(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 16 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a two-employee general contractor established in 2005. In order to continue its employment of the beneficiaries in what it designates as cement mason positions, the petitioner seeks to extend their classification as temporary nonagricultural workers pursuant to 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).

The director denied the petition on the basis of her determination that the petitioner had failed to establish a temporary need for the services of the beneficiaries based upon a peakload need.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Applicable Law and Interpretations

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, in pertinent part, as follows:

> [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)(6) states, in pertinent part, the following:

> *Petition for alien to perform temporary nonagricultural services or labor (H-2B)—*
>
> (i) *Petition.*
>
> (A) *H-2B nonagricultural temporary worker.* An H–2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform 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.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load 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.

In accordance with the precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), the test for determining whether an alien is coming "temporarily" to the United States in order to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. Accordingly, pursuant to *Matter of Artee* it is the nature of the petitioner's need rather than the nature of the duties that controls.

Discussion

The petitioner stated on the Form I-129 that its need for the services of the beneficiaries is a temporary one, based upon a peakload need. In order to establish that the nature of its need is a temporary one based upon a peakload need pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), the petitioner must demonstrate the following: (1) that it regularly employs permanent workers to perform the services or labor at the place of employment; (2) 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 (3) 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 petitioner first filed an H-2B petition regarding its claimed temporary, peakload need that is the subject of this petition on September 20, 2010, and it was approved on September 23, 2010.[1] The petitioner filed for an extension of that petition on October 7, 2011, and it was approved on February 16, 2012.[2] The petitioner filed the instant petition on September 21, 2012, and claimed that its temporary, peakload need for the services of the beneficiaries would last for another year: from October 1, 2012 until September 30, 2013.

In its August 27, 2012 letter of support, the petitioner described itself as a construction business located in Guam, and stated that it needs to extend the beneficiaries' H-2B status "in order for us to carry out our on going projects as well as the incoming projects [for] which we are just waiting [on] a letter from the bank." The petitioner described its peakload need for the services of the beneficiaries on the Form I-129 as follows:

> [The petitioner] has a peak load demand for the continued employment of H-2B workers to supplement it's [sic] permanent staff of U.S. workers. This peak load demand is due to the existing project and the upcoming project to start soon waiting from the Bank the notice to proceed [sic].

The record contains information regarding eight projects in various stages of construction by the petitioner, which are summarized below:

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[1] *See*

[2] *See*

	Name	*Type of Project*	*Issuance of Building Permit*	*Construction Start Date*	*Construction End Date*	*Cost*
1		Single-Family Home	June 16, 2011	October 2011	October 2012	$330,000
2		Single-Family Home	December 1, 2011	February 2012	December 2012	$223,000
3		Single-Family Home	February 10, 2012	May 2012	March 2013 (projection)	$278,000
4		Single-Family Home	May 16, 2012	October 2012	June 2013 (projection)	$230,000
5		Single-Family Home	July 26, 2012	November 2012	June 2013 (projection)	$170,000
6		Single-Family Home	Appears to have been in process at time of appeal	N/A	N/A	$172,000
7		Single-Family Home	Appears to have been in process at time of appeal	N/A	N/A	$168,000
8		Single-Family Home	Appears to have been in process at time of appeal	N/A	N/A	$280,000

The director denied the petition on January 3, 2013.[3] Noting that the beneficiaries had already received two prior grants of H-2B status, the director found that the petitioner failed to establish that it needs the services of the beneficiaries for a limited period of time, and that it will not always need the services of the beneficiaries in order to remain operational.

Newly-retained counsel filed the instant appeal on January 28, 2013. In its January 24, 2013 letter, the petitioner makes the following argument:

> In order to carry out its projects, the Petitioner currently has a peak load demand for the employment of the Beneficiaries [to] supplement its permanent staff of U.S. workers due to a current increase in its construction projects. The Petitioner's peak load demand for the services of the Beneficiaries is temporary in nature and is a result of the demand

[3] The director's notice of denial erroneously provided the date of denial as January 3, 2012.

> for additional housing to accommodate both U.S. military personnel who will reside off-base as well as civilian personnel as a result of the U.S. military build-up in Guam.

The petitioner claims that it has six current construction contracts valued collectively at $999,200: (1) one worth $278,000;[4] (2) one worth $170,000;[5] (3) one worth $220,000;[6] (4) one worth $168,000;[7] (5) one worth $172,000;[8] and, finally (6) one worth $280,000.[9] Comparing this figure of $999,200[10] with the figure of $495,733 the petitioner supplied on its 2011 federal income tax return as its gross receipts or sales for that year, the petitioner claims that the rise in the petitioner's gross construction revenue (again, from $495,733 to $999,200) "constitutes a substantial increase in the company's business activities."

Upon review, it is found that the record of proceeding does not establish that the petitioner has a temporary, peakload need for the services of the beneficiaries as cement masons. The petitioner has established that it regularly employs permanent workers to perform services or labor at the place of employment and has therefore satisfied the first criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one, based upon a peakload need. However, the petitioner has satisfied neither of the remaining two criteria.

The second criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one based upon a peakload need requires the petitioner to demonstrate 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. The petitioner bases its claim for eligibility under this criterion on a claimed increase in its construction revenue from $495,733 in 2011 to its current construction projects, which are worth $999,200. The petitioner claims further that this increase in business activity is due to the U.S. military buildup on Guam.

As will be discussed, neither of these claims has been established.

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[4] The petitioner appears to be referring to the project described above.

[5] The petitioner appears to be referring to the project described above.

[6] It is not clear which to which project the petitioner is referring. It may be referencing the project described above, which is valued at $223,000. The record contains no information regarding a project valued at $220,000.

[7] The petitioner appears to be referring to the project described above.

[8] The petitioner appears to be referring to the project described above.

[9] The petitioner appears to be referring to the project described above.

[10] It is unclear how the petitioner arrived at this figure. By the AAO's addition of the individuals projects' values presented in the record of proceeding, the aggregate value of the six projects it lists is $1,288,000.

First, the record lacks sufficient evidence to demonstrate the claimed increase in the petitioner's business. Although the petitioner claims it has been in business since 2005, the record contains only one federal income tax return – its 2011 Form 1120. As such, even if the petitioner were to demonstrate an increase in business from 2011, which, as will be discussed, it has not, the petitioner would still have failed to demonstrate that the claimed increase did not merely reflect a resumption of usual business level after a temporary decrease that took place in 2011.[11]

However, even if this were not the case, the second part of the petitioner's claim would still fail because the record contains no evidence linking any of these construction projects to the U.S. military buildup in Guam, and its generalized assertion that "[m]any of the larger contractors on Guam are focusing on military projects rather than the housing projects" is far too tenuous to establish the petitioner's eligibility for the benefit sought. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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[11] As noted at footnote 10, the total value of the six projects listed by counsel is $1,288,000, not $999,200. However, the AAO questions the mathematical computation underlying the petitioner's claim that its construction revenues have risen "significantly" since 2011.

It appears as though the petitioner reached this figure by adding the total value of these projects. However, the evidence of record does not make clear that the petitioner is paid for its construction projects in a lump-sum manner. For example, the contract for the project, valued at $278,000, states that the petitioner would be paid in nine increments. The first increment - $27,800 (10% of the project total) – would be paid upon the pouring of the foundation. The second increment - $41,700 (15% of the project total) – would be paid upon the pouring of the floor slab. The third increment - $41,700 (another 15% of the project total) – would be paid upon the completion of the first-floor half wall. The fourth increment - $13,900 (5% of the project total) – would be paid upon the covering of the garage and the rooms. The fifth increment - $55,600 (20% of the project total) – would be paid upon the pouring of the first-floor half-roof. The sixth increment - $13,900 (5% of the project total) – would be paid upon the completion of the second-floor half wall. The seventh increment - $13,900 (another 5% of the project total) – would be paid upon the pouring of the second roof slab. The eighth increment - $27,800 (10% of the project total) – would be paid upon the completion of the plastering. Finally, the ninth and final increment - $41,700 (15% of the project total) – would be paid upon the completion of the entire project. As noted above, the petitioner stated that construction on the project was begun in May 2012 and was projected to be completed in March 2013. Thus, the first increment of $27,800 was likely due in May 2012 or shortly thereafter, and the final increment of $$41,700 would have been due in March 2013 or shortly thereafter. Accordingly, the petitioner would have received payments from this project on a continual basis throughout 2012 and 2013.

This indicates that the petitioner would be paid over a period of several months, and that the total amount of those payments would be spread over, at minimum, two calendar years – 2012 and 2013 – and possibly a third – 2014 – if the three projects for which building permits have yet to be issued are not started before mid-2013. The payment schedule is relevant because, if the $1,288,000 at issue in these six contracts were spread over at least two years, and possibly three, the total amount would not represent the "significant" increase in its business activity claimed by the petitioner over the 2011 figure of $495,733.

For all of these reasons, the petitioner has failed to satisfy the second criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one, based upon a peakload need.

The third criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one based upon a peakload need requires the petitioner to demonstrate that the temporary addition to its staff will not become a part of its regular operations. In this regard, the AAO finds that as the evidence in the record of proceedings does not establish a definable end-date for the petitioner's need for additional cement masons to supplement its permanent staff of cement masons, the petitioner has not demonstrated that the temporary addition will not be part of its regular operation.

In her decision denying the petition, the director noted that this is the second petition extension that the petitioner has filed. As noted by the director, "[t]he petitioner has not established that the cement masons are only needed for a limited period of time or contract having a clear termination date." The AAO agrees. While it is possible to spend up to three years in H-2B status, the fact that three years of H-2B status are possible does not mean they will be granted as a matter of right. To the contrary, the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) specifically states that "[g]enerally, that period of time will be limited to one year or less[.]" Moreover, the petitioner has failed to establish that its need for the services of the beneficiaries "will end in the near, definable future," as required by 8 C.F.R. § 214.2(h)(6)(ii)(B), as the petitioner has not provided evidence establishing how far into the future there would exist two events it claims necessitate the beneficiaries' continued H-2B employment – the U.S. military buildup on Guam and the claimed resulting general upswing in the petitioner's business activity.

For all of these reasons, the petitioner has failed to satisfy the third criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiaries is a temporary one, based upon a peakload need.

The petitioner has therefore failed to satisfy all three criteria described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), and it has consequently failed to establish that its need for the services of the beneficiaries is a temporary one, based upon a peakload need, as required by section 101(a)(15)(H)(ii)(b) of the Act and 8 C.F.R. § 214.2(h)(6)(i)(A).

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.