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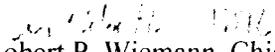
IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

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 approved by the Acting 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 The decision of the acting director will be withdrawn and the petition will be denied.

The petitioner describes itself as a multi-service vessel design, construction, and repair facility. It desires to employ the beneficiaries as plumbers from October 1, 2008 to April 1, 2009. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiaries' services. The DOL also determined that the petitioner had not submitted supporting documentation to justify its temporary need for the beneficiaries' services. Finally, the DOL determined that the petitioner had failed to comply with the DOL's recruitment requirements. The petitioner then filed the current petition containing countervailing evidence to overcome the DOL's decision. The acting director determined that the petitioner had submitted sufficient countervailing evidence to overcome the concerns of the DOL and recommended the approval of the petition. The acting director's decision recommending the approval of the petition for three unnamed plumbers is now before the AAO for review.

On notice of certification, counsel advised the AAO in a letter dated August 12, 2008 that the petitioner agrees with the acting director's recommendation that the petition be approved and waives the 30-day period to submit a statement to the AAO. Therefore, the record is considered complete.

As discussed below, upon careful review of the entire record of proceeding, the evidence of record does not support the acting director's decision to approve the petition. Accordingly, the acting director's decision will be withdrawn and the petition will be denied.

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.

In the petition, the petitioner requests 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) as follows:

Assemble, install, repair pipes, fittings and fixtures of heating, water, and drainage system according to specifications.

The DOL denied the petitioner's temporary labor certification on three grounds:

- (1) Failure to establish that the nature of the employer's need for the services or labor to be performed is temporary;
- (2) Failure to submit supporting documentation that justifies any one of the regulatory standards of temporary need; and
- (3) Failure to comply with DOL requirements.

Counsel submitted a letter dated May 29, 2008 signed by the manager of the petitioning entity that addresses the issues raised by the DOL in its denial of the petitioner's temporary labor certification application. The petitioner also provided its monthly payroll reports for permanent and temporary plumbers for 2006, 2007 and January of 2008 and its recruitment results.

The first basis for the DOL's denial is that the DOL was unable to determine the employer's need is based on a one-time occurrence, recurring peakload need, or recurring seasonal need and temporary. The DOL in its review of the petitioner's past and present filing activity found that the petitioner has applied for three temporary labor certifications for plumbers in the aggregate time period from October 27, 2006 through April 1, 2009. The DOL concluded that the petitioner's filing activity establishes a pattern that demonstrates that its need for the services or labor to be performed is permanent; not temporary.

In rebuttal, the petitioner states in its letter dated May 29, 2008 that it currently has three large-scale yachts (a 42-foot vessel, a 68-foot vessel and a 90-foot vessel) under construction. The petitioner explains that due to vendor delays in obtaining specialized components such as gears, engines, generators and z-drives and the customer's demand for vessel completion by spring of next year, it has a temporary, peakload need for temporary labor during the requested period. The petitioner states that the temporary workers will aid in its meeting customer commitments and construction schedules. The petitioner also states that the delivery delays extended the amount of time needed to complete these projects and should any of these vessels not be completed in a timely manner, it would be in breach of contract and suffer severe legal and financial penalties. Additionally, the petitioner states that it has expanded its facility for boat hull out, vessel storage and maintenance and repair services which requires additional labor during the upcoming hurricane season followed by the peak fall and winter demand.

Upon review, the petitioner has not provided evidence to establish that it currently has three large-scale yachts under construction. The petitioner has not shown through contractual evidence that the vessel construction schedule, delivery date(s) and the petitioner's need for three additional plumbers establishes a temporary, "peakload" need during the requested period of employment and necessitates the use of three additional temporary H-2B plumbers from October 1, 2008 through April 1, 2009. 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)).

As stated in the DOL's denial, the record reflects that the petitioner has applied for three temporary labor certifications for plumbers in the aggregate time period from October 27, 2006 through April 1, 2009. The AAO

agrees with the DOL that the petitioner's need for plumbers is continuous and year-round, and is not a peakload need to end April 1, 2009.

The second basis for the DOL's denial is the petitioner's lack of supporting documentation justifying any one of the regulatory standards of temporary need. The DOL states in its decision that it certified the petitioner's application for five temporary plumbers from October 27, 2006 through July 31, 2007; and subsequently denied the petitioner's two applications each for five temporary plumbers covering the aggregate period August 1, 2007 through April 1, 2009. The petitioner's payroll documentation indicates that it did not employ any temporary plumbers from January 2006 through April 2007. The DOL stated that the petitioner failed to explain the differences/discrepancies in its payroll records with its previous certification history for five plumbers and that the documentation did not provide sufficient information under any one of the regulatory standards of temporary need.

The petitioner explains in its letter dated May 29, 2008 that although its application was approved for 25 temporary welders from October 27, 2006 through July 31, 2007, the delays in the processing resulted in the temporary welders not arriving until April 2007. The AAO finds this information is not relevant to the current petition and does not adequately explain the discrepancies when comparing the petitioner's payroll records with its previous certification history.

In the current case, the petitioner is seeking approval for three unnamed plumbers for a peakload need and not 25 welders, as stated by the petitioner. A temporary labor certification application was approved and certified for five plumbers from October 27, 2006 through July 31, 2007. The reports do not show that the petitioner utilized five plumbers during this intended period of employment. The petitioner only utilized its temporary plumbers for three months, from May 2007 through July 31, 2007. Moreover, the petitioner did not supplement its permanent staff due to a seasonal or short-term demand during the 2006 and 2007 calendar years as the payroll reports show that there were no permanent plumbers employed during those years. The petitioner's monthly payroll reports indicate that it did not employ any temporary plumbers from January 2006 through April 2007; that it employed between one and four temporary plumbers from May 2007 through December 2007; and that it employed no temporary plumbers in January 2008. The petitioner has not shown through documentary evidence such as copies of the beneficiaries' nonimmigrant visas and arrival/departure documents (Forms I-94) that its delay in obtaining temporary plumbers was due to delays in visa processing.

Further, although the petitioner had an approved petition for five plumbers, the petitioner's monthly payroll reports indicate that the company employed four temporary plumbers in May 2007 but only two in July 2007. The petitioner states that its loss of temporary workers was through natural work attrition and that its low worker yield in December and January was due to its company policy of allocating three weeks of vacation to temporary workers during the holiday season. The petitioner has not provided any documentary evidence to prove this assertion. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by its current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill

the peakload positions will be engaged in different duties or have different specialty skills than the 113 workers currently shown to be employed by the petitioner on the petition. The petitioner has not provided evidence of the contracts showing a clear termination date. The petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Consequently, the petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

Finally, in its final determination notice dated April 21, 2008, the DOL stated that its third basis for denying the certification was that the employer failed to comply with the DOL's recruitment requirements to recruit United States workers for the positions. TEGL 21-06, Change 1, section IV.F, states that the employer "shall document that union and other recruitment sources, appropriate for the occupation and customary in the industry, were contacted and either unable to refer qualified United States workers or non-responsive to the employer's request."

The record of proceeding contains a copy of the petitioner's recruitment report dated March 24, 2008 that states that a letter was sent to the local union advertising the job openings. The recruitment report also states that there were two (2) applicants for the position. One applicant was contacted via telephone and scheduled for an interview on March 25, 2008, and the other applicant was spoken to in person on March 18, 2008 and scheduled for a second interview on March 25, 2008. The recruitment report also states that the local union was non-responsive.

The petitioner states in its rebuttal letter dated May 29, 2008 that since March 24, 2008, it sent a certified letter to the local union and received no response after 60 days had passed. However, DOL states in its decision that according to the track and confirm function at www.usps.com, the certified letter sent to the union was delivered on March 24, 2008, which was the same date as the date of the petitioner's letter revealing its results of recruitment and informing the DOL that it had not heard back from the union. The petitioner has not shown that it allowed a sufficient amount of time for the union to refer qualified United States workers for the position and that it engaged in good faith recruitment.

The petitioner also states that it contacted both of the candidates who submitted a request in filling one of the 25 temporary welder positions available. One candidate, [REDACTED] was found to not have welder experience and the letter does not indicate what happened to the other candidate. Nevertheless, the petition is not for welders, and the letter refers to the wrong applicant. The DOL states in its decision that two applicants were referred to the petitioner by the DOL State Workforce Agency (SWA), specifically, [REDACTED] and [REDACTED], not [REDACTED]. Their resumes reveal that they have plumbing experience. Also, the petitioner does not indicate what happened during the interviews scheduled for them on March 25, 2008. Thus, the petitioner has not provided the lawful job-related reason(s) for not hiring each person. The petitioner has not provided the appropriate evidence to prove that it complied with the DOL's recruitment requirements.

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

ORDER: The acting director's decision of August 6, 2008 approving the petition is withdrawn. The petition is denied.