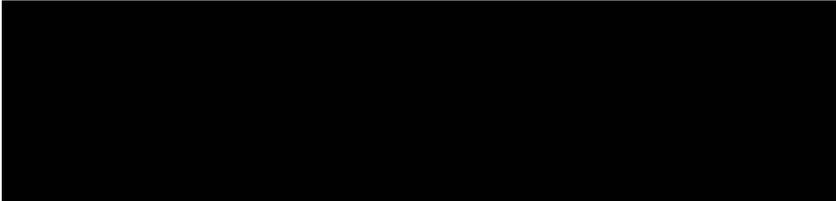


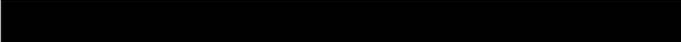
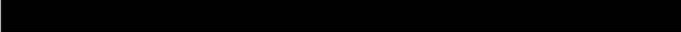


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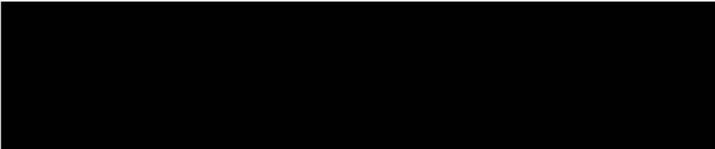


FILE: EAC 08 006 54349 Office: VERMONT SERVICE CENTER Date: **DEC 01 2009**

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)

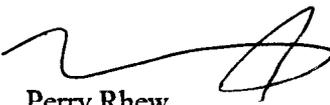
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


b Perry Rhew
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 dismissed. The petition will be denied, although the matter is moot due to the passage of time.

The petitioner is engaged in providing skilled workers to the ship building industry in the Gulf Coast. It seeks to employ the beneficiaries as welders, cutters, and fitters to be employed at shipbuilding companies, 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 2, 2007 until November 30, 2007. 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 director denied the petition on June 3, 2008, concluding that the petitioner did not provide sufficient evidence to establish the beneficiaries had the qualifications required on the temporary labor certification; and that since counsel for the petitioner amended the dates of temporary employment listed on the Form I-129, the petition must be denied since a new temporary labor certification was not certified prior to filing the instant petition.

On the Form I-1290B, counsel for the petitioner states that "due to an inadvertent error submitted by a previous attorney the petition asked for stating dates that were incorrect." Counsel further states that the petition should be approved "as the error was made in good faith and caused no prejudice to the service."

As a preliminary matter, counsel for the petitioner filed the Form I-129 with the employment dates of April 2, 2007 until November 30, 2007. These dates were also listed as the employment dates of the temporary labor certification, Form ETA 750A. The petitioner explained in the letter of support for the temporary labor certification that the ship building industry has a usual peakload period from April to November. The director sent a request for evidence on April 2, 2008, that noted that the Form I-129 listed a start date of April 2, 2007; however, the petition was filed on September 12, 2007, nearly six months after the requested start date. In response to the director's request for evidence, counsel for the petitioner amended the employment dates. Counsel for the petitioner stated that the amended employment date is from September 15, 2007 until July 1, 2008. Counsel stated that the "attorney previously assigned to the case mistakenly" requested incorrect dates. The attorney on record has remained the same throughout the entire record.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any

violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner did not provide any of the required evidence and has not properly established ineffective counsel.

In addition, AAO will review counsel's request to amend the petition. The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) state:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment An amended or new ... H-2B petition must be accompanied by a current or new Department of Labor determination.

The request to reconsider the original petition with new dates of temporary need is rejected. Thus, the original petition dates listed on the Form I-129 will be considered on appeal.

The totality of evidence in the record of proceeding, including the countervailing evidence submitted to overcome the basis cited by DOL for its denial of the temporary labor certification, does not establish that the petitioner's claimed need for welders and ship fitters is a temporary need within the meaning of the regulations governing H-2B petitions.

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:

(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.

(2) *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(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.

(4) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

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.

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. 8 C.F.R. § 214.2(h)(6)(ii)(B). Although the petitioner failed to provide the H Classification Supplement of the Form I-129 that would indicate the petitioner's type of temporary need, it did state in a support letter, dated July 7, 2008, that the temporary employment is peakload.

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).

Upon filing the instant petition, the petitioner indicated that its need is a peakload need. In the letter of support, the petitioner explained its temporary need for the alien's services as follows:

Petitioner has been engaged by Atlantic Marine for 266 welders/fitters to work from the period of April 2, 2007 through November 30, 2007. According to [REDACTED] of Human Resources at Atlantic Marine, they have a permanent year-round workforce comprising of welders, ship fitters and other skilled laborers involved in the repair and construction of ships. They have a temporary need for additional workers which stems from a variety of factors. Atlantic Marine requires the renewal of these workers to complete the projects for which they have been engaged. This need for the renewal of these workers is, however, temporary. They only need workers during the labor shortage crisis [Hurricane Katrina] and during the busiest months of the year.

In this instance, the petitioner has not carefully documented the peakload need through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the 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 had different skills than the workers currently employed by the company. 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. The petitioner did not provide any contracts with Atlantic Marine stating that Atlantic Marine will hire the 264 temporary workers. The petitioner did not provide any contracts, list of projects, or a staffing chart with Atlantic Marine's permanent employees and temporary employees for April through November. The petitioner provided a payroll summary for a company called Sea Services, Inc. The petitioner has not explained how Sea Services, Inc. is connected to Atlantic Marine. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, counsel for the attorney attempted to amend the employment dates and thus, it appears that the original dates of the petitioner do not coincide with a peakload need. Counsel for the attorney requested to amend the employment dates from April 2, 2007 until November 30, 2007, to September 15, 2007 until July 15, 2008, which are completely different dates. 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)).

Further, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for workers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

In addition, upon review of the petitioner's application to DOL for a temporary labor certification, it appears that the recruitment process did not follow DOL's standards and policies. In that application, the petitioner stated that it will place the beneficiaries in three companies: Conrad Industries, located in South Louisiana and Texas; Atlantic Marine, located in Florida and Alabama; and, Offshore Inland Marine and Oilfield Services, located in Alabama. However, upon review of the Form ETA 750A, the petitioner only stated a work address in Alabama and only recruited the job offered in Mobile, Alabama. In addition, the petitioner stated in the support letter to United States Citizenship and Immigration Services (USCIS) that it will place all the beneficiaries with Atlantic Marine, however, this contradicts the statement the petitioner made to DOL that the beneficiaries will be placed in three separate companies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the

petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director also determined that the petitioner had not established that the beneficiaries possessed the requisite experience listed on the labor certification and denied that portion of the petition. The Application for Alien Employment Certification (Form ETA 750) at Part A indicates that the minimum amount of education, training and experience required to perform satisfactorily the job duties is one year of experience in the job being offered. The petitioner provided support letters and documentation for all the beneficiaries that indicate they have one year of experience in the job offered. The AAO will withdraw this portion of the director's decision.

It is noted that the petitioner requested the beneficiary's services from April 2, 2007 until November 30, 2007. Therefore, the period of requested employment has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied although the matter is moot due to the passage of time.