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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: SRC 06 036 52198 Office: TEXAS SERVICE CENTER Date: MAY 09 2006

IN RE: Petitioner:
Beneficiaries: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner operates an industrial, marine commercial, steel fabrication company. It desires to employ the beneficiaries as welders/fitters pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for 11 months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could be made. The period of certification is from October 1, 2005 until July 1, 2006. The director disagreed with the DOL and determined that the petitioner had not established that the need for the beneficiaries' services is temporary.

On appeal, counsel states that the evidence of record clearly establishes a temporary "peakload" need.

Upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to deny the petition. As discussed below, the AAO agrees with the finding of the DOL and will withdraw the decision of the director and sustain this appeal.

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) provides, in part:

> (6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*:
>
> (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:

> *(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.

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.

The petitioner seeks approval of the proffered position as a peakload need.

To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

> Lays out, fits and welds fabricated, cast and forged components to assemble structural forms such as offshore platforms, pipelines, barges and repairing of all types of marine vessels using variety of welding techniques and processes, particularly, shielded metal arc welding (SMAW) process. Must be able to pass various plate and pipe welding tests and written and verbal tests.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists can be justified.

On appeal, the petitioner states that it maintains a permanent workforce of 122 employees to meet the ongoing needs of its clients. The petitioner states that it now faces a sudden and temporary need for welders/fitters in order to provide them to shipyards and fabrication shops to help with the restoration and rebuilding of platforms, pipelines and marine vessels damaged by Hurricane Katrina. The petitioner's explanation is substantiated by a letter from the vice-president of Cembell Industries, Inc. who states that every shipyard and fabrication shop in the New Orleans area is actively seeking welders/fitters for their projects given the damage caused by the hurricane. The petitioner has also provided service agreements and a list of companies with which it does business. The AAO finds no reasons to question the credibility of the petitioner's statement and the evidence presented.

In summation, the petitioner has provided an adequate explanation to overcome the concerns addressed in the director's decision. The petitioner has submitted sufficient evidence to show that qualified persons in the United

States are not available, that the employment policies of the Department of Labor have been observed and that the need for welders/fitters is peakload and temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.