



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF RGFE-G-, INC.

DATE: DEC. 23, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a firm that describes itself as providing “innovative environmental technologies, design and product manufacturing,” seeks to temporarily the Beneficiary as a “graphic design manager” under the H-2B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.¹

I. ISSUE

The issue before us is whether the evidence of record has established the H-2B “one-time occurrence” temporary need for the Beneficiary which the Petitioner presents as the basis for its petition.

II. 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*.² The

¹ We reviewed the record in its entirety before issuing our decision. We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

² 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.

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.

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

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III. FACTUAL BACKGROUND

The Director's decision states that the Petitioner had not established that its need for the Beneficiary's services or labor met the requirements of the type of H-2B temporary need that it specified as the basis for the petition, that is, a "one-time occurrence" as described in the regulation at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii).

The Form I-129, Petition for a Nonimmigrant Worker, reflects that the Petitioner was established in 1992, employs 100 persons, and has a gross annual income of \$20,000,000.

Matter of RGFE-G-, Inc.

The following paragraphs from the Petitioner's "Statement of Temporary Need," which was filed with the Form I-129, fairly represent the nature of the work that the Petitioner asserts that the Beneficiary would perform if the petition were approved:

[The Petitioner] will hire one (1) temporary worker as a Graphic Design Manager for a period of two (2) years to oversee two (2) international projects [the Petitioner] has contracted with [redacted] and [redacted] ("Clients").

[The Petitioner] has partnered with [redacted] to provide its IAQ (indoor air quality) products through an extensive network of national contractors. [redacted] will promote and refer us to their HVAC contractors. [redacted] has 330 contractors within their network dealing with their 2,300 locations and over 300,000 employees.

[redacted] will be selling and distributing [the Petitioner's] IAQ [brand name] (air purification and odor control systems) products. [redacted] is a leading global provider of indoor comfort solutions and services.

The foreign worker is needed to design and coordinate graphic work, marketing materials and in-store displays to be used for client's products. They will: use Photoshop, Corel & Flexi-Sign; create concepts utilizing knowledge of customer/client product; confer with the client regarding projects, layout, graphic design; determine size and arrangement of illustrative material and copy, and select style and size of type; maintain archive of images, photos, or previous work products and prepared notes and instructions for assembly and prepare final layouts for printing and installation; some travel required; train permanent [Petitioner's] employees on how to utilize software and use marketing templates prior to completion of [the] temp[orary] assignment.

A later paragraph in the "Statement of Temporary Need" includes the following explanation of why the Petitioner's need should be recognized as a "one-time occurrence" H-2B temporary need:

[T]he company needs a Graphic Design Manager to assist in creation of the graphic design for marketing materials and in-store displays. The H-2B worker will train an [employee of the Petitioner] on how to utilize these materials and modify them as may be appropriate. Once the templates are completed and the marketing materials are fully implemented, the need for this position will no longer exist; hence its temporary nature under the one-time occurrence standard.

The record of proceedings contains two affidavits from the Petitioner's president. The first affidavit (sworn on October 29, 2014) was filed with the Form I-129. The Petitioner submitted the second affidavit (sworn on January 9, 2015) in response to the RFE. We here quote paragraphs 5 through 7

of the second affidavit. They focus on particular aspects of the proposed graphic-design-manager work that the Petitioner's president would have us consider as satisfying the regulatory requirements for an H-2B "one-time occurrence" temporary need. Those paragraphs state:

4. The job opportunity reflects [the Petitioner's] need for a Graphic Design Manager due to its new business contracts with [redacted] and [redacted] retailers. [The Petitioner's] line of . . . units specifically designed for IAQ (indoor air quality), purification and odor control products will be sold in thousands of stores nationwide.

5. The nature of the position will be to oversee the design and coordinate graphic work, marketing material and in-store displays to be used for the products. [The Beneficiary] will utilize such software as Photoshop, Corel, and Flexi-Sign and create concepts utilizing knowledge of the customer and client and product. She will confer with clients regarding projects, layout, graphic design, determine the size and arrangement of illustrative material and copy, and select style and size of type. [The Beneficiary] will maintain an archive of images, photos, or previous work products and prepared notes and instructions for assembly and prepare final layouts for printing and installation.

6. [The Petitioner's] request satisfies the one-time occurrence standard as we need a Graphic Design Manager to assist in creation of the graphic design for marketing materials and in-store displays to satisfy our contractual obligations. Once the templates are completed and the marketing materials are fully implemented, the need for the position will no longer exist.

7. [The Petitioner] has never previously employed a Graphic Design Manager, hence its temporary nature under the one-time occurrence standard. We expect the duties of this position to be completed no later than October 1, 2016.

IV. ANALYSIS

For the reasons discussed below, we conclude that the Director did not err by denying the petition on the ground that the evidence of record did not satisfy the requirements at 8 C.F.R. § 214.2(h)(6)(ii)(B) for establishing an H-2B "one-time occurrence" temporary need.

The statutory and regulatory framework requires a petitioner to establish an H-2B temporary need through the duties that the beneficiary would perform if the petition were approved. We see that section 101(a)(15)(H)(ii)(b) of the Act identifies an H-2B beneficiary as coming temporarily to the United States "to perform other temporary labor or service." The regulatory definition of an H-2B worker at 8 C.F.R. § 214.2(h)(6)(i)(A) follows suit by identifying an H-2B beneficiary by the "services or labor" that he or she would perform, that is, "temporary labor or services without displacing qualified United States workers available to perform such services or labor . . ." Next, we see that the regulatory section at 8 C.F.R. § 214.2(h)(6)(ii)(A)(ii)(A) identifies "temporary

services or labor” as dependent upon “the petitioner’s need for the duties to be performed.” Likewise the provision at 8 C.F.R. § 214.2(h)(6)(ii)(B), *Nature of petitioner’s need*, introduces the four types of H-2B temporary need as determined by “the petitioner’s need for the services or labor.”

Therefore, while we have considered the “Graphic Design Manager” title that the Petitioner assigned to the proffered position as relevant, we focused especially upon the particular duties that the Petitioner ascribed to that position. Within the H-2B regulatory and statutory framework guiding our analysis, however, we look primarily to the duties as presented in the record of proceedings. We do so to ascertain the petitioner’s need and then determine whether that need qualifies as “temporary” within the H-2B context and as the type of H-2B temporary need that the Petitioner asserts.

A. The H-2B Temporary Need Claimed by the Petitioner

The record reflects that the Petitioner asserts its need for the Beneficiary as satisfying the first of the two alternative criteria at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) for a “one-time occurrence” temporary need. Accordingly the Petitioner must establish both (1) that that it has not previously employed someone to perform the duties that it needs the Beneficiary to perform, and (2) that it will not need workers to perform those duties in the future.

B. The Petitioner’s Need as Established by the Duties to Be Performed

For the reasons discussed above, we first look to the evidence about the duties that the Petitioner would have the Beneficiary perform. We take the Statement of Need’s rendition of the proposed duties as fairly representing the services that the Petitioner says it needs the Beneficiary to perform. They include:

- Designing and coordinating (1) graphic work, (2) marketing materials and (3) instore displays;
- Employing Photoshop, Corel & Flexi-Sign (applications which the Petitioner does not describe);
- Creating concepts utilizing knowledge of customer/client product;
- Conferring with the client regarding projects, layout, graphic design;
- Determining the size and arrangement of illustrative material and copy, and selecting the size and style of type;
- Maintaining an archive of images, photos, or previous work products and prepared notes and instructions for assembly;
- Preparing final layouts for printing and installation;
- Traveling as may be required;
- And, before the end of his employment period, training permanent employees of the Petitioner on how to utilize software and use marketing templates.

Matter of RGFE-G-, Inc.

On appeal, as throughout the record, the Petitioner maintains that it has never before hired a graphic design manager, and that the position would terminate within the period requested in the petition, that is, as soon as the Beneficiary had completed all her other duties and trained permanent employees of the Petitioner “on how to utilize software and use marketing templates prior to completion of the temp[orary] assignment.”

The Petitioner offers its president’s two affidavits as tipping the preponderance of evidence in its favor. We note that the affidavits are consistent with each other and with the assertions that the Petitioner has made throughout the proceedings. However, for the reasons discussed below, we find that they carry little probative weight.

As we discussed above, a material element of an H-2B “one-time occurrence” temporary need for specified services is that the Petitioner will not need workers to perform those services in the future. The Petitioner’s president attests that “the *need for the position* will no longer exist” (emphasis added) once the specified graphic design manager duties are completed for the [REDACTED] and [REDACTED] contracts. However, he does not attest that the Petitioner will not need someone in the future to perform the type of services or duties that the Petitioner outlined for the [REDACTED] and [REDACTED] contracts, in pursuit of other, future projects of the Petitioner. In this regard, we also find that the Petitioner has not presented evidence - such as, for instance, documents regarding the nature, scope, and goals for its business operations, to support the proposition that it would not again need the services that it specified in the petition.

Then, too, there is the other material requirement for an H-2B “one-time occurrence” temporary need, that is, that the evidence of record establish that the Petitioner has not needed the services or duties in the past. We find that neither the president’s affidavits nor any other documents in the record state that the Petitioner, in the words of the regulation, “has not employed workers to perform the services in the past.” The attestations are that the Petitioner has not employed a graphic design manager in the past – not that the Petitioner has not employed workers to perform the services in the past. Thus, the attestations are not inconsistent with the possibility that the Petitioner may have employed workers in the past to perform the services outlined in the petition, though not in a position to which it assigned the “Graphic Design Manager” title.

In any event, the Petitioner has not provided documentary evidence to support the attestations in its president’s affidavits. In light of the deficiencies that we have noted in the president’s affidavits, and in the absence of supportive documentary evidence in the record, we find that the affidavits merit little probative value towards establishing two material requirements for a “one-time occurrence” H-2B temporary need, namely, (1) that the Petitioner has not previously employed someone to perform the duties that it needs the Beneficiary to perform, and (2) that it will not need workers to perform those duties in the future. “[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *In re Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). The Petitioner has the burden to ensure that the record includes sufficient evidence to substantiate the president’s statements regarding the issues of its past and future needs for persons performing the services upon which it asserts H-2B temporary need. There

Matter of RGFE-G-, Inc.

is no evidentiary basis in this record of proceeding for us to extrapolate the extent and accuracy of the relevant knowledge upon which the Petitioner's president bases his affidavit. We also note that the Petitioner cites no legal authority for its proposition on appeal that we should regard the president's making his statements in affidavit form as significantly elevating the probative value of the affidavit's content. Consequently, we find that the Petitioner has not established "one-time occurrence" temporary need for the Beneficiary's services.

V. CONCLUSION AND ORDER

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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of RGFE-G-, Inc.*, ID# 15309 (AAO Dec. 23, 2015)