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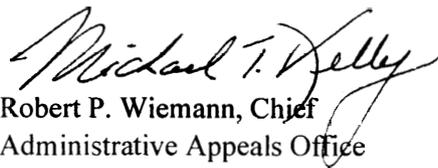
IN RE: Petitioner:
Beneficiaries:

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.

for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was recommended to be 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 affirmed and the petition will be approved.

The petitioner is a shipbuilding company whose principal business is to build commercial vessels for the offshore oil industry operating in the Gulf of Mexico. It desires to continue to employ the beneficiaries as carpenters 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 September 30, 2008. 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 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 recommending the approval of the petition is now before the AAO for review.

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.

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:

Carpentry on boats/ships in the shipyard of Eastern Shipbuilding Group, Inc. Basic training provided.

The petitioner states that it currently employs over 600 workers in various occupations. Recently, the company finalized contracts worth over \$200 million to construct 29 new ships. The destruction of many shipbuilding facilities along the Gulf region of Mississippi and Louisiana by Hurricane Katrina has led to an increased demand at facilities that were not damaged, such as the petitioner's facility. The petitioner has submitted evidence of its contractual obligations.

Further, counsel states that the petitioner was only able to obtain temporary workers during April through December of 2006, but the company's current temporary needs are for the entire October 2007-September 2008 fiscal year, based on their current contractual demands. The petitioner has shown a permanent need for electricians.

These documents establish that the nature of the petitioner's need is continuous and ongoing. The record establishes that these workers have become a part of the petitioner's operation and its need for them cannot, therefore, be considered a peakload need. However, the record does establish that the petitioner's need for these workers 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 workers 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 beneficiaries' H-2B employment in accordance with 8 C.F.R. § 214.2(h)(6)(ii)(B). The Vermont Service Center will issue the appropriate approval notice.

Counsel states that the 10 beneficiaries named on the current petition should be considered in status until October 10, 2007. The beneficiaries' eligibility to extend their nonimmigrant status is an issue that may not be appealed. The issue of whether the ten beneficiaries for whom the petition is approved are eligible for an extension of status is exclusively before the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The decision of the director is affirmed. The nonimmigrant visa petition is approved.