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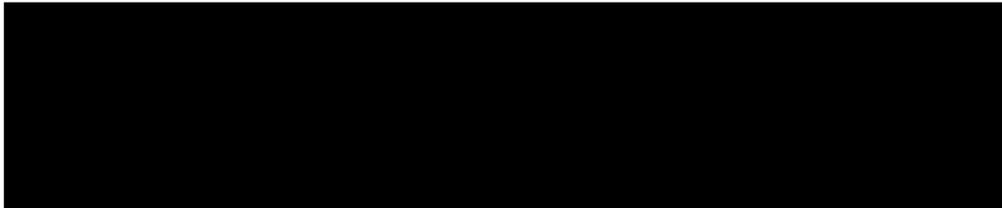
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FILE: EAC 08 048 50900 Office: VERMONT SERVICE CENTER Date: FEB 19 2008

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.

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

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Vermont Service Center (VSC), 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 The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is a Mississippi Limited Liability Company supplying labor and industrial services for the marine and petroleum/chemical industries in the Mississippi Gulf Coast area. It desires to employ the beneficiary as a welder pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b), from December 1, 2007 to September 1, 2008 (see the dates of intended employment specified at item 8 of Part 5 of the Form I-129 (Petition for a Nonimmigrant Worker)). The Department of Labor (DOL) determined that unique, complex, and persistent circumstances generated in the Gulf Region by Hurricanes Katrina and Rita made it impossible to determine whether a temporary labor certification should be issued in the present case.

The regulations state that 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. 8 C.F.R. §214.2(h)(6)(iv)(D). On December 3, 2007, the petitioner filed a petition with the director, VSC, to classify three nonimmigrant beneficiaries under section 101(a)(15)(H)(ii)(b) of the Act. Upon review of the petition, the director issued a request for evidence (RFE) as the documentation submitted with the petition was insufficient. In response to the director's RFE, the petitioner submitted additional evidence and withdrew from consideration two of the beneficiaries [REDACTED] and [REDACTED] named in the petition. The petitioner's counsel stated in his letter dated January 14, 2008 that the petitioner only wishes to process the H-2B transfer of [REDACTED]

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 DOL have been observed and that the need for the services to be performed is temporary. The petition is now before the AAO on certification of the director's decision recommending approval of the petition.

Section 101(a)(15)(H)(ii)(b) of 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:

(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 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 position 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:

Weld together metal components as specified by blueprints and work orders or oral instruction using brazing and various arc and gas welding equipment.

In rebuttal to the DOL’s finding, the petitioner provided copies of its monthly payroll reports for its permanent and temporary workers for 2006, 2007, and January of 2008. The reports show that no workers were permanently employed by the petitioner from January through December of 2006; workers were permanently employed by the petitioner from March through December of 2007 and January of 2008.

The reports also show that workers were temporarily employed by the petitioner during the month of May and October through December of 2006, January through December of 2007, and the month of January 2008. The petitioner’s continuous employment of temporary workers from January 2007 through January 2008 demonstrates the petitioner’s permanent need for temporary workers. There is no time during that period (January 2007 through January 2008) where the petitioner does not employ temporary workers. Therefore, the petitioner has not established that its need for the beneficiary’s welding services is peakload and that the temporary additions to staff will not become a part of the petitioner’s regular operation.

The documents in the record of proceedings establish that the nature of the petitioner’s need for the beneficiary’s services is continuous and ongoing and, therefore, cannot be considered a peakload need. However, the record does establish that the need for the worker 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 worker 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 beneficiary’s H-2B employment in accordance with 8 C.F.R. § 214.2(h)(6)(ii)(B). However, the petition cannot be approved at this time, for the reason discussed below.

The petitioner has not established that the area of the beneficiary’s proposed work, [REDACTED] “Montgomery project in Alabama,” is located in the area covered by the temporary labor certification application, specifically, the Mississippi Gulf Coast area. Accordingly, the director’s decision recommending approval of the petition will be withdrawn, and the case will be remanded to allow the petitioner an opportunity to address this deficiency.

A temporary labor certification is valid only for the number of aliens, the area of intended employment, the specific occupation and duties, and the period of time and the employer specified on the Application for Alien Employment Certification, ETA Form 750. (See: Part VIII. of Attachment A of the DOL Employment and Training Administration’s Foreign Labor Certification Training and Employment Guidance Letter (TEGL) No.

21-06, Procedures for H-2B Certification of Temporary Non-Agricultural Occupations (June 25, 2007); *See also*, 20 C.F.R. §655.1-655.3.

In response to the director's RFE, the petitioner's client [REDACTED] states in its letter dated October 25, 2007, that the services of the beneficiary will be needed for a period of 10 months, with effect from December 1, 2007, to work as a welder at its Montgomery project in Alabama. The Form I-129, Petition for a Nonimmigrant Worker, indicates at Part 5, item 5, that the addresses where the beneficiary will work are the Mississippi Gulf Coast area, Mobile, AL and Tampa, Florida. The Application for Alien Employment Certification (Form ETA 750) indicates that the address where the beneficiary will work is the Mississippi Gulf Coast area. The record does not establish that the Montgomery project in Alabama is located in the area covered by the temporary labor certification application, specifically, the Mississippi Gulf Coast area.

Since this deficiency was not mentioned in the director's decision, this case will be remanded for the director to issue a request for additional evidence on the issue, discussed above, of the discrepancy between the labor certification application and the Form I-129 with regard to the location of the beneficiary's employment. The director must afford the petitioner a reasonable time to provide evidence pertinent to this issue, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the issue, and certify that decision to the AAO for review.

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

ORDER: The director's decision of January 24, 2008 approving the petition is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. Upon completion, the director shall certify the decision to the AAO for review.