

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

by

[Redacted]

FILE: EAC 07 243 51002 Office: VERMONT SERVICE CENTER Date: **AUG 12 2008**

IN RE: Petitioner: [Redacted]
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, Vermont Service Center (VSC), 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 engages in the business of shipbuilding and general repair. It desires to employ the beneficiaries as welders and 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) from October 1, 2007 to March 31, 2008. The Department of Labor (DOL) determined that the petitioner had not established a one-time, temporary need for the services of 500 unnamed beneficiaries. The petitioner then filed a petition with the Director, VSC, with supporting evidence on August 20, 2007. On August 31, 2007, the director issued a request for evidence (RFE) in which he requested the petitioner to submit the DOL's final determination notice in its entirety, a copy of the contract with Bender Shipbuilding & Repair Company, Inc. in Mobile, Alabama, a letter from the welders union verifying that local welders have been given fair opportunity to apply for these positions, and documentation from the State Workforce Agency (SWA) that was used to recruit local workers. In response to the RFE, the petitioner submitted: (1) an incomplete copy of the DOL's final determination notice; (2) a copy of the contract with Bender Shipbuilding & Repair Company, Inc. in Mobile, Alabama; (3) a statement from counsel that there are no local welders or shipbuilders unions in the Tampa area; and (4) documentation from the SWA that was used to recruit local workers. The director determined that the petitioner had not established a temporary need for the services of an additional 500 workers. The director also determined that the petitioner had not submitted the requested documents to the SWA and therefore, had not established that unemployed persons capable of performing the service or labor could not be found in the United States and denied the petition. It is the appeal of the director's decision dated October 16, 2007 that is now before the AAO for review.

On appeal, counsel on behalf of the petitioner states that the documentation provided establishes that the petitioner's need for labor is based on a one-time occurrence. Counsel also submits evidence of the petitioner's recruitment documentation.

Upon review, the evidence of record supports the director's decision to deny the petition. As discussed below, the AAO finds that the petitioner did not establish that an H-2B temporary, "one-time occurrence" exists for the additional 500 welders and fitters specified in the petition.

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)(6), *Petition for alien to perform temporary nonagricultural services or labor (H-2B)* states, 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.

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.

As indicated by section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and 8 C.F.R. § 214.2(h)(6)(i), an H-2B petition may not be approved unless the evidence substantiates that the requested alien workers are not displacing United States workers capable of performing the services or labor for which the petition was filed. The AAO finds that the petitioner provided a letter dated March 7, 2007 detailing the results of its recruitment. The petitioner states that no workers responded to the advertisements for welder-fitters that were placed in *The Tampa Tribune* on February 28, 2007, March 1, 2007 and March 2, 2007. Copies of the job advertisements are contained in the record of proceeding. Therefore, the petitioner has established that it is not displacing U.S. workers capable of performing the services or labor for which the petition was filed, as required by statute and by the regulation at 8 C.F.R. § 214.2(h)(6)(i). However, the petition may not be approved for another reason.

The AAO agrees with the director that the petitioner failed to substantiate its claim that the need for the additional 500 temporary workers specified in the petition is a one-time occurrence within the meaning of the H-2B regulations at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

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

Lay out, fit, and fabricate metal components to assemble structural forms, such as machinery frames, bridge parts, and pressure vessels, using knowledge of welding techniques, metallurgy, and engineering requirements.

The petitioner submitted two DOL final determination notices, dated June 14, 2007 and July 13, 2007. The petitioner states on appeal that it has no explanation as to why the DOL processed the case twice but only assumes that a mistake was made by the DOL. In each case, the DOL determined that a temporary labor certification could not be issued.

In its notice dated June 14, 2007, the DOL stated that the situation makes it difficult for it to determine whether the employer’s need is actually temporary. DOL explained that since the employer’s request for temporary workers is based on a need identified as a result of Hurricanes Katrina or Rita, DOL is unable to make a determination and that its finding should be presented to the Citizenship and Immigration Services (CIS) for final adjudication.

In its notice dated July 13, 2007, the DOL stated that the employer had not established a temporary need for 500 unnamed workers. The DOL explained in its decision that the need for workers to perform the duties described on Form ETA 750 at section 13 are the nature of the petitioner’s business and will always exist. The DOL also explained that as a result of the impact of Hurricane Katrina, the employer is claiming a temporary need for the workers based on a one-time occurrence. The DOL concludes that the employer has not documented the specific impact of Hurricane Katrina on the implied shortage of workers and that the employer’s need for 500 workers is a permanent need.

In responding to either one of DOL’s determinations, the petitioner must provide countervailing evidence to overcome the concerns expressed in the final determination notice in order for the petition to be approved. The petitioner must also establish that the need for the beneficiaries’ services is temporary and in accordance with the regulation at 8 C.F.R. § 214.2(h)(6).

The petitioner includes the following items in support of its claim of an H-2B one-time occurrence: (1) two memoranda entitled *Temporary Nature of the Shipbuilding Labor Shortage* dated July 16, 2007 by [REDACTED] The Avascent Group and *Labor Demand in Oil & Gas Vessel Markets is Reaching its Cyclical Peak* dated December 13, 2007 by [REDACTED] Group; and a statement describing the work of [REDACTED]; (2) Federal Reserve Board’s *Beige Book Reports* (6th District) dated October 17, 2007, November 28, 2007 and January 16, 2008; (3) seven articles entitled *Labor*

Shortage Sows Seeds of Class Struggle dated October 14, 2005; *Gulf Coast Economics Reshaped by Katrina* dated September 12, 2007; *Gulf Coast Shipbuilding Partnership's Transitions Program* dated September 12, 2007; *The State of Shipbuilding: Tankers Aweigh* dated December 1, 2007; *U.S Shipbuilders Grapple with Labor Shortage* dated January 27, 2008; transcript report entitled *Worker Shortages Post-Katrina Send Businesses out of Mississippi* that originally aired February 7, 2007; and article from *The Times Picayune* newspaper entitled *Staffing Shortages Swamping Shipyards*, dated February 19, 2006; (4) counsel's countervailing evidence statement; (5) the Vermont Service Center's decision in EAC 07 029 50868, dated November 13, 2006; (6) a statement from the petitioner's vice-president and chief financial officer dated August 4, 2007; and (7) the subcontract between the petitioner and Bender Shipbuilding & Repair Company, Inc.

The Form I-129 was filed on August 20, 2007. As previously stated, the petitioner engages in shipbuilding, specializing in the construction of new barges for private commercial use in the offshore oil and gas industry. The petitioner also repairs and retrofits existing marine vessels for both the United States government military use and private commercial use. The petitioner states in its letter dated August 4, 2007, that it has a temporary, one-time need for 500 additional welder-fitters from October 1, 2007 through March 30, 2008. According to the letter, the petitioner's need is based on a contract for additional work that it has with its affiliated company, Bender Shipbuilding & Repair Company, Inc. in Mobile, Alabama. The petitioner states that due to Hurricane Katrina, the shipbuilding industry has had an increase in workload and a decrease in skilled workers. Due to Hurricane Katrina, the petitioner states that the price of crude oil has risen and resulted in a greater need for drilling and exploration, which the petitioner claims has resulted in a higher demand for oil rig supply vessels being built by the petitioner. The petitioner also claims that a large part of its business is allocated to the phasing out or conversion of all single-hulled tankers by 2015. The petitioner asserts that the demand for work will decrease in the near future.

The subcontract dated February 14, 2006 is between the petitioner, Tampa Bay Shipbuilding & Repair Company, (Subcontractor) and Bender Shipbuilding & Repair Company, Inc. (Builder). The petitioner states in its letter dated August 4, 2007 that Bender Shipbuilding & Repair Company, Inc. has been subcontracting a large volume of projects to the petitioner. In the subcontract dated February 14, 2006, the petitioner (subcontractor) agrees to build, launch, equip and complete at the shipyard and sell and deliver to builder three barges and builder agrees to purchase and take delivery of the three barges from the petitioner (subcontractor) at the shipyard and to pay for the same, all upon the terms and conditions set forth in the subcontract and in the prime contract. The subcontract states that the barges shall be completed and ready for sea trials on or before the following dates: Barge 1-August 30, 2007; Barge 2 -March 18, 2008; and Barge 3 - October 14, 2008. The completion date for Barges 2 and 3 is within the time period requested in the petition. The record of proceeding does not contain the prime contract.

The subcontract states that the petitioner (subcontractor) will produce, maintain and share with the builder's representative a detailed work schedule and included therein will be an organizational chart. Since the record of proceeding does not contain a detailed work schedule and the organizational chart depicting the key personnel assigned to the subcontract, mutually agreed upon by the subcontractor and the builder in the

subcontract¹, the petitioner has not shown its need for 500 additional welder-fitters to build Barges 2 and 3. Absent such information, the AAO finds that the petitioner has not established a temporary, one-time need for 500 additional welder-fitters for the intended period of employment. The petitioner has not shown that the work contracted is a one-time occurrence.

In her countervailing evidence statement, counsel states that the nature of the petitioner's need is as a result of (1) a job shortage resulting from the displacement of workers following Hurricane Katrina; (2) an increase in demand for labor due to Post-Katrina reconstruction; (3) an increase in demand for shipbuilding construction caused by rising oil prices; and (4) an increase in shipbuilding demands from the Navy and deadlines for compliance with environmental regulations. Counsel states that the evidence shows that all of these circumstances are temporary and that the demand on temporary labor will be dramatically reduced in the next 2-4 years.

The petitioner has not provided evidence to establish "extraordinary circumstances" and that the petitioner is experiencing an increase in workload and a decrease in skilled workers available due to Hurricane Katrina's impact on the shipbuilding industry or that the increased demand for workers is a one-time occurrence. The petitioner has not demonstrated through its contract with Bender Shipbuilding & Repair Company, Inc. that it will be performing hurricane repair work constituting a temporary "one-time" need for additional welders and fitters. The petitioner states that a large part of its business consists of the phasing out and conversion of single-hulled tankers by 2015. The petitioner also states that the rising price of crude oil has resulted in a higher demand for oil rig supply vessels being built by the petitioner. Therefore, the petitioner has shown a permanent need for welders and fitters. The petitioner has not provided any independent documentary evidence of a point in the future when the petitioner will no longer be seeking temporary welders and fitters on a continuous basis.

Counsel provided two memoranda from The Avascent Group in support of the petitioner's claim, the July 16, 2007 memorandum on the shipbuilding labor shortage in the Gulf area and the December 13, 2007 memorandum on the labor demand in oil and gas vessel markets. The general shortage of shipbuilding labor discussed in the memoranda does not establish an actual need for the specific number of workers indicated in the petition. Both of these memoranda establish a continuing need for welders and fitters.

The petitioner also submitted the Federal Reserve Board's *Beige Book* Reports that give a summarized report of consumer spending and tourism; real estate; manufacturing and transportation; banking and finance; employment and prices; and agriculture and natural resources for the sixth district- Atlanta and seven articles which emphasize the labor shortage. The articles do not substantiate the petitioner's need for 500 additional temporary laborers. The articles emphasize the labor shortage facing commercial shipyards or address the general shortage of shipbuilding labor. However, labor shortages cannot be used to justify an employer's need for temporary workers under the H-2B program. If the petitioner is experiencing a severe labor shortage, it may wish to use the immigrant visa program to alleviate the problem.

¹ The work schedule and organizational chart are required under *Article IV- Production Schedules and Progress Meetings* in the subcontract.

In summation, the general shortage of shipbuilding labor described in the evidence does not establish that the petitioner has a one-time need for welders and fitters. The DOL found that the evidence established a permanent need for welders and fitters. The AAO agrees. The petitioner's evidence establishes a continuing, ongoing need for these workers. There is no end point for the petitioner's need. Likewise, the letter from the petitioner's executive vice president and chief financial officer does not state a definite point in the future when the petitioner will no longer be seeking temporary welders and fitters on a continuous basis; and the letter is not supported by any independent documentary evidence of such a definite point in time. As stated earlier, since there is a current shortage of welders and fitters, the petitioner's need is ongoing, not temporary as required by section 101(a)(15)(H)(ii). The petitioner has not shown that its current contractual obligations or the general increase in demand for workers is a "short-term" one-time demand or that such demand results from extraordinary circumstances. The petitioner has not established a temporary need of short duration, as required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

The one redacted decision submitted prior to the director's decision counsel misidentifies as an AAO decision. In fact, it is a decision from the service center that was certified to the AAO for review. The AAO also notes that, at page 4 of her Countervailing Evidence Statement, counsel misquotes the service center director's statement from the certification decision EAC 07 029 50868 as beginning with the words "The need for flux core welders." Actually the paragraph begins with the words "The petitioner has stated that the need." Thus, contrary to counsel's assertion, the paragraph is not from an AAO decision and is not a statement of policy, but is a service center director's summation of a portion of evidence presented by the petitioner in that particular case.

The decision cited by counsel is not a precedent decision, that is, a decision that has been designated and published as a precedent in accordance with 8 C.F.R. §§ 103.3(c) and 103.9(a). While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

For the reasons discussed above, the petitioner has not established a temporary need for 500 welder-fitters. Thus, the petition will be denied.

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