



U.S. Citizenship
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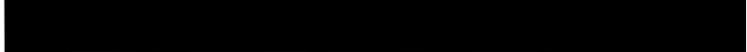
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FILE: EAC 08 184 51726 Office: VERMONT SERVICE CENTER Date: **OCT 21 2008**

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 approved by the Acting Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed; the petition will be approved.

The petitioner is an oilfield fabrication shop that desires to employ 74 beneficiaries as pipe fitters 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 October 1, 2008 to May 29, 2009. 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 that its need for the beneficiaries' services or labor was temporary. The petitioner then filed the current petition with the acting director with supporting evidence.

On July 2, 2008, the acting director issued a request for evidence (RFE) in which he requested the petitioner to submit a 2006 monthly payroll chart for the designated occupation, copies of the advertisements placed in the newspaper for fitters, a statement and interview sheets documenting the number of applications received for the position and the number of interviews conducted and a letter from the local union to establish that no United States workers were available for employment during the period requested.

In response, the petitioner submitted with its letter, dated July 3, 2008, a 2006 monthly payroll chart for the occupation fitters, copies of the advertisements placed in the Daily Advertiser, the recruitment report and a copy of the letter sent to the AFL-CIO regarding the designated occupation.

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 July 11, 2008. The acting director's decision recommending the approval of the petition for the 74 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).

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:

(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 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.

In the petition, the petitioner requests approval of the proffered position 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:

Lay out plate & structural shape, tube steel & beam according to blue print. Cut to shape & size with torch. Fit & tack with welding machine.

According to the petitioner's statements in the record of proceeding, its clients, W&T Offshore, Inc. and RCI Consultants, Inc. have generated the petition's temporary need for 74 fitters from October 1, 2008 to May 29, 2009. In an October 10, 2008 Request for Evidence (RFE), the AAO requested that the petitioner submit additional evidence to supplement the record to show: (1) the exact duties of the beneficiaries; (2) the location where the beneficiaries would work; and (2) letters from the petitioner's clients to support the petitioner's contentions that the work was temporary and tied to a season or short-term demand.

In response, the petitioner submitted a letter detailing its company's business plan, charts of the work to be performed, and a letter from W&T Offshore. The petitioner explains that it is not a labor contracting company and that all of the work to be performed will be done on its premises in Youngsville, Louisiana. The petitioner further asserts that the project for which it needs the 74 pipe fitters is of a limited duration because it must meet its contract obligations by May 29, 2009. The letter from W&T Offshore confirms that it entered into a contract with the petitioner for a project with a delivery date of May 29, 2009.

The record of proceeding establishes that the petitioner has a bona fide temporary need for pipe fitters from October 1, 2008 through May 29, 2009. The petitioner has established 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 petitioner has provided sufficient evidence to establish that its need for the beneficiary's services is peakload and temporary.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.