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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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FILE: EAC 07 149 55379 Office: VERMONT SERVICE CENTER Date: **JAN 05 2010**

IN RE: Petitioner: [Redacted]  
Beneficiaries: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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).

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 and the petition will be denied, noting that the matter is moot due to the passage of time.

The petitioner provides deliveries via tractor trailers. It desires to employ the beneficiaries as “over the road tractor-trailer drivers,” 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 of May 7, 2007 to November 30, 2007. The Department of Labor (DOL) determined that a temporary labor certification (Form ETA-750) by the Secretary of Labor could not be made because the petitioner had not established that its need for the beneficiaries' services is temporary.

On appeal, counsel for the petitioner states that the petitioner has established a peakload need during its high season from March through November. Counsel asserts that the petitioner's clients “contract the company to haul additional loads” during the spring and summer seasons. Counsel further states that “since the products Petitioner transports during its peak season are frozen food and ice cream, which are higher in demand during the warmer months, it is self-evident that Petitioner's business and revenue has seasonal peaks.”

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.

The petitioner seeks approval of the proffered position as a peak-load. 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).

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 nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Drive diesel-powered tractor trailer, usually long distances, to transport and deliver drive [sic] and refrigerated goods in packaged form. Drive truck to destination, applying knowledge of commercial driving regulations and skill. Inspect truck for defects before and after trips and submit report indicating truck condition. Maintain driver log according to I.C.C. regulations....

As stated in the petitioner's memorandum in response to the director's request for evidence, the petitioner explained that its temporary need for the beneficiaries' services arose because many of the petitioner's clients are "seeking to deliver highly seasonal products, resulting in peak hauling needs for the months of March to November." In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload as a trucking company. The petitioner has not carefully documented the peakload situation 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 submitted a staffing chart for 2004 and 2005 which indicated that the petitioner utilized temporary employees all year long. On appeal, counsel for the petitioner

stated that the petitioner did not employ the temporary employees in January, February, March and April of 2005. Instead, the petitioner was a “fiscal agent for the subsidiary company [REDACTED] during 2005,” and the temporary workers appear on the petitioner’s payroll records but they were not actually employed by the petitioner. The petitioner did not provide any evidence of the relationship with [REDACTED]. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner also submitted payroll records for temporary employees for 2006, that indicated the petitioner employed temporary workers for the months of September, October, November and December only. Thus, the petitioner did not employ temporary workers during the stated March to November peakload need.

The petitioner also submitted a chart indicating the number of drivers and the miles driven for each month of 2004, 2005 and 2006. In reviewing the charts, the numbers on the chart do not reveal a peak or seasonal need for all three years. Each month displays changes in the number of drivers and mileage driven. However, the changes are not significant, change on a monthly basis, and do not evidence a peak or seasonal need. Although the petitioner submitted a statement indicating the seasonal peak needs of the company during each spring and summer, the statement has not been substantiated by financial or other documentary evidence, such as business contracts and monthly sales records to confirm the accuracy of the information given in the statement and establish that the petitioner's business activity has formed a pattern where its need for temporary workers is for a certain time period and will recur next year at the same time. Absent supporting documentation, the petitioner has not shown that its need for the beneficiaries' services is tied to a seasonal trend or a particular event that recurs every year. 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*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

It is also noted that the petitioner requested the beneficiary’s services from of May 7, 2007 to November 30, 2007. Therefore, the period of requested employment has passed.

The petitioner noted that USCIS approved other petitions that had been previously filed on behalf of the petitioner. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

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