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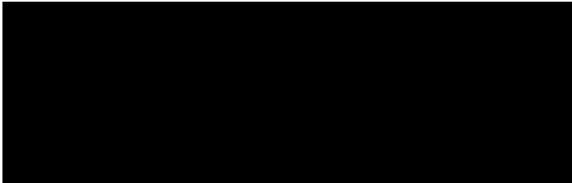
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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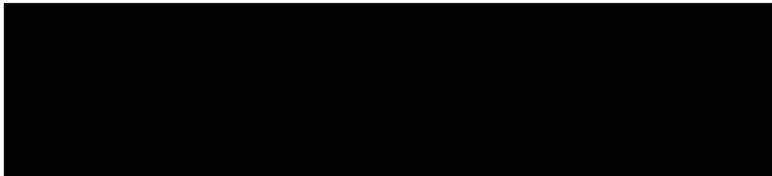
Date: **JUL 30 2007**

IN RE: Petitioner:
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:



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 Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: 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 The decision of the director will be withdrawn and the petition will be denied.

The petitioner is a remodeling/construction company. It desires to employ the beneficiaries as stucco masons from October 2, 2006 to September 30, 2007. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made.

The director determined that sufficient countervailing evidence has been submitted 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 the services to be performed is temporary.

The petitioner has presented no additional evidence for consideration in response to the director's Notice of Certification. As the period for response to the Notice of Certification has passed, the record is considered complete and ready for adjudication.

Upon review of the entire record of proceeding, the AAO finds that the evidence of record does not support the director's decision to approve the petition. Accordingly, the director's decision will be withdrawn and the petition will be denied.

The totality of evidence in the record of proceeding, including the countervailing evidence submitted to overcome the basis cited by DOL for its denial of the temporary labor certification, does not establish that the petitioner's need for stucco masons is based on a one-time occurrence within the meaning of the regulations governing H-2B petitions.

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:

(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.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the 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 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 shall 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). The petition asserts 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).

The description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Responsible for installing, repairing and renovating Fresco style stucco and acrylic plaster applications to interior and exterior moldings, columns and walls. Also responsible for installing and repairing ornamental moldings and decorations, and for matching color and finish coatings for repair jobs.

In order for the petitioner's need to be a one-time occurrence, the petitioner must demonstrate that (1) 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 (2) 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. In regard to the first type of one-time occurrence, the record reflects that the petitioner has employed workers to perform the services and labor in the past. The petitioner states that it was founded in 1985, it is engaged in repairing and renovating Fresco style stucco and acrylic plaster applications, and it currently has ten stucco masons and plasterers on its permanent staff. Furthermore, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. Consequently, the petitioner has not demonstrated that it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future.

The petitioner has also not established 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. The petitioner states that it has been hired by the city of Albany to complete stucco work inside and outside a large number of residential buildings. The record includes a letter from the director of the Albany Community Development Agency which states that this is the largest project that has been given to the petitioner and the agency does not usually get such large projects. The director of the agency states that the petitioner will have to hire extra help, and that the agency is confident that the petitioner will meet the deadline and have the project completed within one year. The AAO notes that the contract is not included in the record. In addition, there is no supporting evidence that this contract is significantly larger than the petitioner's normal contracts and that it is not part of the normal expansion of the business. Simply 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)). The petitioner has not established that a temporary event of short duration has created the need for stucco masons and that its need for the beneficiaries' services is a one-time occurrence 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 not met that burden.

ORDER: The decision of the director is withdrawn. The nonimmigrant visa petition is denied.