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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: WAC 09 041 50705 Office: CALIFORNIA SERVICE CENTER Date: MAR 1 9 2010

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:

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, California 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 engaged in insulation services, and it seeks to employ the beneficiaries as insulation workers, pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b) for the period of April 1, 2009 to October 31, 2009. The Department of Labor (DOL) certified the petitioner's temporary labor certification (Form ETA-750), valid from January 2, 2009 until October 31, 2009.

The director determined that the petitioner had not established a temporary need for the beneficiaries' services. The director also concluded that the petitioner did not establish that the beneficiaries will not displace United States workers capable of performing the services. In addition, the director denied the petition based on the fact that the petitioner failed to submit evidence requested by the director.

On appeal, counsel for the petitioner states that the petitioner has established a seasonal need and the "operations are slowed significantly during the winter season." Counsel also states that the "petitioner is attempting to participate in the H2B program for the first time." Counsel further states that DOL monitors the recruitment efforts and "requires a report establishing that the recruitment was sufficient to justify a peak load need," and the recruitment effort was made in good faith.

Section 101(a)(15)(H)(ii)(b) of 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 occurence.* 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 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 peakload 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. 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, 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*).

On the Form I-129, the petitioner explained that it had not been able to hire enough U.S. workers to fill the required positions of insulation workers. The petitioner explained that the reasons for not finding sufficient U.S. workers are the following:

> First, there are not enough U.S. workers willing to do this type of work: American workers consider the job duties strenuous and demanding. According to the Occupational Outlook Handbook (OOH), "most laborers do physically demanding work." Second, American workers want a year-round job, not a temporary job. Due to the temporary nature of these positions, I am unable to offer permanent employment to U.S. workers.

On December 9, 2008, the director requested further information regarding the petitioner's temporary need and evidence regarding the petitioner.

In its response, the petitioner submitted a letter dated, September 9, 2008, and stated the "insulation business deals closely with the construction business," and its work is dependent on the weather. The petitioner stated that the "operations increase from January through October of each year." The petitioner also stated that business activities decrease in the winter and it predicts that the business activities will follow the patterns of the past year whereby the work increased during the summer months.

The petitioner submitted the quarterly wage reports for 2008. According to the wage reports, the company hired more individuals during the summer months and it experienced a decrease in employment for the months of October, November and December. The wage reports do not indicate that all the employees listed in fact fill the position of insulation workers. The petitioner did not indicate the temporary and permanent employees who solely filled the position of insulation workers for 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 need in insulation services. 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. As noted above, the petitioner failed to provide a chart of the temporary and permanent employees for the position of insulation workers only, and therefore it is impossible to determine if the petitioner has a peakload need for insulation workers. 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)).

Although the petitioner submitted a statement indicating the peakload need of the company during each spring and summer, the statement has not been substantiated by financial or other documentary evidence, such as staffing charts of permanent and temporary insulation workers employed by the petitioner for each month of the year, or work contracts for 2008 and for the upcoming year, or invoices that confirm the accuracy of the information given in the statement and establish that the petitioner's business activity has formed a need for temporary workers for a certain time period and will recur next year at the same time. The petitioner has not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or will have different specialty skills than the other workers currently employed by the company. The petitioner has not provided evidence of contracts for work to be performed in the next year showing a clear termination date. The petitioner has not presented documentary evidence that demonstrates that its workload has formed a pattern where its months of highest activity are traditionally tied to a season of the year and will recur next year on the same cycle. Absent supporting documentation, the petitioner has not shown that its need for the beneficiaries' services is tied to a trend or a particular event that recurs every year. Again, 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. at 165.

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

In addition, on appeal, counsel for the petitioner stated that "the DOL specifically monitors the recruitment efforts during the Labor Certification process and requires a report establishing that the recruitment was sufficient to justify a peak load need." The regulations at 8 C.F.R. § 214.2(h)(6)(iii) states that "the labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." Thus, the certified labor certification by DOL is solely "advice" as to whether U.S. workers are available to fill the temporary position and is not a determination of the petitioner's temporary and peakload need for additional workers.

The director also denied the petition, because the petitioner failed to submit all documentation requested by the director. The director requested additional information due to inconsistencies in the record. Failure to submit requested evidence that precludes a material line of inquiry shall be

grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In addition, 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).

Finally, in the denial, the director also concluded that the petitioner failed to provide sufficient evidence to establish that the beneficiaries will not displace U.S. workers capable of performing such duties. The petitioner provided a temporary labor certification certified by DOL. Upon review, the certified temporary labor certification submitted in this matter is sufficient to establish this criterion. The AAO will withdraw this portion of the decision.

It is also noted that the petitioner requested the beneficiary's services from April 1, 2009 until October 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.