



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 196 51192 Office: CALIFORNIA SERVICE CENTER Date: **DEC 01 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:

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.

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).

A handwritten signature in black ink, appearing to read "Perry Rhew", with a long horizontal stroke extending to the right.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California 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 a drywall installation company, and it seeks to employ the beneficiaries as drywall helpers 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 October 1, 2008 to May 31, 2009. The Department of Labor (DOL) issued a temporary labor certification for the petitioner on June 10, 2008 for 15 workers from July 1, 2008 until May 30, 2009. The director determined that the evidence submitted by the petitioner was insufficient to approve the H-2B classification.

The director denied the petition on October 20, 2009, concluding that the petitioner did not establish that its need for the beneficiary's temporary services or labor is peakload or seasonal in nature. The director noted that the petitioner submitted invoices for only part of the year, and the petitioner's permanent employees do not appear to be working full-time after reviewing their annual salaries. The director also noted that the petitioner did not establish that its need for the temporary workers is tied to a season of the year by an event or pattern and is of a recurring nature.

On appeal, the petitioner explains its temporary need as follows:

Second of all, [the petitioner] is currently performing drywall installations and repairs in Utah and other states such as Arizona, and it will continue like that during the months we are requesting the temporary workers. Our company has expanded gradually this year and the permanent staff that is working for us cannot perform all the jobs so we have a peak load need because the amount of work for our company increases during these seven months and we could not find local laborers.

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). The petitioner indicates in its statement of temporary need that the 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).

The AAO finds that the petitioner has not established the type of H-2B temporary need asserted in the petition.

Upon filing the instant petition, the petitioner indicated that its need is peakload. On the Form I-129, the petitioner explained its temporary need for the alien's services as follows:

[The petitioner] is a drywall company, the drywall, steel framing, acoustical and cleanup work, additions, alterations, maintenance and repairs of ceiling and walls.

We work all year round, our business has a peak load need because our busiest months start to pick up early October (10/01/2008) and runs until late May (05/31/2009) of the following year.

On September 29, 2008, the director sent a request for further information. The director requested, in part, additional evidence to establish the temporary and peakload need for the temporary workers. In response, the petitioner repeated its earlier statement that its need is peakload from October 2008 until May 2009. The petitioner explained that it made attempts to find local workers but those attempts were unsuccessful.

In this instance, the petitioner has not 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 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. 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)).

Upon filing the instant petition, the petitioner indicated that its need is peakload. The petitioner submitted invoices from October 2006 through August 2008, and a staffing list with the petitioner's permanent employees and a list of the H-2B beneficiaries. The invoices do not indicate an increased demand of work from October through May. Instead, the invoices show a steady workload for each month of the year. The petitioner did not submit any evidence of a peakload demand such as additional contracts for work during the requested employment dates of October 2008 through May 2009; or charts indicating an increase of income during the peakload need; or past employment history indicating the use of temporary employees during the peakload months of October through May. In addition, on appeal, the petitioner states that the company has "has expanded gradually this year," thus, the petitioner's need for workers is due to its growth as a business rather than a peakload need. The petitioner did not establish that its business activity has formed a pattern where its need for temporary workers is for a certain time period. Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Further, on the Form ETA-750A submitted to the DOL, the petitioner indicated the employment dates as July 1, 2008 until May 30, 2009. These dates do not coincide with the peakload dates the petitioner indicated on the Form I-129 as October 1, 2008 until May 31, 2009. 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).

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 drywall helpers to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist.

It is noted that the petitioner requested the beneficiary's services from October 1, 2008 until May 30, 2009. 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.