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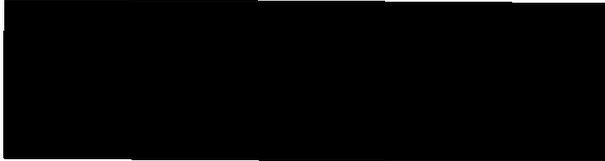
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: EAC 08 025 51261 Office: VERMONT SERVICE CENTER

Date: **SEP 10 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:



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). Upon review, the AAO withdrew the director's decision and remanded it to the director for further action and consideration. The acting director has now issued a new decision and certified it to the AAO for review. The acting director's decision will be withdrawn and the petition will be denied although the matter is moot due to the passage of time.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 continue to employ the beneficiaries as welders pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(15)(ii)(b), from November 1, 2007 to August 31, 2008. 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 Director, VSC, with supporting evidence on October 31, 2007. The petition was initially filed for the continuation of employment for 19 H-2B workers.

On December 28, 2007, the director issued a request for evidence (RFE) in which he requested the petitioner to submit a listing of the beneficiaries included in the petition and documentary evidence establishing that the petitioner's need for the beneficiaries' services is temporary.

In a response to the director's request for evidence, dated January 25, 2008, counsel stated that the petitioner wanted to proceed with processing the H-2B petition for five (5) of the 19 workers named in the petition.

These workers are [REDACTED] and [REDACTED]. The petitioner withdrew the names of the other 14 workers from the petition.

The director determined that sufficient countervailing evidence had been submitted to show that qualified persons in the United States are not available, that the employment policies of the DOL had been observed and that the need for the services to be performed was temporary. The director approved the petition on April 2, 2008 and certified the case to the AAO for review.

Upon review, on April 11, 2008, the AAO withdrew the director's decision because the record of proceeding did not contain evidence that the beneficiaries possessed the minimum amount of experience to perform satisfactorily the job duties described in the proffered position. The AAO remanded the case to the director for further action.

On May 27, 2008, the director requested that the petitioner submit documentary evidence to support its claim that the five (5) beneficiaries possessed the requisite experience, as specified on the Form ETA 750.

In response, on June 27, 2008, counsel submitted letters verifying two years of experience as welders for [REDACTED] and [REDACTED].

The petition is now before the AAO on certification of the acting director's decision dated August 6, 2008 recommending approval of the petition for four (4) of the beneficiaries.

Upon careful review of the entire record of proceeding, the AAO finds that the petitioner has submitted sufficient evidence to establish that the above-named beneficiaries have the requisite two years of experience specified on the Form ETA 750. The AAO also finds that although additional evidence was requested by the director on December 28, 2007 to establish the petitioner's need for the beneficiaries' services, and the petitioner was given until January 30, 2008 to submit such evidence, the record does not contain sufficient evidence. Accordingly, the decision of the acting director recommending approval of the petition will be withdrawn and the petition will be denied.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

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 petitioner's letter dated August 26, 2007, the petitioner contends that its current need is peakload. The petitioner also explains that although it employs permanent workers, it 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 "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).

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:

Weld together metal components as specified by blueprints and work orders or oral instruction using brazing and various arc and gas welding equipment.

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).

As previously stated, the petitioner is a labor contractor that supplies workers to its clients' businesses. The current petition indicates that the company is located in Moss Point, Mississippi. As evidence of its peakload need, counsel provided with his letter dated January 25, 2008, a letter of intent from the petitioner's client, [REDACTED] signed by [REDACTED] Vice President of Operations. The letter states that [REDACTED] will need the services of eight (8) welders, for a temporary period of nine months from February 2008, for a demolition project in Montgomery, Alabama. 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 eight (8) welders to perform work for [REDACTED], in Montgomery, Alabama, for the period specified in the petition. The letter does not establish a commitment by the petitioner to provide temporary workers and [REDACTED] is under no obligation to hire eight welders from the petitioner. Absent the contract and work/purchase order, the petitioner has not established that it has a binding commitment to perform work for [REDACTED]. The record does not contain any contracts and/or work/purchase orders to demonstrate 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 the eight (8) welders requested by [REDACTED].

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 11 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 August 26, 2007, 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 welders from November 1, 2007 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 welders. 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 welders 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 welders 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 August 26, 2007 letter from the petitioner does not state a definite point in the future when the petitioner will no longer be seeking temporary welders 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 welders, 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).

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 welders 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 welders for the period of intended employment. The evidence contained in the record of proceeding does not substantiate the petitioner's temporary need for welders from November 1, 2007 through August 31, 2008.

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 6, 2008 is withdrawn. The nonimmigrant visa petition is denied although the matter is moot due to the passage of time