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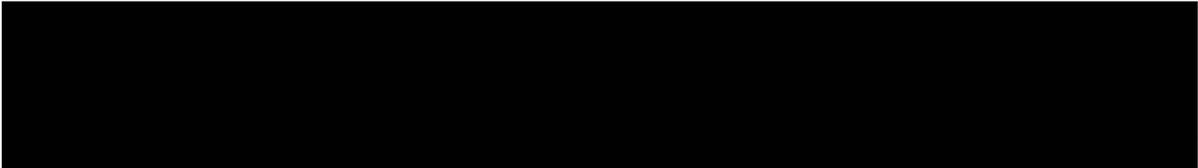
FILE: EAC 07 259 52384 Office: VERMONT SERVICE CENTER Date: JAN 31 2008

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:** On September 14, 2007, the petitioner filed the Form I-129 (Petition for a Nonimmigrant Worker) and allied documents. This petition seeks Citizenship and Immigration Services (CIS) H-2B classification of 200 unidentified aliens to work as disaster remediation workers in Miami, Florida. The petition was filed after the Department of Labor (DOL) decided to not issue a temporary labor certification, having determined that unique, complex, and persistent circumstances generated in the Gulf Region by Hurricanes Katrina and Rita made it impossible for DOL to determine whether the employer's need is temporary within the meaning of the CIS regulations on the H-2B program. The Director, Vermont Service Center issued a decision recommending approval of the petition, that he certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). On October 18, 2007, the AAO withdrew the director's decision and issued a request for additional evidence (RFE), in order to provide the petitioner an opportunity to submit additional documentation to resolve evidentiary issues that the AAO has identified during its review of the record of proceeding. The petitioner provided a timely response to the RFE, and the matter is now before the AAO for a decision based upon the record of proceedings as supplemented by the documents submitted in response to the RFE. As discussed below, the AAO's withdrawal of the director's decision will be affirmed, and the petition will be denied.

### Background

Prior to its determination on the petitioner's application for labor certification (Form ETA 750), DOL allowed the petitioner an opportunity to supplement the application. In response, the petitioner submitted to DOL's Atlanta Processing Center a four-page document (with seven attachments) entitled "Supplemental Statement of Need (Including Exhibits/Documents in Support of the Petition)" (hereinafter referred to as the ETA 750 Supplement).

After DOL's decision not to grant the temporary labor certification, the petitioner filed the Form I-129, the related Form ETA 750, and these documents in support of the petition: (1) the ETA 750 Supplement, including its seven attached documentary exhibits; (2) DOL's Final Determination letter, dated September 7, 2007, relating why DOL could not issue a temporary labor certification; and (3) a September 12, 2007 letter from the petitioner to the service center's premium processing unit.

The Forms ETA 750 and I-129 were filed for 200 unnamed aliens to work as "Disaster Remediation Workers." The Form ETA 750 identifies the proposed work locations as Miami and Dade, Florida. According to the Form I-129, the petitioner would employ and assign the workers to work only in Miami, Florida. The Forms I-129 and ETA 750 specify the beneficiaries' dates of intended employment as October 1, 2007 to July 31, 2008.

The petitioner used the following paragraph at both the Form ETA 750's item 13 (description of the job to be performed) and at item 3 of section 2 of the Form I-129 Supplement H (explanation of the temporary need for the aliens' services):

Clean up rubble and debris and prepare sites related to natural disasters; dig trenches, erect scaffolding, and set excavation braces; perform tasks requiring physical labor at building, heavy construction, and demolition sites; may operate hand and power tools of all kinds and a variety of other equipment and instruments; assist other trained workers as needed.

Neither the Form ETA 750, the Form I-129, nor any other document submitted into the record indicates that the petitioner's disaster remediation jobs require any experience or training.

The petitioner asserts that its need for temporary workers is a peakload need as defined at 8 C.F.R. § 214.2(h)(6).

The following narrative summarizes statements in the ETA 750 Supplement. There exists a "unique set of circumstances relating to unique cyclic peaks associated with hurricane work." The petitioner's operations in response to Hurricane Katrina are an example of "the unique context" in which the petitioner's need should be evaluated. The petitioner performed "over 700 major jobs during the Katrina period alone," which included all the hurricane-response work at Tulane University; over 150 jobs for Wal-Mart and Sam's Clubs; over 30 jobs for the U.S. Postal Service; and restoring and powering-up the U.S. Department of Energy New Orleans computer facility so that the oil reserves could be assessed and released. The devastating effects of hurricanes on insurers and local economies would be mitigated if labor resources for rebuilding the infrastructure were more readily available. Immediate infusion of workers to mitigate damage and restore/rebuild damage zones would save insurers and local economies billions of dollars. Such a timely response requires an immediate source of reconstruction laborers. Currently, the petitioner "must subcontract labor from out-firms or bring in labor from other operation divisions from far away (which has a very high cost, time mobilization factors and hardship)."

The ETA 750 Supplement asserts that the National Oceanic and Atmospheric Administration (NOAA) and AccuWeather both "firmly forecast a very strong 2007 hurricane season" for the region for which the petitioner seeks remediation workers. The Supplement also describes the petitioner's trademark program "Red Alert®" whereby clients enter into a "frame agreement" that is marketed to Fortune 500 companies, insurers, hospitals, condominium associations, and businesses. The "Red Alert®" contract (or frame agreement) is an initial contract with the petitioner that ensures a "priority response" from the petitioner in the case of a disaster. The record indicates that, in the event of such a response, the particular services to be provided, and the number of disaster remediation workers assigned to perform them, would be determined by the actual situation for which the petitioner launches a priority response.

The ETA 750 Supplement states also that the revenue figures at its Exhibits 6 and 7 reflect the fact the petitioner's "core operations" are "relatively constant" but "clearly show spikes during hurricane season between October and January of hurricane years (the precise time we need the H-2B visa employees)."

As an indication of the petitioner's unique competency in providing damage recovery services, the ETA 750 Supplement refers to its Exhibit 1, which is a bar-graph comparison of the sales figures of the petitioner and 11 other firms that provide damage recovery services. According to this document, the petitioner is significantly greater and more comprehensive in organizational scope and structure than "all other potential competitors."

The Supplement's Exhibit 2 consists of (1) a two-page article reporting on AccuWeather.com's 2007 forecast on hurricanes in the year 2007, and (2) a 22-page document from Colorado University's Department of Atmospheric Science, entitled "Extended Range Forecast of Atlantic Seasonal Hurricane Activity and U.S.

Landfall Strike Probability for 2007.” The Exhibit 2 article states, in part, that AccuWeather.com “forecasts 13 or 14 total storms in the Atlantic Basin, with three or more likely to be major hurricanes of Category 3 or greater.” The headnote to the Colorado University extended range forecast states that, as of May 31, 2007, its authors continued to “call for a very active Atlantic basin hurricane season in 2007,” with well above long-period-average landfall probabilities for the U.S. coastline.” This document includes the following probability summary:

PROBABILITIES FOR AT LEAST ONE MAJOR (CATEGORY 3-4-5) HURRICANE  
LANDFALL ON EACH OF THE FOLLOWING COASTAL AREAS:

- 1) Entire U.S. coastline – 74% (average for last century is 52%)
- 2) U.S. East Coast Including Peninsula Florida – 50% (average for last century is 31%)
- 3) Gulf Coast from the Florida Panhandle westward to Brownsville - 49% (Average for last century is 30%)
- 4) Above-average major hurricane landfall risk in the Caribbean

Exhibit 3 of the ETA 750 Supplement is a document, developed by the petitioner, in slide-presentation format, that is divided into four sections: (1) a line graph on “Damage recovery value proposition;” (2) four explanatory phrases under the heading “Favorable industry dynamics;” (3) a pie chart entitled U.S. insured catastrophe losses by cause of loss (1984-2004); and (4) a bar graph on “Largest hurricane insured losses (1992-2005) – (\$ billions).”

The Supplement’s Exhibit 4 is a redacted copy of a Red Alert® Service Agreement for a priority response from the petitioner in the event of a disaster. Exhibit 5 contains copies of other types of contracts that the petitioner has entered into with clients: Exhibit 5-A is a redacted copy of a Recycling and Disposal Services Agreement; Exhibit 5-B is a redacted copy of a Hurricane Service Agreement calling for a “best efforts response” from the petitioner (as opposed to the “priority response” required in Red Alert® agreements); Exhibit 5C is a redacted copy of a Master Preferred Services Agreement engaging the petitioner to provide consulting services; Exhibit 6 is a slide-presentation type page divided into four parts: (1) three explanatory phrases under the heading “Base business”; (2) a bar graph, under the heading “Recurring business contribution – (\$ millions)”; (3) a bar graph, under the heading “Strong backlog coverage business contribution – (\$ millions)”; and (4) a line graph on the petitioner’s net working capital from January 2003 to August 2006. Exhibit 7 is a diagram and bar-graph summary of the petitioner’s history.

In contrast to the ETA 750 Supplement’s narrative, the petitioner’s September 12, 2007 letter to the service center focuses on current needs, rather than on the probabilities of future events requiring disaster remediation workers. The following excerpt asserts the current need:

[The petitioner] currently temporarily requires the services of 250 [sic] disaster remediation workers to clean up rubble and debris and prepare sites related to natural disasters; dig trenches, erect scaffolding, and set excavation braces; perform tasks requiring physical labor at

building, heavy construction, and demolition sites; may operate hand and power tools of all kinds and a variety of other equipment and instruments; and assist other trained workers as needed. A temporary peak-load need has arisen for workers with these skills because of the large number of ongoing construction projects in the area at this time as well as due to unprecedented destruction caused by Hurricane Katrina along the Gulf Coast of Mississippi. This is an unusually large workload for our company that will be sustained for a short period of time. As to the itinerary, the worksite encompasses the Miami, Florida area and crews will be assigned to specific locations as necessity requires. . . .

The ten-month period of 10/1/07 to 7/31/08 will be required in order for the workers to complete the job responsibilities assigned. . . .

We appreciate your consideration of this petition on our behalf in light of the recommendation/instruction made by the Department of Labor that we present this petition directly to you for possible adjudication based upon the circumstances currently prevalent in Miami.

The AAO's RFE includes these comments on evidentiary deficiencies that prompted the AAO to request additional evidence. (The referenced Exhibits are the ETA 750 Supplement's.)

Upon review of the aforementioned evidence, the petitioner has not established its need for temporary workers. The graph of gross sales (Exhibit 1) does not establish the petitioner's need for 200 disaster remediation workers. The petition has not been substantiated by financial evidence, such as the petitioner's 2006 and 2007 monthly payroll reports, staffing records, federal quarterly income tax returns, or any other financial document that demonstrates a projected increase in the number of disaster remediation workers for the period of intended employment. The petitioner has not demonstrated its need for temporary workers by the hurricane and storm forecasts (Exhibits 2 and 3) and the petitioner's Red Alert program. Such employment is based on a possibility instead of an actual occurrence.

In Exhibit 5, none of the existing contracts are for the Miami/Dade, Florida area. One of the contracts is for recovery work to be performed at several locations in the parishes of Louisiana. Another contract entitled "Offer and Award, Fixed Price Construction" is for work including furnishing materials, labor and equipment for emergency cleanup of the petitioner's client's facility located in New Orleans, Louisiana. The Hurricane Service agreement is between the petitioner and its client located at various locations and the locations are not stated on the agreement. Finally, the Master Preferred Vendor Services Agreement between the petitioner and its client does not state the location; however, it does state that the agreement shall be construed and enforced in accordance with the laws of the State of New York. The record of proceeding contains no relevant contracts and letters of agreement on the petitioner's letterhead between the petitioner and clients in the Miami/Dade, Florida area for the type of services that is the subject of the petition. Form I-129 and Form ETA 750 state specifically that the beneficiaries will work in Miami/Dade, Florida.

The record of proceeding contains no other statements by the petitioner's client(s) justifying the need for 200 unnamed disaster remediation workers. The petitioner has not established a peakload need for 200 unnamed disaster remediation workers to provide services temporarily in the Miami/Dade, Florida area. The petitioner has not submitted any contracts for work to be performed by the disaster remediation workers in the Miami/Dade, Florida area. The petition states that the petitioner currently employs 1600 employees but the petitioner has not submitted evidence that it regularly employs these permanent workers to perform the services or labor at the place of employment. The petitioner has not provided evidence to show 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.

After the above comments, the RFE requested the following evidence relevant to the petitioner's assertion of an H-2B peakload need:

(1) the contractual commitments stating the number of workers and their proposed job duties during the period of asserted need, October 1, 2007 through July 31, 2008 in the Miami/Dade, Florida area. The petitioner should provide work orders, service agreements, work schedules, or any other documents prepared in the usual course of business that substantiate the petitioner's need to hire 200 disaster remediation workers to supplement its permanent staff of disaster remediation workers during the period of asserted need; (2) a statement from an appropriate management official of the petitioner addressing how it calculated its need for 200 unnamed disaster remediation workers, why its need for these workers is temporary and that these temporary workers will not become a part of the petitioner's regular operation. The official making the statement should sign the statement beneath a typed attestation that the statement is true and accurate; (3) financial evidence such as staffing records for a two-year period, quarterly tax returns for a two-year period, and monthly payroll reports for a two-year period that shows by month the total number of permanent and temporary workers employed in the proffered occupation, the total hours worked and total earnings received; (5) documentary evidence of the petitioner's permanent disaster remediation employees and why the petitioner's permanent staff of disaster remediation workers is not sufficient; (6) an explanation of what it intends to do with 200 disaster remediation workers in the event there are no future disasters during the period of asserted need; (7) any other documentation that establishes that a temporary demand that requires the hiring of 200 H-2B disaster remediation workers from October 1, 2007 through July 21, 2008 is a peakload need of the petitioner within the meaning of 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The petitioner timely submitted four (4) binders of documents in response to the RFE. The petitioner provides a Response Index that outlines the documents, by exhibit tab number, as follows

(1) Copy of Notice Dated 10/18/07 File Number EAC 0725952384: [a copy of the RFE issued by the AAO.];

- (2) Attachment A: [a copy of a sheet of tables – previously filed with the Form I-129 as its “Attachment A” – that summarize the petitioner’s employment of Disaster Remediation Workers for the calendar years 2005 and 2006, and for January through May 2007, by these monthly categories: Total Workers; Total Hours Worked; and Total Earnings Received.]
- (3) Attachment A – Reformatted: [a copy of the Attachment A sheet of tables which has been modified to include the yearly total earnings received for Disaster Remediation Workers.]
- (4) Graph of Attachment A[,] Total Workers per Month: [a bar graph representation of the monthly number of workers specified in the Attachment A tables (described in the Response Index as “[s]howing the increase of Temporary Labor during peak disaster response conditions as a result of Hurricane Katrina (2005/06 vs. 2007)).”]
- (5) Detail of the Amounts Invoiced to Subcontractors Providing Temporary Labor: [an internally created spreadsheet, entitled “Miami Temporary Employees,” that details for the calendar years 2005 and 2006, and for January through May 2007, the total dollar amount of monthly invoices received from 21 different subcontractors. The Response Index states that the figures “support the Temporary Employment calculations” and that “Temporary Employment by month is a calculation based on the amount of general labor subcontractor invoices for the Miami region billed during the month divided by an average rate of \$17/hr. per employee.”]
- (6) Vendor Usage by Invoice Accrual Reports: [two one-page printouts, generated by the petitioner’s accounting system, pertaining to subcontractors’ invoices for South Florida remediation workers provided to the petitioner during accounting years 2005 and 2006.]
- (7) Paid Invoice Register 2005 & 2006: [printouts, generated by the petitioner’s accounting system, submitted to “provide the detail amounts and invoices that make up the total vendor amount included in the Temporary Employee Calculation. Separately for each specified vendor, the printouts include the following information about the vendors’ invoices for remediation workers: invoice number; invoice date; the number of the check used to pay the invoice; the original invoice amount; and the amount paid. The printouts identify and provide the information for 10 vendors for 2005 and 13 vendors for 2006. ]
- (8) Copies of Checks and Corresponding Invoices: [contains copies of individual invoices, and the petitioner’s checks issued to pay them, for four vendors: Tab A: [REDACTED] (for year 2005); Tab B: [REDACTED] for 2005); Tab C: [REDACTED] (for 2005); and [REDACTED] (for 2006)];
- (9) Permanent Employee Reconciliation - State of Florida SUI Tax Information.
- (10) September 12, 2007 Letter to Department of Homeland Security. [an additional copy of the letter the petitioner filed with the Form I-129.]
- (11) Supplemental statement of Need: [an additional copy of the ETA 750 Supplement.]

The two-page cover letter that the petitioner submitted with the RFE response comments directly on several sections of the RFE. The AAO takes special note of three of these comments.

In response to segment 1 of the evidence request (for business records that substantiate the temporary need for 200 disaster remediation workers), the cover letter refers the AAO to the copy of the redacted Red Alert® Service Agreement that the petitioner previously submitted as Exhibit 4 to the ETA 750 Supplement, and states:

[The petitioner] maintains both a trademarked program called RED ALERT® which is a frame agreement for businesses that provides a “priority response” for the client should a disaster strike[,] and we have special response agreements with the world’s largest insurers. Please see tab 11 [another copy of the ETA 750 Supplement], Item # 4 for further clarification of this program.

The AAO notes that the Red Alert® agreement commits neither the petitioner to assign nor the client to accept any particular number of disaster remediation workers for any definite period.

In response to segment 2 of the RFE’s section asking for a statement on how the petitioner calculated its need for the 200 disaster-remediation workers sought in the petition, the petitioner states that the number of workers was derived by “[t]aking an average of the labor data (tab 4 [bar graphs on the number of the disaster remediation workers used by the petitioner in 2005, 2006, and January through May of 2007]),” which “equals approximately 100,” and doubling that number “to allow for a more reasonable work shift expectation” than experienced in the past, when “most of these disaster remediation laborers were forced to work unrelenting long hours due to labor shortages.” The speculative nature of this formula does not generate a number of workers to be definitely employed in disaster remediation work during the period specified in the petition. Therefore, the formula does not provide an accurate factual basis for the number of workers sought in the petition.

In response to the RFE’s segment 5 request for documentation on the petitioner’s permanent workers, the petitioner indicates that it has not employed permanent disaster remediation workers:

[The petitioner] had not established a permanent base location in this area and therefore utilized permanent employees from other [of the petitioner’s] locations in the surrounding areas. These permanent [petitioner] employees consist of Office and Administrative Staff for billing and insurance purposes, as well as Restoration Supervisors and General Managers who provide work plans, project management, and oversee the general labor in addition to other supervisory functions. General laborers are hired through labor subcontractors brought in from areas outside the disaster location.

As will be discussed later, the lack of permanent workers of the type sought by the petition fails an essential element of the H-2B peakload criterion, namely, supplementation of a petitioner’s permanent workers that provide the labor or services sought from the workers specified in the petition.

Finally, the petitioner provided the following response with regard to the request at segment 6 for “an explanation of what [the petitioner] intends to do with 200 disaster remediation workers in the event that there are no future disasters within the period of asserted need”:

Although there are very unique circumstances surrounding disaster remediation work such as the inability to predict with exact preciseness the location and timing of an event, the likelihood of these events occurring within the period of asserted need is statistically certain to happen. We are requesting these 200 unnamed workers to be available to [us], as the largest property restoration company in the United States, so that when the time of crisis occurs, we will be prepared on a short term basis to stabilize the affected region and begin reconstruction.

Consistent with documentation in the record, the above response reflects the fact that the petitioner has failed to establish when and in what numbers the workers sought in the petition would be employed as disaster remediation workers.

#### H-2B Standards

The regulation at 8 C.F.R. § 214.2(h)(6) provides, 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.

(2) *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(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.

(4) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after 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.

### Analysis

As indicated both in the summary of the principles of section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), at 8 C.F.R. § 214.2(h)(6)(i), and mirrored in the job description and employment period sections of the Forms I-129 and ETA 750, the H-2B petitioner must establish that the alien workers

sought in the petition would perform their temporary services or labor throughout the employment period designated on the Form I-129. This the petitioner has failed to do.

The evidence of record indicates that the specific number of beneficiaries, if any, who would actually perform disaster remediation at any given time during the period requested in the petition, and the periods during which they would perform such work, are speculative. Both aspects depend upon clients' specific needs for disaster-remediation that may or may not arise during the period specified in the petition. In this regard, the AAO notes that, the petitioner asserts in part that current Miami-area construction and rebuilding needs require the petitioner to provide disaster remediation workers. However, the petitioner has not documented such need. 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)). Also, the AAO is not persuaded by the petitioner's formula for determining the number of workers required for the period, because the formula is not based upon obligations by the petitioner to provide and obligations by the petitioner's clients to use that number.<sup>1</sup>

Further, the petitioner has not established an H-2B peakload need. The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) states that for an H-2B peakload need the petitioner must establish [1] that it regularly employs permanent workers to perform the services or labor at the place of employment, [2] that it needs to supplement its permanent staff at the place of employment on a temporary basis, [3] that the need for supplementation is due to a seasonal or short-term demand, and [4] that the temporary additions to staff will not become a part of the petitioner's regular operation.

The documentation in the record of proceedings establishes that the petitioner does not maintain a permanent staff of disaster remediation workers. Therefore, the petitioner does not meet the H-2B peakload criterion's element of regularly employing permanent workers to perform the services or labor sought. As noted earlier in this decision, the petitioner's reply to the RFE states that its only cadre of permanent employees for disaster-remediation work in Miami has been "Office and Administrative Staff for billing and insurance purposes, as well as Restoration Supervisors and General Managers who provide work plans, project management, and oversee the general labor in addition to other supervisory functions."

Also, the documentation of record, particularly the historical tables and charts at Exhibits 3, 4, and 5 of the petitioner's response to the RFE, do not indicate that the petitioner has a seasonal or short-term demand recurring annually from October 1 through July 1 of the following year. These charts do not establish a peakload need for disaster remediation workers for the period of work specified in the petition (October 1, 2007 to July 31, 2008). Nor do the invoices for South Florida submitted by the petitioner establish its need for 200 workers from October 1, 2007 to July 31, 2008. The AAO notes that the petitioner's summary of ADP filings submitted as exhibit 9 to the AAO's RFE do not reflect any wages paid to its permanent workforce in the Miami/Dade area from

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<sup>1</sup> As noted earlier in this decision, the petitioner derived 200 as the number of required workers by "[t]aking an average of the labor data (tab 4 [bar graphs on the number of the disaster remediation workers used by the petitioner in 2005, 2006, and January through May of 2007])," which "equals approximately 100," and doubling that number "to allow for a more reasonable work shift expectation" than experienced in the past, when "most of these disaster remediation laborers were forced to work unrelenting long hours due to labor shortages."

2005-2007. The evidence does not establish that the petitioner has a seasonal or short-term demand for 200 disaster remediation workers and that such workers will not become a part of the petitioner's regular operation.

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

**ORDER:** The AAO's withdrawal of the director's decision on October 18, 2007 is affirmed, and the petition is denied.

