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

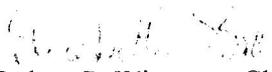
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

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 The decision of the acting director will be withdrawn and the petition will be denied although the matter is moot due to the passage of time.

The petitioner is a Mississippi Limited Liability Company supplying labor and industrial services for the marine and petroleum/chemical industries in the Mississippi Gulf Coast area. It desires to employ the beneficiaries as 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 May 1, 2008 to August 31, 2008. In accordance with the Application for Alien Employment Certification (Form ETA 750), the petitioner would employ and assign the beneficiaries to work in the Mississippi Gulf Coast area. The Department of Labor (DOL) determined that unique, complex, and persistent circumstances generated in the Gulf Region by Hurricanes Katrina and Rita made it impossible to determine whether a temporary labor certification should be issued in the present case. The petitioner then filed the current petition with the Acting Director, VSC, with supporting evidence on April 30, 2008.

On May 14, 2008, the acting director issued a request for evidence (RFE) in which he requested the petitioner to submit documentary evidence demonstrating its temporary peakload need for an additional 25 fitters. In response, the petitioner submitted with its letter dated May 27, 2008, an unsigned Temporary Worker Payroll Distribution Chart, for the months January through May of 2008, an unsigned monthly earnings report for permanent and temporary employees for January through May of 2008, for the petitioner's location in Moss Point, Mississippi, an unsigned 2008 Temporary Worker Payroll Distribution and Projection Chart, an unsigned monthly earnings report for permanent and temporary employees for the 2008 calendar year, for the petitioner's location in Mobile, Alabama, and a letter of intent from the petitioner's client, Performance Contractors, Inc. In a later RFE dated June 10, 2008, the acting director requested the petitioner to submit evidence that each beneficiary had two years of experience as a fitter. In response, the petitioner submitted with its letter dated July 28, 2008, copies of experience letters regarding the beneficiaries' two years of experience.

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 11, 2008. The acting director's decision recommending the approval of the petition for the 25 fitters named in the petition is now before the AAO for review.

On notice of certification, counsel presents 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 acting director's decision to approve the petition. Accordingly, the acting 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) 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 . . .
        - (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.
        - (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.

In the petition, the petitioner requests 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).

In the petitioner's letter dated April 28, 2008, the petitioner states that although its client employs permanent workers, its client must supplement its workforce with "one-time" temporary workers who will not become a part of the permanent workforce.

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 Application for Alien Employment Certification (Form ETA 750) as follows:

Lay out position of parts and metal working from blueprints and templates using scribe and hand tools. Align parts in relation to each other using jacks, come-alongs, turnbuckles, clips, wedges and mauls. Tack weld clips and brackets into place prior to permanent welding.

In its notice dated October 3, 2007, the DOL states that the situation makes it difficult for it to determine whether the employer's need is actually temporary. The DOL explains that since the employer's request for temporary workers is based on a need identified as a result of Hurricanes Katrina or Rita, the DOL is unable to make a

determination and that its finding should be presented to the Citizenship and Immigration Services (CIS) for final adjudication.

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).

In response to the director's notice of certification to the AAO, counsel on behalf of the petitioner provided with its letter dated August 18, 2008 a letter of intent from the petitioner's client, Performance Contractors, Inc., a copy of the petitioner's monthly earnings reports for permanent and temporary employees working out of the petitioner's site in Moss Point, Mississippi for the 2007 calendar year and January through May of 2008, a list of the names of the petitioner's permanent and temporary employees, copies of the petitioner's employees' 2007 Wage and Tax Statements (Form W-2) and a copy of the petitioner's quarterly federal and state withholding records for the first and second quarters of 2008. Counsel states that the petitioner has demonstrated that it must supplement its permanent workforce with temporary workers to meet its "peakload" need.

As previously stated, the petitioner is a labor contractor that supplies workers to its clients' businesses. As evidence of its peakload need, counsel provided two undated letters from Performance Contractors, Inc. signed by [REDACTED] Manager of Operations, SE division. One of the letters states that "Performance Contractors will award the petitioner, J&M Marine & Industrial, LLC, a purchase order for performance of a contract that requires the temporary services of 25 fitters to perform work at its worksite located in Pascagoula, MS." Another letter that is signed by the same manager of operations states that the temporary job is expected to start on May 1, 2008 and expected to end on or before March 1, 2009. This letter does not contain a delivery date that falls within the requested period of need stated on the petition. The record does not contain an executed contract and purchase order to establish that the petitioner is contractually obligated to employ 25 fitters to perform work for Performance Contractors, Inc., in Pascagoula, Mississippi, for either the period specified in the petition or for the extended period through March 1, 2009. Neither letter establishes a commitment by the petitioner to provide temporary workers nor is Performance Contractors, Inc. under an obligation to hire 25 fitters from the petitioner. Absent the work/purchase order, the petitioner has not established that it has a binding commitment to perform work for Performance Contractors, Inc. The record does not contain any contracts and/or work/purchase orders to demonstrate that the petitioner is experiencing an unusual increase in the demand for its services that is different from its ordinary workload. The petitioner has not established a temporary, peakload need for 25 fitters.

The monthly payroll documentation submitted does not establish the petitioner's temporary need for 25 fitters. The 2007 monthly earnings report and the earnings report for January through May of 2008 are based upon the petitioner's payroll records maintained by its company located at Moss Point, MS. The current petition is for work out of the petitioner's location at Mobile, Alabama. The 2008 monthly earnings report based upon the petitioner's payroll records maintained by its company located at Mobile, Alabama, is not signed, does not indicate what the information contained in the report represents and the designated occupation is not indicated. Consequently, the 2008 monthly earnings report does not support the dates of need listed on the Form ETA 750 (November 1, 2007 to September 1, 2008).

The graph entitled *J&M Temporary Worker Payroll Distribution - 2008* for the months January to May does not indicate the number of temporary employees employed during that period. The graph does reflect an increase in total earnings from January through February, with a decline in the earnings from February to March. The graph also shows a slight increase in earnings from March to April and a decline again from April to May. The information on the graph has not been substantiated by staffing records or other financial evidence, and is not signed. Further, the peak period reflected on the graph is not the period reflected on the current petition which is May 1, 2008 to August 31, 2008. 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 chart entitled *J&M Temporary Worker Payroll Distribution - 2008 & Projections for Remainder of 2008* does not reflect a peakload need for the period of intended employment indicated on the petition. The chart shows that the number of employees and earnings increased from January to February and then the number of employees steadily declined from February through April 30, 2008, the filing date of the current petition. The projected need for employees continues to decline through early September, 2008. The petitioner has failed to establish its need for an additional 25 fitters, from May 1, 2008 to August 31, 2008, to supplement its permanent staff.

Moreover, the copies of the petitioner's employees 2007 Wage and Tax Statements (Form W-2) and a copy of the petitioner's quarterly federal and state withholding records for the first and second quarters of 2008 do not substantiate the petitioner's peakload need from May 1, 2008 to August 31, 2008. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by its current situation or contracts. The petitioner has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or have different specialty skills than the 15 workers currently shown to be employed by the petitioner on the petition. The petitioner has not provided evidence of the contracts showing a clear termination date. The petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Consequently, the petitioner has not demonstrated that its need to supplement its permanent staff at the place of employment on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner's regular operation. Absent evidence of the petitioner's "peakload" situation to justify its need for the beneficiaries' services, this petition cannot be approved.

The petition also lacks supporting documentation to justify the petitioner's need as a one-time occurrence. In its letter dated April 28, 2008, the petitioner states that as a result of Hurricanes Katrina and Rita, and the devastation to the Gulf Coast, the entire area is still faced with the repair of hundreds of rigs, vessels and port casualties. The petitioner states that its company continues to be behind in its committed schedules for marine and petrol/chemical sectors' construction service and repair. However, the petitioner has not provided evidence to establish "extraordinary circumstances" and that the petitioner will perform hurricane repair work constituting a temporary "one-time" need for additional fitters from May 1, 2008 through August 31, 2008. The petitioner has not shown that its work primarily consists of contracts for marine and petrol/chemical sectors' construction service and repair work as a result of storm damage that necessitates the use of temporary H-2B fitters. 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*. The petitioner has not shown that its need for additional fitters is due to extraordinary circumstances resulting from storm damage.

The petitioner also states that these hurricanes have caused a severe labor strain in its company's required skilled trades. The petitioner states that there still remains a tremendous shortage of skilled, qualified workers to supply the immense need and the United States labor market has no additional available skilled workers to meet the temporary urgent needs of the company, impacting both the marine and petrol/chemical sectors. If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

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 prescribes 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.

Here, the record indicates that the petitioner started its contractor business in April 2006 and intends to continue it indefinitely by hiring temporary H-2B workers until the labor force returns to the devastated Gulf Coast region. As such, it appears that the petitioner's need for temporary fitters 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. The April 28, 2008 letter from the petitioner does not state a definite point in the future when the petitioner will no longer be seeking temporary fitters on a continuous basis; and the letter is not supported by any independent documentary evidence of such a definite point in time. The letter states that "we estimate that within the coming year, the workforce should be normalized following the post-storm cleanup, repair and reconstruction cycle. . . ." Since there is a current shortage of fitters, 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).

This petition cannot be approved for another reason. The record, as it is presently constituted, does not contain evidence of two years of experience in the job being offered for all of the beneficiaries named in the current petition.

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.

The petitioner has not provided documentary evidence for all of the beneficiaries named in the petition. The Application for Alien Employment Certification (Form ETA 750) at Part A, item 14 indicates that the minimum amount of experience needed to perform satisfactorily the job duties is two years of experience in the job being offered. The record contains documentary evidence for 13 out of the 25 beneficiaries named in the current petition. Absent such evidence for the remaining 12 named beneficiaries, the petition may not be approved with respect to those beneficiaries. However, as the petition cannot be approved for other reasons, there is no need to name the 13 beneficiaries that qualify for the proffered position.

In summation, the nature of the asserted need appears to be continuous and ongoing. The countervailing evidence provided with the petition does not establish the petitioner's "one-time occurrence" or "peakload" need. The petitioner has not shown that its current contractual obligations are a result of hurricane storm damage, and therefore, might possibly be viewed as a "temporary event of short duration" or a one-time demand resulting from extraordinary circumstances. Contrary to the petitioner's assertions, the evidence of record does not establish a short term demand for fitters and that the temporary additions to the 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 has not submitted documentary evidence to show that its company needs the number of temporary fitters for the period of intended employment. The evidence contained in the record of proceeding does not substantiate the petitioner's temporary need for fitters from May 1, 2008 through August 31, 2008. The petitioner has not established that 12 of the 25 beneficiaries named in the current petition have two years of experience in the job being offered.

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 not been met.

**ORDER:** The decision of the director dated August 11, 2008 is withdrawn. The nonimmigrant visa petition is denied although the matter is moot due to the passage of time.