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FILE: EAC 08 214 50361 Office: VERMONT SERVICE CENTER Date: **OCT 21 2008**

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

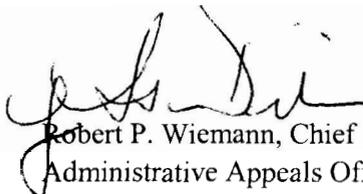
PETITION; Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

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 recommended to be approved by the Acting 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 The decision of the acting director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner engages in all aspects of electrical, mechanical, data and surveillance installation and engineering for the cruise ship industry. It desires to employ the beneficiaries as marine pipe fitters pursuant to 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), from October 1, 2008 to June 1, 2009. The petitioner would employ and assign the beneficiaries to work as marine pipe fitters with Triton Corporation. The Department of Labor (DOL) determined that the petitioner has not established that its need for the beneficiaries' services is intermittent and temporary. The DOL also determined that the documentation submitted was not acceptable to justify a temporary need. Finally, the DOL determined that the petitioner had not established that it will employ its temporary workers in the United States for the entire period of employment.

The acting 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 August 7, 2008. The acting director's decision recommending the approval of the petition for the 15 marine pipe fitters named in the petition has been certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii).

Upon careful review of the entire record of proceeding, the AAO finds that the record does not support the acting director's decision to approve the petition. As discussed below, the AAO finds three separate and independent grounds for remanding the petition, namely: (1) that the petitioner has not established a temporary need for the services of 15 marine pipe fitters in accordance with the H-2B regulations at 8 C.F.R. § 214.2(h)(6); (2) that the petitioner has not established that it will employ its temporary workers in the United States for the period of intended employment; and (3) that this petitioner has not established that the beneficiaries possess the minimum amount of experience to perform satisfactorily the job duties described in the proffered position. Since these deficiencies were not mentioned in the director's decision, the AAO withdraws the acting director's decision. The case will be remanded to the director for further action.

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:

(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 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 an intermittent need in accordance with the provision at 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

To establish that the nature of the need is “intermittent,” the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

The petitioner described the duties of the proffered position at Part A, section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Cutting; threading and hammering pipe to specifications, using tools such as saws, cutting torches and pipe threaders and benders; assembling and securing pipes, tubes, fittings and related equipments, according to specifications, by welding, blazing, cementing, soldering and threading joints; and modifying, cutting and boring holes in structures; and cleaning and maintaining pipe systems using hand and power tools. Must be certified to install [REDACTED] products.

In its letter, the DOL states that the petitioner desires to employ temporary workers to assist its permanent staff. The DOL also states that the petitioner did not establish that its need for the beneficiaries’ services is intermittent.

In response, counsel states in its letter dated July 9, 2008, that the petitioner’s need is intermittent because the petitioner does not have any permanent or full-time employees who are marine [REDACTED] r pipe fitters. Counsel explains that the temporary workers will work on the same projects as its permanent staff, but they will perform distinctly different and independent duties. Counsel for the petitioner also states that none of its permanent staff are employed as marine [REDACTED] pipe fitters. Therefore, the petitioner has established that it has not employed permanent or full-time workers to perform the services or labor the temporary workers would perform.

The Form I-129 indicates that the petitioner requires pipefitters with [REDACTED] certification to repair and replace water systems on cruise vessels. In a letter signed by the senior project manager of Triton Corporation dated June 19, 2008, it states that it seeks to employ the services of the petitioner to assist with its company’s expansion into the marine and off-shore industry, specifically, cruise lines that operate out of Port Everglades in Fort Lauderdale, Florida. The senior project manager of Triton Corporation also explains that the company is an authorized dealer of [REDACTED] Piping Systems, and has several bids requiring the manpower of experienced pipe fitters certified to install [REDACTED] products.

Upon review, 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 Triton Corporation to use, the 15 H-2B marine pipe fitters for the period stated in the petition. The letter does not identify any specific project; does not mention the 15 [REDACTED] r marine pipe fitters or any other type of worker; does not specify a number of workers, the term for which they would be required, and work locations; and does not describe specific work to be performed. The letter from Triton Corporation does not provide a sufficient factual foundation for the AAO to determine that the asserted need for 15 marine pipe fitters qualifies as an H-2B temporary need. 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)).

This petition can not be approved for another reason.

The regulation at 8 C.F.R. § 214.2(h)(6)(vi) requires the petitioner to submit:

- (C) *Alien's qualifications.* Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary.

The regulation at 8 C.F.R. § 103.2(b) states:

- (3) *Translations.* Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Form ETA 750 at Part A, item 14 indicates that the minimum amount of experience needed to perform satisfactorily the job duties is one year and six months in the job being offered and certification from [REDACTED] to install GF products.

Upon review, the record, as it is presently constituted, does not contain evidence of the beneficiaries' experience. The AAO cannot ascertain whether the beneficiaries have the one year and six months of experience in the job being offered and certification from [REDACTED] to install GF products. The record does not contain any evidence of the beneficiaries' employment history with the petitioner, such as a letter attesting to the beneficiaries' work experience with the petitioner or any other work experience with another employer. The record does not contain documentary evidence of each beneficiary's certification from [REDACTED] to install GF products. Absent documentary evidence of the beneficiaries' one year and six months of experience in the job being offered and certification from [REDACTED] to install GF products, the petition may not be approved.

Further, the Act defines an H-2B temporary worker as one who is coming temporarily to the United States to perform other temporary services or labor. The petitioner must establish that it will employ its temporary workers in the United States for the intended period of employment. Counsel for the petitioner states that during the few periods of time that it does not have a specific pipe fitter job for the beneficiaries to perform, the petitioner will send the workers back to their home country or to its office location in the British Virgin Islands (BVI). The petitioner states that its temporary workers will not work in the BVI but it will send them there temporarily because it is convenient, cheaper and faster to bring them back from the BVI than having to plan intercontinental travel for each of the 15 pipe fitters. The petitioner states that it does not want the beneficiaries in the United States unless it has a job for them to work. Consequently, the petitioner has not established that it has sufficient work to employ the beneficiaries for the entire period of intended employment from October 1, 2008 to June 1, 2009. The petitioner must have evidence such as current contracts, work orders, service agreements, work schedules, or any other documents prepared in the usual course of business that substantiates the petitioner's asserted temporary need for 15 marine pipe fitters for its client, Triton Corporation, for the period October 1, 2008 to June 1, 2009.

Since these deficiencies were not mentioned in the acting director's decision, this case will be remanded to the acting director in order to give the petitioner an opportunity to submit proof of the beneficiaries' one year and six months of experience in the job being offered, the beneficiaries' certification from [REDACTED] to install GF products and evidence to establish that the petitioner will temporarily employ the 15 marine pipe fitters pursuant to an intermittent need. The acting director must afford the petitioner a reasonable time to provide evidence pertinent to these issues, and any other evidence the acting director may deem necessary to adjudicate the matter at hand. The acting director shall then render a new decision based on the evidence of record as it relates to the issues, and certify that decision to the AAO for review.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The acting director's decision of August 7, 2008 recommending approval of the petition is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. Upon completion, the acting director shall certify the decision to the AAO for review.