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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 2 6 2015

PETITION RECEIPT #:

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:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129) the petitioner describes itself as a "Limited Liability Company – forestry." In order to employ the beneficiaries in what it designates as reforestation worker positions, the petitioner seeks to classify them 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, concluding that the petitioner did not establish the seasonal need for the 13 beneficiaries that it claims as the basis for the petition.

The record of proceeding before us consists of (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; and (5) the Notice of Motion or Appeal (Form I-290B) and supporting documentation.

Upon review of the entire record of proceeding, we conclude that the Director's denial of the petition on the basis specified in her decision was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. H-2B LEGAL FRAMEWORK

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. . . .

For the regulatory provisions specific to the H-2B program, we look to 8 C.F.R. § 214.2(h)(6), *Petition for alien to perform temporary nonagricultural temporary services or labor.*[1] The regulatory definition of an H-2B temporary worker, at 8 C.F.R. § 214.2(h)(6)(i)(A), mirrors section 101(a)(15)(H)(ii)(b) of the Act, stating:

> *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.

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[1] Here we will reference and address only the provisions at 8 C.F.R. § 214.2(h)(6) which figure in our determination to dismiss the appeal.

The scope of employment within the H-2B category is addressed by the provisions at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii), *Temporary services or labor,* which read:

(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 [(1)] a one-time occurrence, [(2)] a seasonal need, [(3)] a peak load need, or [(4)] an intermittent need.

(*1*) *One-time occurrence.* The petitioner must establish [(A)] 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 [(B)] 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 [(A)] that it regularly employs permanent workers to perform the services or labor at the place of employment and [(B)] (1) 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 (2) 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 [(A)] has not employed permanent or full-time workers to perform the services or labor, but [(B)] occasionally or intermittently needs temporary workers to perform services or labor for short periods.

II. EVIDENCE OF NEED

The petitioner claims that it has established an H-2B "seasonal need" as defined at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(2). At section 3, page 13, of the Form I-129 Supplement H, the petitioner checked the box indicating that the claimed need was seasonal, and it entered the following as its explanation of the temporary need that it claimed as the basis for the petition:

> Tree planting and reforestation are predominately seasonal activities determined by the climatic conditions occurring once or twice a year depending on the location. At this location in South Carolina, tree planning is tied to the Winter and early Spring seasons. Backpack spraying is tied to the Summer and early-Fall seasons. Petitioner is a reforestation service company that began operating in 2012. Employer seeks to employ 13 H-2B temporary alien workers to plant trees in the forest starting about December 1 and ending about March 30 (Winter and early Spring). From about April 1 to September 30 (Spring and Summer) the temporary workers are needed to perform backpack spraying. These are 2 separate functions that occur back-to-back for less than 10 total months of the calendar year. Petitioner does not need temporary alien workers in October or November as these 2 months are out-of-season for tree planting and backpack spraying at this location. Petitioner has been unable to meet its seasonal labor need for experienced Reforestation Workers as evidenced by the attached temporary employment certification certified by USDOL.

The Form I-129 was filed without any documentation substantiating the petitioner's claimed need of 13 beneficiaries to perform reforestation services for the seasonal period specified in the petition. Accordingly, the service center issued an RFE, pertinent parts of which we quote below:

> Additional evidence is needed to establish that you have a temporary seasonal need.
>
> Provide a combination of the following or similar types of evidence. The list is not inclusive of all types of evidence that may be submitted. You may submit any and all evidence you feel would establish that you have a temporary need for the beneficiary's [(sic)] services.
>
> - A summarized monthly payroll table that identifies by month, for the two-year period prior to filing your petition, the number of permanent and temporary employees in the requested occupation, as well as all other occupations that you employ. Include the related monthly salaries paid to the permanent and temporary workers by occupation.
>
> - Copies of monthly payroll journals for the previous two-year period that reflect the number of permanent and temporary workers in the requested occupation.

- Copies of signed federal and state quarterly payroll tax returns that cover the prior two-year period and show the number of workers you have employed each quarter. This should include how many individuals were employed each month within the quarter.

- Copies of signed work contracts, letters of intent, or statements of work between your business and the employer ultimately utilizing the beneficiaries' services. If the ultimate employer is not your direct client, include the chain of contracts that establishes your link to the employer where the work will be performed. All contracts, letters of intent, or statements of work should identify a contact person, their title, business address, telephone number, and email address.

Please note that petitioner prepared charts and records submitted alone may not be sufficient to show a temporary need as they are considered self-serving unless supported by additional documentary evidence.

* * *

You are responsible for submitting sufficient evidence to establish that you meet all requirements to qualify for the requested classification, This request provides suggested evidence that you can submit to provide clarification regarding the issues listed below[(sic)]. . . .

In response to the RFE, the petitioner submitted a letter from its attorney and two petitioner-produced charts outlining the petitioner's employment of temporary workers for the years 2013 and 2014. According to the letter, the petitioner was not established until June 15, 2012. The letter introduces the petitioner's two charts as reflecting the petitioner's use of temporary employees in 2012 and 2013, stating:

> This employer has no prior payroll history. During years 2013 and 2014, employer contracted with a staffing service to provide 12 temporary workers on a monthly basis to perform the work described in the labor certification. Attached is a monthly summary showing employer's contract labor usage for the last 2 years.

With regard to the petitioner's petition for 13 H-2B beneficiaries, the letter states:

> Employer anticipates that the H-2B workers for which visa approval is being sought will be the employer's first and only non-family employees on employer's own payroll. Employer anticipates that its first payroll will be for the pay period after the date of the arrival of the H-2B workers. Temporary workers are not needed during October and November of each calendar year. No tree planting or back-pack spraying occurs during these 2 months of the year because of the climate.

For each month of the years 2013 and 2014 the aforementioned charts summarize the petitioner's use of temporary workers by columns headed "Month," "# of Workers," and "Monthly Payroll." According to the 2012 chart, the petitioner employed 12 temporary "Contract Labor" workers in every month except October and November, at a combined monthly payroll of $11,954.23. The 2013 chart also shows 12 "Contract Labor" temporary workers for every month except October and November, but at a higher monthly cost of $19,464.68.

The Director's decision clearly conveyed the finding that the RFE-reply did not remedy the evidentiary deficiencies noted in the RFE because the reply lacked evidence substantiating the assertions in counsel's letter and the accompanying chart. The appeal attempts to overcome the Director's decision by two documents introduced as "copies of two signed work contracts, letters of intent, or statements of work between [the petitioner] and the employers ultimately utilizing the beneficiaries' services."

The first document is a letter from the owner of a South Carolina company which, according to the letter, is engaged in forestry, pine-needle supply, tree planting, sales of selective herbicides, wildlife activities, and global habitat restoration. The author states that his company has sub-contracted forestry projects to the petitioner and that the petitioner will be working for his company "Hand-Tree Planting 3,000 to 4,000 acres and Hand Herbicide Application 3,000-4,000 acres, in South Carolina December 2014 through September, 2015."

In the second letter a South Carolina registered forester employed by a South Carolina, company whose business includes forest-resource consulting and timber sales states that, between December 2014 and September 2015, the petitioner will be working for his company "Hand Tree Planting an estimated 600 acres and Hand Herbicide Application\TSI on an estimated 900 acres in South Carolina."

III. ANALYSIS

To merit approval of this petition for beneficiaries to provide H-2B seasonal services or labor for the ten-month period sought in the petition, the evidence of record must establish not only that the nature of the labor or services would be "temporary" and "seasonal" as those terms are described at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii), but also that such work would exist (1) for the number of beneficiaries specified and (2) through the period of employment specified in the petition. We find that the evidence does not satisfy the latter two elements of proof. Accordingly, the appeal will be dismissed, and the petition will be denied.

We find the statement and the accompanying petitioner-produced charts that counsel presented in the RFE-reply insufficient to establish the extent to which the petitioner had used the 12 workers in 2013 and 2014 in the reforestation work that the petitioner specifies as the basis of its petition. The statement and the charts amount to claims by the petitioner, but not independent evidence of the accuracy of those claims. Further, while the petitioner asserts that those 12 workers were not on its payroll, it presumably had the ability to produce contractual documents and/or other evidence sufficient to show the nature and duration of the work for which it used a staffing agency to procure its temporary workers for the periods 2013 to 2014. However, the petitioner has not provided such

evidence, either in response to the RFE or on appeal. 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'l Comm'r 1972)). 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). Consequently, we do not accord any significant weight to either the letter or the charts that the petitioner submitted as its response to the RFE. Thus, the petitioner has not adequately documented that its past use of temporary workers shows either (1) an H-2B seasonal need for any specific number of workers to be devoted to the reforestation work that the petition specifies as the basis of its petition, or (2) the time lengths of the ten-month claimed employment period in which its temporary workers were actually employed (a) in tree-planting segment and (b) in herbicide application.

Also, even read together, the two letters from the South Carolina companies intending to use the petitioner for tree planting and herbicide application do not establish either (1) the number of workers that each of those activities would require from the petitioner, or (2) the periods of time that such workers would be engaged in each of the two activities, that is, the number days in tree planning and the number of days in herbicide application. In this regard, we note that, while each of the letters estimates the number of acres to be serviced, neither letter specifies how many reforestation workers would be needed for tree-planting; and, for the ten-month period during which tree planting and herbicide application would take place, neither letter specifies the amount of the ten-month period the petitioner-supplied workers would spend in tree planting and how much time in herbicide application. Also, the petitioner does not provide a factual basis for us to conclude that the tree-planting and the herbicide-application functions would require the same amount of workers.

We also find that neither the letters submitted on appeal nor any other evidence in the record of proceeding substantiates the petitioner's assertion of two distinct periods for the claimed reforestation work (i.e., that is a tree-planting period commencing around December 1 and ending around March 30 (Winter and early Spring) and a herbicide-application period extending from around April 1 to September 30 (Spring and Summer)). 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In short, the evidence of record does not provide an evidentiary basis sufficient for us to find that the petitioner has a need for H-2B temporary workers for the 10-month period specified in the petition and that such need - if it were established - would require the number of temporary workers specified in the petition. Accordingly, we conclude that the petitioner has not satisfied its burdens to establish an H-2B seasonal need for the 13 reforestation workers and to establish that those workers would be required for the ten-month period specified in the petition. Therefore, as the petitioner has not established that its asserted need satisfies the requirements for an H-2B temporary need as defined at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii), the appeal will be dismissed.

IV. BEYOND THE DIRECTOR'S DECISION

There is an additional aspect of the record which, although not addressed, leads us to conclude that the petition could not be approved as filed. Since the identified basis for denial is dispositive of the petitioner's appeal, we need not address this additional ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the petitioner seeks again to employ the beneficiaries or other individuals as an H-2B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

The petitioner claims that the tree planting and herbicide-application phases of the beneficiaries' reforestation work constitute two distinct functions, each of which, the petitioner claims, is relegated to different seasons of the year (i.e., "Winter and early Spring" for the tree-planting, and "Spring and Summer" for the herbicide application). On the other hand, the petitioner would have us meld what appear to be two distinct season-tied periods into one season, apparently on the basis of a claim that the two periods of different functions would follow "back-to-back," that is, without any intervening period during which the beneficiaries would not be engaged in either tree planting or herbicide application. However, the petitioner has not established that the tree-planting would regularly require the full period claimed by the petitioner, so that the beneficiary's reforesting employment would be continuous, so as to constitute one, rather than two, seasons for H-2B purposes, thus requiring two separate petitions, one for the hand tree-planting season, and another for the herbicide-application proceeding.

V. CONCLUSION AND ORDER

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of

the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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