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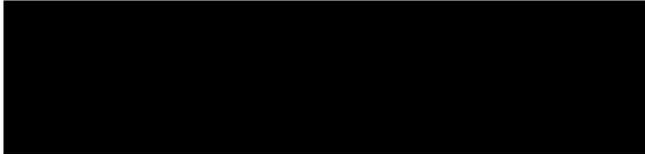
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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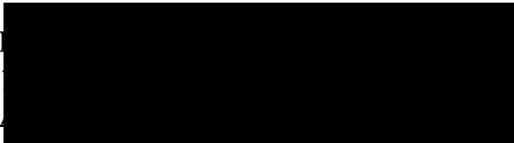
FILE:  Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiaries:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 is a roofing company and it seeks to continue to employ the beneficiaries as roof 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 of December 16, 2008 to July 31, 2009.<sup>1</sup> 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 determined that the countervailing evidence submitted by the petitioner was insufficient to overcome the DOL's decision.

The director determined that the petitioner did not establish a temporary need for the beneficiaries' services. The director noted that according to the documentary evidence submitted by the petitioner, it showed that the petitioner has a need for temporary workers all year round and the record fails to demonstrate an off-peak season from August to December.

On appeal, counsel for the petitioner stated that the director erred in noting that its "off peak" season is August to December and "in all its filing and briefs; it provided payroll and wage evidence and charts which identify that August and September are the off-peak season." In addition, counsel focuses on the fact that due to misrepresentation of prior counsel, the petitioner's previous filing for H-2B status was for a different peakload need as the current filing. However, the director did not question this issue. Instead, the director noted that the petitioner did not establish a temporary need based on the documentation presented by the petitioner with this petition.

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)(2009) 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

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<sup>1</sup> On the Form I-129, the petitioner indicated the employment start date as December 16, 2008; however, the supporting documentation and the appeal indicated that the employment start date is actually October 2008.

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)(2009) 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 peakload. 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 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In the letter of support, counsel for the petitioner explained why the petitioner should be approved as follows:

As is detailed more fully in the Statement in Support of Petition, petitioner is eligible for the requested petition extension and extension of stay because petitioner has demonstrated that its previous counsel improperly filed an Application for Alien Labor Certification on February 22, 2008 without consulting with the petitioner regarding its actual peakload need for temporary workers. The improper

Application requested certification of temporary workers from April 15, 2008 to December 15, 2008, despite the actual peakload need of the company falling from October 1, 2008 to July 31, 2009 [sic].

In the support letter, dated October 10, 2008, the petitioner explained its peakload need as follows:

[The petitioner] regularly employs roofing laborers to complete its roofing contracts in Central Texas and neighboring counties, but requires temporary laborers to supplement the permanent staff due to the increased work orders arising in the fall and winter and carrying on through July of the succeeding year that is due to the large number of corporate client roofing work bids it submits in the summer months of July through September. The significant peak in the company's roofing workload in fall and winter and lasting to the following July is attributable to the timing of the roof-bidding schedules of its corporate clients.

The petitioner submitted a graph entitled "Total Roofing Bids Submitted Per Month (2006 – 2008)". The graph does not indicate a consistent peak in bids in the summer months as stated by the petitioner. The graph does not show a pattern of increased bids in the summer months from 2006 to 2008.

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 in the roofing business. The petitioner has not carefully documented the peakload situation through data on 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 have different specialty skills than the workers currently employed by the company. As noted above, the petitioner stated that its peakload need is from October through July because it is working on the bids that were submitted in the summer months. However, as noted above, the chart of submitted bids from 2006 to 2008 do not indicate a pattern of increased bids in the summer months to support the petitioner's claim of a peakload need in order to finish the contracts from October to July. 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 petitioner submitted staffing charts for 2006, 2007 and the months of January through July of 2008. The charts show the petitioner's temporary and permanent employees. According to the charts, the petitioner hired temporary employees for every month in 2006 and 2007. In addition, in a support letter by the petitioner's counsel, counsel included a graph on the number of project bids the petitioner received and the petitioner's retained work from January to November 2008. According to the graph, the petitioner has a dramatic increase in retained work in August, September, October and November which shows that the petitioner needs more workers during these months. 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. at 591-92.

Thus, according to all the documentation submitted by the petitioner, the petitioner does not present evidence of a peakload need from October through July. In fact, all of the documentation indicates that the petitioner requires temporary workers for every month of the year. Thus, the need for workers is in fact, not temporary. Thus, the petitioner has not shown that its need for the beneficiaries' services is tied to a particular event that recurs every year. 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, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. In other words, the petitioner's need for roofers 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 December 16, 2008 to July 31, 2009. Therefore, the period of requested employment has passed.

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 passage of time.