent workers as cement masons on a regular basis.

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one Beneficiary be removed from the petition. The Petitioner's request was granted, and the petition currently contains 16 Beneficiaries.

2. Need to Supplement Permanent Staff

The Petitioner also has not established 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.

Even assuming the military buildup or an upswing in the tourism industry ultimately caused a spike in the number of the Petitioner's construction projects, the record does not substantiate a peakload need in this case. An employer must establish that it needs to temporarily supplement its permanent staff on a peakload basis "due to a seasonal or short-term demand." 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*). The record does not support a finding that the Petitioner's need for cement masons is due a demand that is "seasonal or short-term," regardless of which sector - military, tourism, or other - may be driving the present construction boom.[2]

Further, the record does not establish a near and definite end to whatever impacts the military buildup and tourism may have upon the Petitioner's staffing needs. Specifically, the record reflects that the construction-project demand for H-2B cement mason services extends from the November 2, 2012, the start-date of the employment period sought in the first petition, through the May 3, 2016, the end-date of the employment period sought in this extension petition - a period of approximately 42 months. Accordingly, we find that the Petitioner's claimed need to supplement its permanent staff is not due to a "seasonal" or "short-term" demand, defined in the regulations as generally a year or less. Any greater period would generally conflict with a "temporary need."

3. Temporary Addition of Workers

We further find that the Petitioner has not demonstrated that the temporary additions to its staff will not become a part of its regular operation. The record reflects (1) that the Petitioner has been employing the Beneficiaries as cement masons under the prior H-2B petitions, and (2) that the Petitioner filed the present petition to retain them for an additional 11 months.[3] As the record indicates over three continuous years of dependence upon these H-2B cement masonry workers to meet its contract needs, the Petitioner has not established that the Beneficiaries would not become a part of its regular operations.

IV. ONE-TIME OCCURENCE

The Petitioner did not claim that its need for cement masonry labor would be a one-time occurrence under 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*), but we will evaluate the petition through this alternate basis for H-2B labor. To establish a one-time occurrence, the record must establish either (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to

[2] While an H-2B petitioner must also substantiate its actual need for the number of workers specified in its petition, we need not address that issue where, as in the case before us, the Petitioner has not first established an H-2B temporary need for the labor or services in question.

[3] A prior approval does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x 556 (5th Cir. 2004).

perform the services or labor in the future; or (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*).

There is insufficient evidence of record to establish either that the Petitioner regularly employs permanent cement masonry workers or, conversely, that it had never previously employed such workers. To support its claimed peakload need, the Petitioner asserts, but does not substantiate in the record, that it has regularly employed cement masons in the past. Therefore, we do not find sufficient evidence for a one-time occurrence under the first prong.

With regard to the second prong, the record does not contain sufficient evidence of a temporary event of short duration. Read within the context of 8 C.F.R. § 214.2(h)(6)(ii)(B), a temporary event is an occurrence that will end "in the near definable future," like a World's Fair. To meet these conditions, a one-time event must have a start and end date and last no more than "3 years." While the Petitioner's need for cement masonry services for over three years may possibly be acceptable for a one-time occurrence under appropriate circumstances, the record here does not support an H-2B classification under the one-time occurrence ground.

VI. CONCLUSION

The Petitioner has not established that it has a temporary need, whether peakload or one-time occurrence, that will end in the near, definable future. The burden is on the Petitioner to show 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.

Cite as *Matter of A-C-D- Corp.*, ID# 17371 (AAO July 18, 2016)