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U.S. Citizenship
and Immigration
Services

D4



FILE: EAC 08 045 51939 Office: VERMONT SERVICE CENTER

Date: APR 09 2008

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:

SELF-REPRESENTED

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)(i). The decision of the director will be affirmed and the petition will be approved for the period of January 15, 2008 to November 15, 2008.

The petitioner is a road and bridge construction company with several contracts within Louisiana. It desires to employ the beneficiaries as construction laborers, pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b), from January 15, 2008 to December 1, 2008. The Department of Labor (DOL) was unable to make a decision on the labor certification due to the unique circumstances of the applicant as an employer requesting temporary workers based on a need identified as a result of Hurricanes Katrina or Rita. The petitioner then filed a petition with the Director, VSC, containing countervailing evidence to overcome the DOL's decision. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the DOL decision and approved the petition. The director's decision to approve the petition is now before the AAO for review.

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 pertinent part, the following:

(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 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 precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states that 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 positions 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) which reflects that physical labor will be provided at bridge and highway construction project sites. The petitioner asserts that from December to March, it needs labor for preparation of equipment and materials and that from April to October, the weather is most favorable for working on construction job sites.

The documents accompanying the petition include copies of (1) the petitioner's employee list; (2) classification of the present workforce; (3) contracts for the petitioner's services; and (4) letters from the petitioner.

In this instance, the petitioner has not shown that that it needs to supplement its permanent staff 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 petitioner has not provided documentation sufficient to establish an H-2B peakload situation through data on its usual workload and staffing needs. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The AAO notes that the petitioner has a number of contracts with the Louisiana Department of Transportation and Development, Louisiana Time Management, Acadia Parish, Jefferson Davis Parish, Cameron Parish and Rapides Parish. The petitioner states that the need for unskilled labor has been increased by the effects of Hurricanes Katrina and Rita. The petitioner has submitted evidence of its contractual obligations.

These documents establish that the nature of the petitioner's need is continuous and ongoing. The record establishes that these workers would become part of the petitioner's operation and its need for them cannot, therefore, be considered a peakload need. However, the record does establish that the petitioner's need for these workers is a temporary event of short duration, caused by the extraordinary circumstances of the 2005 hurricane season.

The totality of evidence establishes that the petitioner's need for the workers is a one-time occurrence as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) and that extraordinary circumstances justify the beneficiaries' H-2B employment in accordance with 8 C.F.R. § 214.2(h)(6)(ii)(B).

In addition, the AAO notes that the maximum period of employment that Citizenship and Immigration Services (CIS) may approve in a particular H-2B petition is the period that the related application to DOL for temporary labor certification (Application for Alien Employment Certification (Form ETA 750)) states as the period of intended employment. *See* 8 C.F.R. §§ 214.2(h)(6)(iii)(A) and (C) (identifying the filing of an application for temporary labor certification and DOL's decision thereupon as conditions precedent to filing an H-2B petition); 8 C.F.R. § 214.2(h)(6)(iii)(E) (requiring that the Form I-129 for an H-2B petition be accompanied by DOL's labor certification determination and related documents); 8 C.F.R. § 214.2(h)(6)(iv)(E) (requiring the H-2B petitioner to submit countervailing evidence that addresses each DOL reason for not granting the temporary labor certification); *see also* 8 C.F.R. § 214.2(h)(9)(iii)(B) (indicating that the approval period of an H-2B petition is dependent upon the content of the application for labor certification). Further, the regulation at 20 C.F.R. § 655.206(b)(1) states in pertinent parts that temporary labor certifications shall be considered subject to the conditions and assurances made during the application process and "shall be limited to the employer's specific job opportunities."

In the present case, item 18 of the temporary labor certification application specified January 15, 2008 to November 15, 2008 as the exact dates that the petitioner expects to employ the beneficiaries. However, item 8 at Part 5 of the Form I-129 specifies different dates for the period of intended employment, namely, January 15,

2008 to December 1, 2008. For the reasons discussed above, this petition cannot be approved beyond the period of employment specified in the application for temporary labor certification, that is, November 15, 2008.

After review of the documentary evidence contained in the record, the petition will be approved for the period of January 15, 2008 to November 15, 2008. This is that portion of the Form I-129 period of intended employment that falls within the period of employment specified in the petitioner's application for temporary labor certification. The Vermont Service Center will issue the appropriate approval notice.

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

ORDER: The decision of the director is affirmed. The nonimmigrant visa petition is approved for the period of January 15, 2008 to November 15, 2008.