



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF J-S- INC.

DATE: DEC. 23, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a firm operating a stone quarry, seeks to temporarily employ 12 unnamed workers as “laborers” 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.

I. ISSUE

The issue before us is whether the evidence of record has established the H-2B “peakload” need for 12 temporary workers that the Petitioner presents as the basis for its petition.¹

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:

[A foreign national] 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 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:

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.

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)(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)] 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 [(C)] 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.

III. BACKGROUND

The record reflects that the Petitioner has been operating its stone-quarry business since 2005 and that this is the first petition that it has filed for H-2B workers. On the Form I-129, the Petitioner asserted an H-2B "peakload" need for 12 temporary workers for the period February 2, 2015 to December 2, 2015. The Petitioner described its need for H-2B workers in a document with the heading "RE: Statement of Temporary Need Continued" (Statement of Need), which was appended to both the Form I-129, Petition for a Nonimmigrant Worker, and the ETA Form 9142B, H-2B Application for Temporary Employment Certification. There, the Petitioner stated that it "currently requires the services of laborers to perform manual labor associated with stone quarry work such as cutting, sorting and loading and unloading rock at a stone quarry."

The record reflects that the Director issued two requests for additional evidence (RFEs) before she reached her decision to deny the petition. The first RFE requested business-identity information, which the Petitioner provided to the Director's satisfaction. However, the Director was not persuaded by the response to the second RFE, which requested documentary evidence to support the peakload need asserted in the petition. The Director's decision identified deficiencies in the documents submitted in response to the second RFE and then concluded that the Petitioner "failed to establish that [its] need meets the regulatory definition of temporary services or labor as described in 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)." On appeal, the Petitioner contends that the Director erred by not recognizing an H-2B peakload need on the basis of "[c]ommon sense and the evidence submitted by the petitioner," which, the Petitioner asserts, "shows that the need for quarry rock splitters in Central Texas fluctuates, dipping in the colder winter months due to less need for raw materials for construction."

IV. EVIDENCE OF NEED

We will here separately address the following documents which the Petitioner has submitted into the record:

1. The aforementioned Statement of Need,
2. Copies of the Employer's Quarterly Federal Tax Returns filed by the Petitioner for the years 2013 and 2014,
3. The Petitioner's tables reflecting its employment of rock quarry laborers for the calendar years 2013 and 2014, and

4. Copies of letters from four business firms expressing each firm's intent to use the Petitioner's services in 2015.

A. Statement of Need

We look first to the aforementioned Statement of Need. As reflected in the following excerpts from that document, the Petitioner claims that an increase in business requires it to supplement its usual, non-temporary workforce with 12 temporary workers:

Our company has not applied for H-2B visas in the past[;] however, we have had an increase in our business and do anticipate needing temporary peak load workers to supplement our permanent staff.

....

[O]ur need for peak load workers . . . is 12 workers. . . .

....

[M]ost of our work is done on a year to year basis, and the number of temporary workers can only be estimated about a year or so in advance. Based on present business, we do have a temporary peak load need for the H-2B workers we are asking for in 2015, but cannot anticipate, at this time, that we will need H-2B workers in 2016 due to fluctuations in the economy.

The Statement of Need also provides following weather-related information to show why the Petitioner specified the 10-month period of need from February 2 to December 2:

Our company currently requires the services of laborers to perform manual labor associated with stone quarry work such as cutting, carrying, loading, and unloading rock at a stone quarry. Lifting up to 35 lbs. Our company has a temporary peakload need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately February 2nd to December 2nd during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Texas winters (during which time our business slows significantly each year due to the winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be. Historically, these winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months (we do however continue to employ some year round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent work force. Due to the nature of our work we are

unable we are unable to engage in much business during the winter months, of approximately February 2nd to December 2nd, because the cold and wet weather is not conducive to working outside cutting, carrying and sorting stone. . . .

B. The Employer's Quarterly Federal Tax Returns for the years 2013 and 2014

We find that the information on these documents with regard to the number of the Petitioner's employees from quarter-to-quarter generally comports with the number of permanent employees that the Petitioner's employment tables reflect for the years 2013 and 2014.

C. The Petitioner's Employment Tables

The Petitioner presents the figures in these two tables as representing its month-by-month, January through December, employment history regarding rock quarry workers for calendar years 2013 and 2014. The tables address two categories – Permanent Employment and Temporary Employment – by monthly measures of Total Workers, Total Hours Worked, and Total Earnings Received. The tables contain no entries for Temporary Employment. The table for calendar year 2014 reveals 11.9 as the average number of permanent workers for February through November, 10 as the average number of permanent workers for January and December, and 0 as the number of temporary workers throughout the year. The table for calendar year 2015 also indicates no temporary workers. It also shows 8 permanent workers for January and 2 permanent workers for December, as compared to an average of 10.7 permanent workers for the other 10 months. We also note that the total hours worked entered for December 2014 (2888.5) is higher than those entered for eight of the 10 months from February through November.

We find that the combination of the employment tables and the Petitioner's quarterly federal tax returns for 2013 and 2014 is sufficient to establish that the Petitioner has been employing permanent workers to perform the type of work for which the petition was filed.

D. Letters of Intent

In three of the four letters the author attests to his or her firm's intent to use the Petitioner's services from February 2, 2015 to December 1, 2015 – the period of need specified in the petition. Those three letters also contain a sentence stating that the services that the Petitioner will provide will require "a substantial number of workers" and that it will be difficult, if not impossible, to find U.S. workers to perform the work for which it intends to engage the Petitioner. The body of the fourth letter reads as follows: "This is to confirm that [the brick company supplying the letter] intends to use the products of [the Petitioner] for resale in commercial and residential construction products from January 1, 2015 through December 31, 2015.

The letters reflect that the four firms that submitted them intend to engage the Petitioner's services during the February through November period that the petition specifies as the Petitioner's period of temporary need. However, neither the letters nor any other document in the record of proceeding

provides quantitative evidence to support the Petitioner's claim that there is an increase in its business which will require it to employ 12 temporary workers in 2015. In this regard we particularly note that the Petitioner has not provided any evidence to establish that the four firms would generate so much additional business as to require it to employ H-2B beneficiaries for the first time.

V. ANALYSIS

As indicated in the definition at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(3), to successfully assert a "peakload" need, the Petitioner would have to establish that:

1. It regularly employs permanent workers to perform the services or labor at the place of employment;
2. There is a seasonal or short-term demand creating a need to supplement its permanent staff; and
3. Those temporary additions to staff will not become a part of the petitioner's regular operation.

We base the following comments and findings upon our consideration of each piece of evidence both individually and in context with the entire evidentiary record.

As we have already indicated, the combination of the employment tables and the Petitioner's quarterly federal tax returns for 2013 and 2014 is sufficient to establish that the Petitioner has been employing permanent workers to perform the type of work for which the petition was filed. Therefore, the Petitioner has satisfied the first element of proof inherent in the "peakload" definition at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(3) – that is, the requirement to establish that it regularly employs permanent workers to perform the services or labor at the place of employment. However, as we shall now discuss, the Petitioner has not satisfied the second element of proof, that is, the requirement to substantiate its claim that there is a seasonal or short-term demand creating the asserted need to supplement its permanent staff with temporary workers.

The certified ETA Form 9142B, or Temporary Labor Certification, is sufficient to establish that the Petitioner may petition for temporary agricultural workers under the H-2B program because the form transmits the Department of Labor's certification that, based upon the documentation and attestations provided to it:

[A] sufficient number of able willing and qualified U.S. workers have not been identified as being available at the time and place need to fill the job opportunities for which the certification [was] sought, and the employment of the H-2B temporary labor or services will not adversely affect the wages and working conditions of U.S. workers similarly employed.

However, we find that the Petitioner has not established that it has the H-2B “peakload” temporary need that it claims as the basis of its petition. The record of proceeding contains insufficient documentary evidence to substantiate the accuracy of the Petitioner’s anticipation that it will require the 12 Beneficiaries in order to meet its business needs for the timeframe specified as the period of peakload need. “[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)). Further, U.S. Citizenship and Immigration Services regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg’l Comm’r 1978). Accordingly, the appeal must be dismissed.

The letters of intent reflect that the four firms that submitted them intend to engage the Petitioner’s services during the February through November period that the petition specifies as the Petitioner’s period of temporary need. However, neither the letters nor any other document in the record of proceeding provides quantitative evidence to support the Petitioner’s claim that there is an increase in its business which will require it to employ 12 temporary workers in 2015 to supplement its staff of permanent employees. In this regard we particularly note that the Petitioner has not provided any evidence to establish that the four firms would generate so much additional business as to require it to employ H-2B beneficiaries for the first time.

Surveying the entire record of proceeding, we find insufficient substantive evidence that the Petitioner will experience a peakload of business beyond that which it has been able to handle by its permanent staff. Thus, the evidence of record is not sufficient for us to find that the Petitioner has a need for the number of H-2B temporary workers for the period specified in the petition. Further, particularly in light of the facts (1) that the specific number of Beneficiaries sought roughly comports with the number of permanent workers reported for 2014 and 2015 for the months for which the Petitioner claims a peakload need and (2) that the evidence of record does not substantiate the claimed need for additional workers, the Petitioner has not shown that the temporary workers would supplement, rather than replace, permanent workers. Consequently, the Petitioner has not established that its asserted need qualifies as an H-2B temporary “peakload” need as defined at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii). Accordingly, the appeal will be dismissed.

VI. 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.

Matter of J-S-Inc.

ORDER: The appeal is dismissed.

Cite as *Matter of J-S-Inc.*, ID# 15027 (AAO Dec. 23, 2015)