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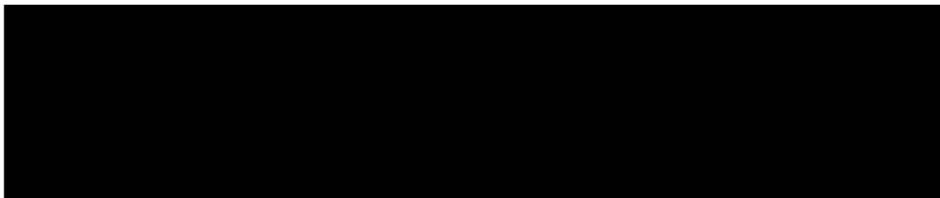
U.S. Department of Homeland Security  
20 Massachusetts Ave. N.W., Rm. 3000  
Washington, DC 20529



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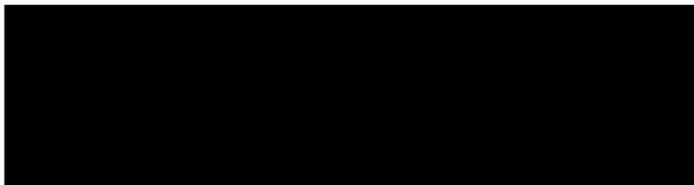
FILE: EAC 08 051 50467 Office: VERMONT SERVICE CENTER Date: JUN 09 2008

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. Wiema  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was recommended to be 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 The decision of the director will be withdrawn and the petition will be denied.

The petitioner is a general labor contractor that provides laborers to shipbuilders and maintenance yards. It desires to employ 284 alien workers 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 April 1, 2008 to August 1, 2008. According to the Application for Alien Employment Certification (Form ETA 750), the petitioner would employ and assign the beneficiaries to work with Signal International in Pascagoula, Mississippi.

In its Final Determination letter on the petitioner's Form ETA 750, the Department of Labor (DOL) notified the employer that a temporary labor certification could not be issued at this time as circumstances generated by Hurricanes Katrina and Rita made it impossible for DOL to determine whether the employer's need is temporary as defined for the H-2B classification. The petitioner then filed a petition with the Director, VSC, containing countervailing evidence to overcome the DOL's decision. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the DOL and approved the petition. The director's decision to approve the petition is now before the AAO for review.

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

As discussed below, the evidence of record does not support the director's decision to approve the petition. The AAO finds that the petitioner has not established a temporary need for the services of the beneficiaries (welders and fitters) in accordance with the H-2B regulations at 8 C.F.R. § 214.2(h)(6). Accordingly, the director's decision will be withdrawn and the petition will be denied.

The petitioner seeks approval of the proffered position as a one-time occurrence, in accordance with the provision at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

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)*, 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.

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.

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).

As reflected in the discussion below, the AAO finds that the evidence of record is insufficient to establish the H-2B need asserted in the petition.

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, and pressure vessels, for the purpose of repair and construction of ships. Employer provides tools.

In its Final Determination letter, DOL states that it is receiving subsequent H-2B applications filed, in many instances, by the same employers under the same standard of temporary need for approximately the same period of need. DOL states that this situation makes it difficult to determine whether the employer's need is actually temporary. DOL explains that since the employer's request for temporary workers is based on a need identified

as a result of Hurricanes Katrina and Rita, it is unable to make a determination and that this finding should be presented to Citizenship and Immigration Services (CIS) for final adjudication.

The petitioner filed a petition with the Director, VSC. Evidence in support of the petition includes a statement from the petitioner explaining the temporary need for H-2B workers; a Countervailing Evidence Statement signed by counsel; two decisions certified to the AAO by the Vermont Service center for review – they are dated November 13, 2006 and August 6, 2007 and address, respectively, petitions filed on November 1, 2006 and May 16, 2007; a February 19, 2006 article from The Times-Picayune newspaper, regarding the labor shortage situation in Gulf Coast shipyards; and a memorandum, dated July 16, 2007, from [REDACTED] of The Avascent Group regarding the shipbuilding labor shortage in the Gulf Coast area of the United States.

As previously stated, the petitioner is a labor contracting company that supplies workers to businesses that are seeking laborers. In its statement, the petitioner asserts that the company was established in January 2007 to address the growing need for skilled construction laborers in the region. The petitioner states that in the previous year it has been inundated with requests for work and has obtained numerous contracts from shipbuilders and maintenance yards in the Gulf Coast region to provide skilled construction laborers.

According to the Form ETA 750 and the Petition for a Nonimmigrant Worker (Form I-129), the 284 beneficiaries would be assigned to work at Signal International (Signal) facilities in Pascagoula, Mississippi. The Form I-129 was filed on December 3, 2007. A letter from Signal's Vice President of Production, dated August 7, 2007, states that Signal has a business relationship with the petitioner, under which the petitioner provides Signal with welders and fitters. The letter also states that, based on its current and projected workload through next year, Signal will require up to 400 temporary workers (welder-fitters) from the petitioner for the period October 1, 2007 through July 31, 2008 at its Mississippi operations.

The body of the letter is here presented in full:

Signal International has established a business relationship with [the petitioner] and they continue to provide us with reliable, hardworking, skilled welders and fitters.

Based on our current and projected workloads through next year, we will require up to 400 temporary workers (Welders-Fitters) from [the petitioner] for the period from October 1, 2007 through July 31, 2008 in our Mississippi Operations.

The letter does not indicate that Signal has entered a contract with the petitioner for the 284 workers sought in this petition. Nor does the letter specify any contractual commitment for any specific number of workers from the petitioner. The petitioner has not submitted any documentary evidence that, at the time the petition was filed, there was any contractual commitment from the petitioner to provide, and from Signal to use, 284 H-2B welders and fitters for the period stated in the petition. The record of proceedings contains no documentary evidence of the factual basis of the letter's assertions about projected need. Neither the letter nor any other evidence of record presents the "current and projected workloads through next year" upon which the expressed requirement for "up to 400 temporary workers (Welders-Fitters)" is based. Further, the letter does not provide a specific number of workers that will be required, but, instead, cites only the

noncommittal generalization of “up to 400,” a possible upper limit rather than an exact requirement. Neither this letter nor any other evidence of record conveys specific information about Signal’s particular operational needs; its history with regard to its employment of permanent staff, temporary U.S. workers, and H-2B workers as welders and fitters; and the staffing agencies, employment contractors, and other sources from which it may be drawing workers for the same “up to 400” positions referenced in the letter. Further, the record of proceedings contains no documentary evidence of the basis upon which the petitioner deduced a need for 284 welders and fitters from Signal’s expression of an indefinite need of “up to 400” workers. While the petitioner premises the petition on the needs of Signal, the record contains no evidence from Signal than its August 7, 2007 letter discussed above, which contains no specific information about that company’s particular operational needs during the period in question. In short, there is an insufficient factual basis for a finding that Signal has an H-2B need for the workers specified in the petition. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The basic points of [REDACTED]’s July 16, 2007 memorandum on the shipbuilding labor shortage in the Gulf area is captured by its Conclusion section, which states:

The shipbuilding labor shortage is primarily caused by two temporary factors resulting from Hurricane Katrina: the housing shortage (which translates into smaller labor supply) and the increased demand for labor from the construction industry.

In the past months important obstacles to addressing the housing shortage have been overcome, and significant federal funding resources have recently become available to homeowners and developers. The labor force has already started to grow more quickly, and increasing number of housing units will help sustain this trend. Within two to three years, the severe housing shortage will have been mostly addressed, and the labor force will have increased correspondingly.

At the same time, as rebuilding efforts start to wind down, the construction industry’s demand for labor will decrease. Workers who were previously employed by construction firms will seek new jobs, freeing up labor for shipbuilders. These dynamics of increased labor supply and decreased labor demand will combine to eliminate the shipbuilding labor shortage in the Gulf Coast area.

Neither the memorandum nor The Times-Picayune newspaper article is probative. A labor shortage does not establish a temporary need for H-2B workers. Further, the Gulf area labor shortage which these two documents discuss does not establish that the particular company, Signal, has the asserted H-2B need to hire for the time specified in the petition 284 workers under the one-time occurrence or any other temporary need criterion defined at 8 C.F.R. § 214.2(h)(6). Further, a shortage of labor does not establish that the labor-contractor

petitioner here has the need for the 284 workers for specific assignment at Signal and for the period stated in the petition, and that such need is temporary within the meaning of the H-2B program. The AAO further notes that the newspaper article submitted by the petitioner was not current at the time of the petition's filing in December 2007, as it was written in February 2006, and that the article does not specifically address either the petitioner's or Signal's specific needs.

In the summary section of her Countervailing Evidence Statement, counsel asserts that the petitioner has satisfied the requirements of the H-2B regulations by "statements from the employer, the article from the Times-Picayune, and a detailed statement from a recognized expert." For the reasons discussed above, the AAO disagrees, and again notes that unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena; Matter of Laureano; Matter of Ramirez-Sanchez.*

The AAO also notes that, contrary to counsel's assertions in her Countervailing Evidence Statement, the petitioner did not provide "copies of contracts with Petitioner's clients." Also, such documents were not included in counsel's list of exhibits.

The two redacted decisions entered into the record counsel misidentifies as AAO decisions. In fact, they are decisions from the service center that were 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. It is a service center director's summation of a portion of evidence presented by the petitioner in that particular case.

Also, none of the decisions cited by counsel are precedent decisions, that is, decisions that have been designated and published as precedents 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. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding, *see* 8 C.F.R. § 103.2(b)(16)(ii), and the record presently before the AAO does not merit approval of the present petition in accordance with the regulations at 8 C.F.R. § 214.2(h)(6).

The AAO also finds that the petition does not merit approval by application of the precedent decision *Matter of Artee*, which, as earlier noted in this decision, states that it is the nature of the petitioner's need that determines whether or not a petition establishes an H-2B temporary need.

The present proceeding's salient facts are similar to those in *Matter of Artee*, where a "temporary help service" was seeking H-2B classification for alien machinists that it would employ but assign to perform their work at the petitioner's client firms. As in the present proceedings, the *Matter of Artee* petitioner was attempting to use the H-2B program to obtain temporary workers that it would assign to clients to help relieve a labor shortage of indefinite duration. In *Matter of Artee* the shortage was in machinists; in the present proceedings the shortage is in welders and ship fitters.

*Matter of Artee's* synopsis section, at the beginning of the decision, states these precedential holdings:

(1) In determining whether an alien is coming “temporarily” to the United States to “perform temporary services or labor” as required by section 101(a)(15)(H)(ii) of the Act, 8 U.S.C. 1101(a)(15)(H)(ii), the test is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling.

(3) Because the business of a temporary help service is to meet the temporary needs of many clients, the nature of the petitioner's needs for the beneficiary is more or less continuous. Where as here there is a current shortage of the particular skill, the petitioner's need to supply this employee to its clients is ongoing, not temporary as required by section 101(a)(15)(H)(ii).

The main body of *Matter of Artee* includes the following explanation as to why the BIA denied the H-2B petition:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hires workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand.

There is currently a wide-spread shortage of skilled machinists in the United States. Because of this shortage, the petitioner, as a prudent business measure, has ensured that it can supply machinists to its customers. Its need to supply machinists to its customers is ongoing. Therefore, as long as this universal shortage of machinists exists, the nature of the need for the position with the petitioner is such that the duties are not temporary and will persist as long as the shortage.

In the absence of evidence that the petitioner has a non-recurring or infrequent demand for skilled machinists, the following order is entered:

ORDER: The petition is denied.

[18 I &N Dec., at 367, 368]

The principles of *Matter of Artee* are incorporated clearly in the H-2B temporary-need definitions at 8 C.F.R. § 214.2(h)(6)(ii), which prescribes that whether the asserted need for workers qualifies as an H-2B temporary need is to be evaluated solely in terms of the petitioner. Here, the record indicates that the petitioner commenced and continues its labor contractor business “in order to address the extraordinarily rapidly growing need for skilled construction workers in the region.” As such, it appears that the period of the petitioner’s need for temporary welder-fitters is ongoing, will be coextensive with the shortage of those workers in the Gulf region, and is basic to the very nature of the petitioner’s business. Therefore, to the extent that the petitioner has established a need for the workers that are sought in this petition, it has not established that its need is temporary as evaluated under *Matter of Artee*, 8 C.F.R. § 214.2(h)(6)(ii), and the H-2B temporariness criteria at 8 C.F.R. § 214.2(h)(6). **The AAO here incorporates its earlier discussions of the evidence of record about the insufficiency of the evidence of record. That insufficiency also applies to analysis of temporary need in terms of the petitioner in this proceeding. Whether analyzed in terms of the petitioner’s need or its client’s, the record here fails to substantiate a need for the 284 temporary welders and fitters specified in the petition for service at Signal.**

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 dated April 11, 2008 is withdrawn. The petition is denied.