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FILE: EAC 08 005 53463 Office: VERMONT SERVICE CENTER Date: SEP 11 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [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:

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 Acting Director, Vermont Service Center, 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 affirmed and the petition will be approved although the matter is moot due to the passage of time.

The petitioner is an information technology consulting and software development company. On September 28, 2007, the petitioner filed the Form I-129, Petition for a Nonimmigrant Worker. The petitioner desires to continue to employ the beneficiary as an Urdu language data entry keyer 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 August 1, 2007 to June 1, 2008, the dates of intended employment indicated on the Application for Alien Employment Certification (Form ETA 750). The petition was filed after the Department of Labor (DOL) decided to not issue a temporary labor certification, having determined the petitioner was previously granted an H-2B temporary labor certification on September 27, 2006 citing a one-time occurrence to employ three (3) data entry staff from October 1, 2006 to August 1, 2007. The DOL also determined that this is the second application filed by the petitioner requesting the same data entry staff for the same project.

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

Section 101(a)(15)(H)(ii)(b) of 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:

(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.

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:

Read periodicals and publications in Urdu language. Operate keyboard to enter data into computer data base in Urdu language. Maintain data and keep record of work completed.

In rebuttal to the DOL's findings, the petitioner states that it originally required the services of the beneficiary in conjunction with a special project from October 1, 2006 to August 1, 2007. The project involves the collection of technical data from Urdu periodicals and publications and entering the collected data in Urdu language into the computer database. The petitioner explains in his letter dated July 25, 2007 that the beneficiary was issued a visa at the United States Embassy in Islamabad, Pakistan on January 5, 2007 and he entered the United States on February 23, 2007. The petitioner also states that the beneficiary was unable to start work on the project until April 2007 because of social security requirements. The petitioner explains that because of these delays the beneficiary has worked only four months on the project and that it needs his expertise to complete the project. The petitioner states that once the project is completed, it does not anticipate an Urdu language data entry keyer on the staff. The petitioner concludes by stating the project will be completed by May 1, 2008.

Upon review, the AAO finds that the decision of the director is correct. The record contains a copy of the beneficiary's nonimmigrant visa, I-94 Departure Record, and the beneficiary's social security card. The I-94 Departure Record reflects the beneficiary's entry as February 23, 2007, five months prior to the expiration of his H-2B classification. The approval notice shows that the petition was valid from October 26, 2006 to August 1, 2007. Therefore, the petitioner's explanation as to why it needs an extension of stay for the beneficiary is reasonable and overcomes the objections raised by the DOL. The petitioner has established that a temporary event of short duration has created a need for a temporary worker.

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 director's decision dated September 3, 2008 is affirmed. The petition is approved although the matter is moot due to the passage of time.