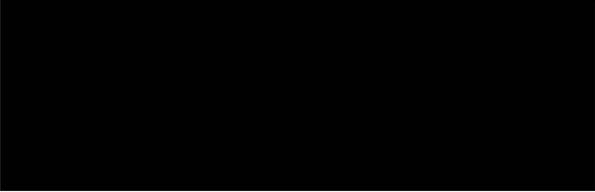




**U.S. Citizenship  
and Immigration  
Services**

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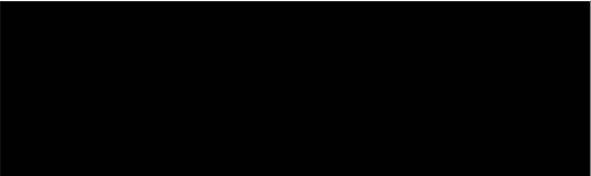


FILE: EAC 09 044 50725 Office: VERMONT SERVICE CENTER Date: **APR 21 2009**

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.

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a stone fabricator that seeks to employ the beneficiaries as helper-production laborers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for the period from April 1, 2009 until November 11, 2009. The Department of Labor (DOL) determined that the petitioner had submitted insufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor. The acting director determined that the petitioner had not overcome the objections addressed in the DOL's decision and denied the petition.<sup>1</sup>

On appeal, the petitioner states that it has complied with all of the procedural filing requirements mandated by the United States DOL and the United States Citizenship and Immigration Services (USCIS). In addition, the petitioner submitted copies of the company's payroll summary and sales from 2006 until 2008, and the company's production summary from January 2008 through November 2008.

On January 29, 2009, the director denied the petition concluding that the petitioner failed to demonstrate a temporary need for the beneficiaries' services since the petitioner's total sales did not fluctuate much throughout the entire year, and thus failed to evidence a peak-load or temporary need.

On appeal, the petitioner has overcome the concerns addressed in the director's and the DOL's decisions. Moreover, sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed and that the petitioner's need for the beneficiaries' services is peak-load 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.

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<sup>1</sup> The Department of Homeland Security (DHS) published the H-2B Nonagricultural Temporary Worker Final Rule in the Federal Register on December 19, 2008. The final rule became effective on January 18, 2009. See 73 FR 49109. This final rule amends DHS regulations regarding temporary nonagricultural workers, and their U.S. employers, within the H-2B nonimmigrant classification. The current Petition was filed with United States Citizenship and Immigration Services on November 25, 2008, prior to the date the new H-2B regulation came into effect. Under general rules of legal construction, a substantive, non-curative, adverse change in administrative rules is not to be applied retroactively unless the language of both the administrative rule and the statute authorizing the rule requires such a result. *Uzuegbu v. Caplinger*, 745 F.Supp. 1200, 1215 (E.D. La. 1990).

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