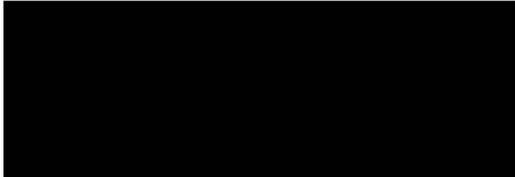


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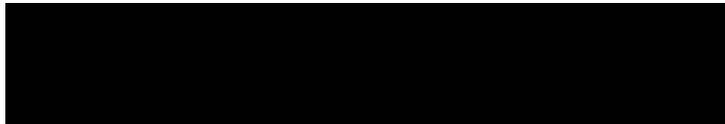


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FILE: EAC 08 105 50354 Office: VERMONT SERVICE CENTER Date:

OCT 03 2008

IN RE: Petitioner:  
Beneficiaries:



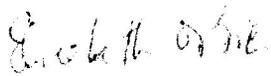
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 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 The decision of the director will be withdrawn and the petition will be denied.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 commercial oilfield construction company. It desires to extend the stay of 200 alien workers as construction equipment operators 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) from February 16, 2008 to November 16, 2008. According to documents submitted with the Application for Alien Employment Certification (Form ETA 750), the petitioner would employ and assign the beneficiaries to work with Conrad Industries, Inc. at 1501 Front Street, Morgan City, La. The Department of Labor (DOL) determined that a temporary labor certification could not be issued in the present case because the petitioner had not substantiated its temporary need for the beneficiaries' services. The petitioner then filed the current petition with the Director, VSC, with supporting evidence on February 29, 2008.

On March 12, 2008, the director issued a request for evidence (RFE) in which he requested the petitioner to submit an original memorandum of agreement signed by a representative of the petitioning entity and a representative of Conrad Industries identifying the dates of need, the number of workers required, the type of services to be performed and the phone number for the representative of Conrad Industries, which will permit confirmation if Citizenship and Immigration Services (CIS) deems it necessary. The director also requested that the petitioner provide evidence to establish its one-time need for the beneficiaries' services. Finally, the director requested that the petitioner provide staffing documentation identifying its permanent and temporary workforce by occupation for the past two years.

In response, the petitioner submitted with its letter dated April 18, 2008, a memorandum of agreement, a 2007 monthly payroll report, a work schedule outlining the timeline of the work to be performed and an employee compensation history for April 18, 2008.

The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the concerns of the DOL and recommended the approval of the petition on May 2, 2008. The director's decision recommending the approval of the petition for the 200 construction equipment operators named in the petition is now before the AAO for review.

On notice of certification, the petitioner did not present additional evidence for consideration. Therefore, the record is considered complete.

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)(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 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 one-time occurrence, in accordance with the provision at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

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).

The petitioner described the duties of the proffered position at section 13 on the Form ETA 750 as follows:

Perform tasks involving physical labor at heavy construction projects and demolition sites; will operate hand and power tools of all types: air hammers, welding torch, cement mixers, mall mechanical hoists, surveying and measuring equipment and a variety of other equipment and instruments. May clean and prepare sites.

In its notice dated February 19, 2008, the DOL stated that the subcontractor agreement and statement of need from Conrad Industries dated October 14, 2007 and signed by [REDACTED] could not be verified. DOL explained that the certifying officer placed a call to Conrad Industries and requested to speak to [REDACTED]. DOL stated that neither [REDACTED] nor any other representative of Conrad Industries contacted the certifying officer in reply. Accordingly, the DOL was unable to render a favorable determination inasmuch as the certifying officer was unable to verify that the jobs in question were bonafide. The DOL determined that the petitioner did not substantiate its temporary need for the beneficiaries' services.

In responding to the DOL's determination, the petitioner must provide countervailing evidence to overcome the concerns expressed in the final determination notice in order for the petition to be approved. The petitioner must also establish that the need for the beneficiaries' services is temporary and that the petition meets the requirements of the regulation at 8 C.F.R. § 214.2(h)(6).

As evidence of its temporary need, the petitioner provided a letter from Conrad Industries, Inc., dated October 14, 2007. The letter states that it is to confirm Conrad's temporary need for 200 additional workers from February 16, 2008 through November of 2008. The letter does not state why Conrad needs 200 workers and what each worker will be doing during this time period. The letter also requests the petitioner to forward the construction and trailer schedules for the project.

The Contractor/Subcontractor Service Agreement entered into on November 2, 2007 between the petitioner and Conrad Industries, Inc. states that the petitioner agrees to provide a workforce sufficient to complete maintenance and repairs to a marine platform TARA356 from February 16, 2008 until completion of project specifications. Exhibit A of the service agreement entitled "Scope of Work" describes the type of work to be performed as construction, assembling and cleaning and states that the delivery date is scheduled for November 16, 2008. It does not specify the various tasks in construction, assembling and cleaning the 200 beneficiaries will perform and how Conrad Industries will employ 200 laborers to complete such a project. The service agreement does not indicate that Conrad Industries has entered into a contract with the petitioner for the 200 workers sought in this petition. Conrad Industries agrees to allow the petitioner onto its premises to perform work, but does not obligate itself to provide work for 200 workers. The petitioner generally agrees to "provide a workforce sufficient to complete maintenance and repairs. . ." The service agreement does not specify any contractual commitment from the petitioner to provide, and from Conrad Industries to use, 200 H-2B construction equipment operators for the period stated in the petition. Further, the record of proceedings contains no documentary evidence of the basis upon which the petitioner deduced a need for 200 construction equipment operators.

While the petitioner premises the petition on the needs of Conrad Industries, the record contains no evidence from Conrad Industries other than its October 14, 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 the petitioner, through Conrad Industries, 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)).

The Petition for a Nonimmigrant Worker (Form I-129) indicates that the petitioner currently employs 725 workers. The petitioner's 2007 monthly payroll report shows that permanent and temporary workers were employed by the petitioner for the entire year receiving \$12,156,783 and \$1,648,545 in wages, respectively. Therefore, the petitioner had not established that the nature of the need is a "one-time occurrence" as it currently has a staff of 725 workers to perform the services or labor and has not shown that it will not need these 725 workers to perform the services or labor in the future.

The letter submitted to serve as an addendum to the Master Service Agreement does not indicate the type of services the 200 workers will perform for Conrad Industries. As stated previously, the record of proceedings contains no documentary evidence of the basis upon which the petitioner deduced a need for 200 construction equipment operators. The rig schedule which gives the number of hours used and remaining for a particular phase of work and the employee's compensation history for April 18, 2008 do not substantiate the petitioner's need for 200 workers during the requested period.

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 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 prescribe

that whether the asserted need for workers qualifies as an H-2B temporary need is to be evaluated in terms of the petitioner, not the clients it serves.

In the instant case, the petitioner, WHP, LLC, is conducting itself as a labor contractor and has agreed to supply workers to Conrad Industries, Inc. Here, the record indicates that the petitioner is a commercial construction company chartered in the state of Louisiana with seven years of experience in the industry. The petitioner states on Form I-129 and in its letter dated November 1, 2007 signed by [REDACTED] president, that it has had great difficulty in the recruitment of workers in this area for construction projects and it cannot find the necessary pool of workers in the area of need. The petitioner states that there are not sufficient United States workers in the area that are able, willing, qualified and available for this job. As such, it appears that the petitioner's need for temporary construction equipment operators is ongoing, will be coextensive with the indefinite shortage of those workers in the Gulf Coast region, and is basic to the very nature of the petitioner's business. Since there is a current shortage of construction equipment operators, the petitioner's need to supply these employees to its clients is ongoing, not temporary as required by section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Therefore, the petitioner has not established a temporary need of short duration, as required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). A labor shortage does not establish a temporary need for H-2B workers. Further, a shortage of labor does not establish that the labor-contractor petitioner here has the need for the 200 workers for specific assignment at Conrad Industries for the period stated in the petition, and that such need is temporary within the meaning of the H-2B program. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

In summation, the need for the beneficiaries' services appears to be ongoing. Although the delivery date is scheduled for November 16, 2008, the service agreement specifically states "from February 16, 2008 until completion of project specifications." The petitioner has not established that its need for the beneficiaries' services is a temporary event of short duration and that the maintenance and repair work to be performed by the beneficiaries constitutes a temporary "one-time occurrence." Contrary to the petitioner's assertions, the evidence of record does not establish a temporary event of short duration for construction equipment operators. The petitioner has not submitted documentary evidence to show that its company needs the number of temporary construction equipment operators for the period of intended employment. The evidence contained in the record of proceeding does not substantiate the petitioner's temporary need for construction equipment operators from February 16, 2008 to November 16, 2008.

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 May 2, 2008 is withdrawn. The petition is denied.