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FILE: EAC 07 036 51213 Office: VERMONT SERVICE CENTER Date: DEC 20 2007

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

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, Vermont Service Center, and 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.

The petitioner is a car and truck dealership. According to Part 5 of the Form I-129 (Petition for Nonimmigrant Worker) this H-2B petition was filed in order to employ the beneficiary from October 2, 2006 to September 30, 2007 under the job title "Truck Technician" (with a nontechnical job description of "Diesel Mechanic"). As indicated by relevant entries at pages 1 and 2 of the Form I-129 (Petition for Nonimmigrant Worker), the petition also requested a change of the beneficiary's status, from B-2 to H-2B.

The Department of Labor (DOL) denied the petitioner's application for temporary labor certification (Form ETA 750), based on its finding that the employer did not establish an H-2B temporary need. The director denied the petition on two independent grounds: (1) that the evidence of record, including the documents submitted in response to a request for evidence (RFE), did not establish an H-2B temporary need for labor or services as defined at 8 C.F.R. § 214.2(h)(6)(ii); and (2) that the evidence of record did not establish that the beneficiary is qualified for the job. The director also found that the beneficiary was ineligible to change status to H-2B because his previous nonimmigrant status expired prior to the filing of the petition.

On appeal, counsel contends that, as filed, the Form I-129 and its accompanying documents established that the petition qualifies for approval; and, therefore, that the director's RFE and the petitioner's response to it have no bearing on the merits of the petition. As discussed below, the AAO finds that the director's decision to deny the petition was correct. Accordingly, the appeal shall be dismissed.

The AAO first notes that there is no appeal to that part of the director's decision finding that the beneficiary was ineligible to change status. See 8 C.F.R. § 248.3(g) (no appeal from the denial of an application for change of status filed on Form I-129 or I-539).

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 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.

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.

On August 7, 2006, DOL denied the petitioner's application for a temporary employment certification. As indicated in the following excerpt from the attachment to its notice of denial, DOL determined that the petitioner's letter in support of the application indicates that the job proposed for certification is of a permanent rather than temporary nature:

Labor certification for this application is denied because the employer has not established a temporary need. . . . [T]he employer must establish that the need for the workers is based on either: a one-time occurrence, seasonal, peak load[,] or intermittent need. The employer's letter of explanation does not fully explain the actual work to be performed. A temporary need justification letter is required to support why the employer's need for workers is of a temporary nature. The nature of the employer's business is Auto Truck Dealership, which operates on a year[-]round continuous basis. In addition the date[s] of need October 2, 2006 thru October 2, 2007 demonstrates continuous year round employment. The job offered is deemed as permanent and ongoing. The employer may consider filing applications for permanent labor certification.

On November 13, 2006, the petitioner filed the Form I-129 and supporting documents. Only two of the documents address the DOL finding that the petitioner failed to establish an H-2B temporary need. These are a letter from the petitioner's Director of Dealer Services (DDS) and a letter from counsel. Both letters are dated September 25, 2006. Counsel's letter introduced the DDS letter as the petitioner's "countervailing evidence" in response to the DOL denial of certification. The DDS letter states, in total:

In support of our application for labor application and Petition for a Nonimmigrant Worker, we would like to state that our need is a one-time occurrence, to cover for our temporary loss of help in this area of our operations.

The petition was filed without any documents regarding the asserted "temporary loss of help."

As noted in the director's decision, the record's copy of the petitioner's newspaper advertisement for the truck technician position specified as a minimum hiring requirement 1 year of experience in repairing and maintaining diesel trucks. However, no documentation of the beneficiary's experience was filed with the Form I-129.

The AAO finds that the record of proceedings does not support counsel's contention that the Form I-129 and the documents filed with it satisfied the H-2B regulations at 8 C.F.R. § 214.2(h)(6). As filed, the Form I-129 and its allied documents provided no evidence substantiating the petitioner's assertion that its employment

situation satisfied the H-2B one-time occurrence criterion at 8 C.F.R. § 214.2(h)(6)(ii)(B)(I). 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. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In light of the petition's failures to establish an H-2B temporary need and that the beneficiary possessed at least one year's experience repairing and maintaining diesel trucks, the only alternative to the RFE would have been denial of the petition.

Because the petition as filed did not include sufficient evidence to satisfy any temporary need criterion at 8 C.F.R. § 214.2(h)(6), the issuing of an RFE was a correct exercise of the director's discretion, under 8 C.F.R. § 103.2(8), to provide an opportunity to provide additional evidence when the petition does not establish eligibility for the benefits sought by the petition.

Upon initial review of the Form I-129 and the documents filed with it, the director issued an RFE. The items requested by the RFE include: (1) evidence that the beneficiary has the experience required for the petition's job; (2) payroll records "that clearly designate the permanent employee that normally fills the position for which you wish to hire the beneficiary"; (3) "documentary evidence which confirms the temporary leave status of the permanent employee and the date of the expected return of the employee"; and (4) a copy of the approval notice for the beneficiary's most recently filed I-539 application.

The AAO finds that the scope of the RFE was appropriate. Each type of evidence requested by the RFE was reasonably tailored towards curing a material deficiency of the petition.

The following documents are included among those comprising the petitioner's response to the RFE:

1. A letter from counsel that states:

The beneficiary is to repair foreign diesel engines plus train and assist diesel mechanics in foreign diesel repair.

The beneficiary is a diesel mechanic from Europe who is trained and experienced in repairing foreign diesel engines.

The position is empty. The permanent employee that normally fills the position is unavailable until September 30, 2007.

2. A resubmission of the petitioner's September 25, 2006 letter that asserts that its need for the truck technician is "a one-time occurrence, to cover for our temporary loss of help in this area of our operations."

3. A Form I-797A (Notice of Action), dated July 6, 2006, which indicates that the petitioner was approved for B-2 status from June 27, 2006 to September 26, 2006.
4. A Form I-797A, dated September 27, 2006, acknowledging receipt of \$200 for an I-539 application to extend/change nonimmigrant status.

The AAO finds that the documents submitted in response to the RFE cured neither of the two evidentiary defects affecting the merits of the petition, namely, the failures to establish an H-2B temporary need and the beneficiary's experience in diesel truck repair and maintenance. The response to these aspects of the RFE includes only assertions by counsel and the petitioner that are not substantiated by any corroborating documents. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* (citing *Matter of Treasure Craft of California*). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*; *Matter of Laureano*; *Matter of Ramirez-Sanchez*.

The AAO shall not address the RFE-response documents relevant to the beneficiary's status. As noted earlier in this decision, the director's denial of a change of status due to a lapse in the beneficiary's nonimmigrant status is beyond the AAO's jurisdiction.

For the reasons discussed above, the petition may not be approved. It is noted that the petitioner requested the beneficiaries' services for the period October 2, 2006 to September 30, 2007. Therefore, the period of employment has passed.

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

ORDER: The appeal is dismissed. The petition is denied although the matter is moot due to the passage of time.