

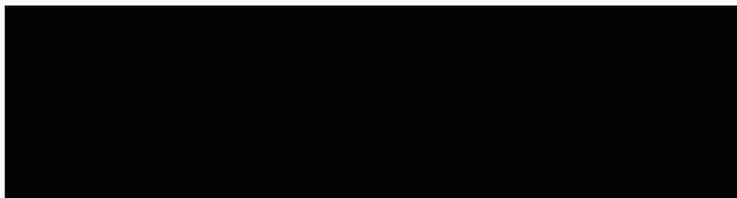
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U.S. Citizenship
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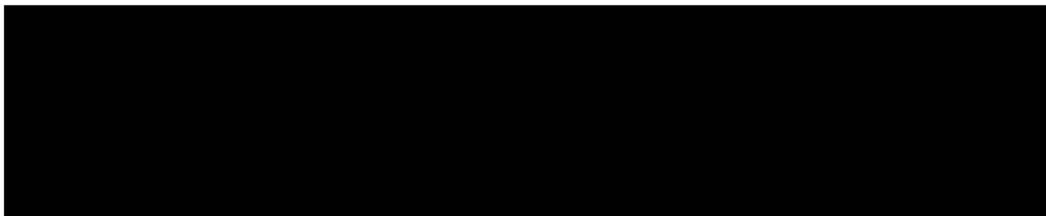
D4

FILE: EAC 08 003 51763 Office: VERMONT SERVICE CENTER Date: **JAN 29 2008**

IN RE: Petitioner: 
Beneficiaries:

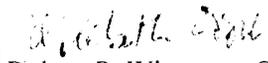
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:



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 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 The decision of the director will be withdrawn and the petition will be denied.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 provides scaffold construction services to oil refineries in the United States in order to maintain their facilities. It desires to employ the beneficiaries as scaffold helper 3s' 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 (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 a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiaries' services. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

As discussed below, the AAO agrees with the findings of the DOL that the petitioner has not established a temporary need for the beneficiaries' services. Upon careful review of the entire record of proceeding, 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.

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:

(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 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:

Pack/unpack scaffold components; carry components, hand tools to scaffold helper 1s; assemble/disassemble subcomponents (including joints and sections of frames) using nuts, bolts, and wrenches. All work to be performed on ground.

In its final determination notice, the DOL stated that the petitioner had not established a temporary need for the beneficiaries' services. The DOL stated that in support of its peakload need, the petitioner submitted monthly payroll reports for all of 2006 and January through May of 2007. The DOL concluded that the documentation was inadequate in substantiating the petitioner's peakload need of October 1, 2007 through March 31, 2008.

The petitioner also submitted a copy of a contract that it has with one of its customers. In review, the DOL stated that the contract has been in inception since 1999 and that the end date of the contract has been extended on several occasions; from April 30, 2006 to December 31, 2006, from December 31, 2006 to June 30, 2007 and from June 30, 2007 to December 2007. In summation, the DOL stated that the petitioner's need is permanent rather than temporary inasmuch as the contract has been in existence since 1999 and there doesn't appear to be an end to the contract due to the amendments made to extend the end date.

The petitioner explains in its letter dated September 19, 2007 that the DOL misunderstood the manner in which contracts are negotiated in this industry. The petitioner explains that contracts are executed annually and renewed at the end of the year, generally within 30 days of the existing contract's expiration. Therefore, the petitioner states that it regularly employs permanent workers; however, during a portion of the year, there is a need to supplement its permanent staff at the place of employment on a temporary basis due to a short-term demand. Specifically, the petitioner's contract with its customer, Motiva, and Motiva's need for scaffold helpers substantially increases only in the colder months of the year, October through March. The petitioner states that it has projected the need for 50 additional workers during the peak period October 2007 to March 2008 based upon commitments by its long-term clients, Motiva, ExxonMobil and Reformer. The petitioner concludes in stating that the oil refineries must perform their maintenance during the colder months of the year because the refineries are located in the tropical Gulf area and the workers must wear heavy clothing for protection and the nation's oil needs increase during the summer months.

Upon review, the nature of the asserted need appears to be continuous and ongoing, and the countervailing evidence provided with the petition does not overcome the reasons for the DOL denial of the petitioner's request for temporary labor certification. Contrary to the petitioner's and counsel's assertions, the evidence of record does not establish an H-2B peakload need as defined at 8 C.F.R. §§ 214.2(h)(6)(ii)(B)(3).

Counsel states in her letter dated August 23, 2007 that the petitioner only requires additional temporary labor during its clients' turnaround¹ periods from October to March. However, the petitioner's monthly payroll reports for the calendar years 2005, 2006 and 2007 show that temporary workers were employed for the month of April and June through July of 2005, the entire year of 2006 and from January through April of 2007 in the proffered occupation of helper 3. The charts do not establish a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. Neither the petitioner's explanation nor any of its submissions overcome the DOL decision's information about this employer not establishing a temporary need for labor. The petitioner's 2005-2007 monthly payroll reports do not show a temporary peakload need during the months of October through March.

In its September 19, 2007 letter, the petitioner states that there is a shortage of workers who are willing and able to perform the work of scaffold helper 3. The fact that the petitioner is unable to locate and secure United States workers to perform the job does not justify the petitioner's request for temporary H-2B workers. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

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 director's decision is withdrawn. The petition is denied.

¹ "Turnaround" refers to the work that is done when an entire plant facility or major units within a facility are shut down completely and equipment is opened for inspection, repairs, capital installations and tie-ins are done while the facility or unit is idle (See Brand's Regional Staffing Manager's letter dated November 20, 2007).