

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D4

[REDACTED]

FILE: EAC 05 013 53539 Office: VERMONT SERVICE CENTER Date: JAN 03 2005

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[REDACTED]

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.

Elizabeth H. O'Brien
for Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The nonimmigrant petition was approved by the Director, Vermont Service Center, who certified his decision to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(ii)(B)(2)(ii). The director's decision will be withdrawn, and the petition will be denied.

The petitioner, a corporation engaged in the masonry business, endeavors to employ the beneficiary as a stonemason for one year. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the employer had not established a temporary need. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the DOL's objections, pursuant to 8 C.F.R. § 214.2(h)(6)(vi)(B).

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. . . .

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. 8 C.F.R. § 214.2(h)(6)(ii)(A). 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. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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 must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

At section 2 of the Form I-129, the petitioner checked the box that indicates that the employment is a one-time occurrence. To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

At the part of section 5 of the Form I-129 for a nontechnical description of the job, the petitioner stated:

Erection of walls and retaining walls with country-style stones, which [the] alien will cut and shape. Will also work with brick and stucco.

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At section 13 of the Application for Alien Employment Certification (Form ETA 750) (which is introduced by the instruction to "Describe Fully the Job to be Performed (Duties)"), the petitioner entered:

The employee shall do masonry work in the erection of walls and retaining walls with country style triangular stones. He shall cut and shape them. He shall work with bricks, stucco and in the alteration of buildings

The petitioner's contention that the position and the need are temporary is articulated at Section 4 of the petitioner's affidavit in support of the petition:

In its application for employment certification the employer pointed out to the Department of Labor of the State of New York, Office of Alien Employment Certification, that the job was temporary by reason of the inability of the employer to find an experienced mason and that the alien beneficiary would work during the period set forth in the application and return to his country at the end of such period. It was further pointed out that the employer would train as a mason a U.S. Citizen or a permanent resident of the United States. Such training is taking place at this time. See copy of the letter of May 19, 2004, annexed hereto. In addition to the foregoing, an ad was placed in the Journal News[, a] copy of which is annexed hereto, [sic] A recruitment statement was also made available to the State Labor Department, indicating that no response was made to the said advertisement. The reason for the lack of such response to the advertisement is the scarcity of stonemasons in the local market.

It is apparent that the U.S. Labor Department has overlooked the evidence submitted to it and has failed to note that[,] in the absence of an experienced stonemason, the employer is training a United States citizen. It should be noted that it takes in excess of two (2) year[s] to train a stonemason to acquire complete experience to perform the duties, set forth in Part A of the Application for Alien Employment Certification.

The record of proceeding does not include either of the documents that the affidavit identifies as annexes. Thus, the record contains no details about the stonemason training program other than the affidavit's statements that it "takes in excess of two years" and is underway; that the trainee is a U.S. citizen; and that, at the end of the beneficiary's employment, the petitioner "will have a half-experienced mason to attend to its projects, for which it has signed contracts." Likewise, the record contains no information about the recruitment advertisement other than the "Recruitment Statement" document's assertion that it was placed in the *Journal News* for Westchester and Putnam counties on July 17 through 19, 2004, but produced no responses.

In this case, the petitioner has not sufficiently established that its stonemason needs are temporary or consistent with the test set forth in *Matter of Artee, supra*. The petitioner has failed to produce the recruitment advertisement and details about the content and specific schedule of the training program that it asserts is underway. The totality of the evidence of record indicates that the petitioner has a continuous need for a stonemason, that the need would continue after the period of the beneficiary's employment, and that a fully trained stonemason would not be available until some unspecified date after the period of the beneficiary's

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employment. Contrary to the director's determination, the petitioner has not overcome the objections of the DOL.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision of December 27, 2004 is withdrawn. The petition will be denied.