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

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

MATTER OF R-C-C-, INC.

DATE: OCT. 14, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company that designs, manufactures, and distributes [REDACTED] costumes, seeks to employ the Beneficiary as an H-2B temporary nonagricultural worker in a position designated by the job title "Project Manager/Production Coordinator." 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.

The Director denied the petition, concluding that the Petitioner did not establish its need for the Beneficiary as an H-2B "one-time occurrence" need, which the Petitioner specified as the basis of 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.

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 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*. 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.

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

- (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

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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. NATURE OF THE PETITIONER'S CLAIM

The Petitioner asserts that it has an H-2B "one-time occurrence" temporary-need as defined at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(1). Accordingly, the Petitioner must establish [(A)] that (1) it has not employed workers to perform the services or labor in the past and that (2) 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.

The Petitioner's "Statement of Temporary Need," submitted as an addendum to the Form I-129, identifies the Petitioner as "the world's largest designer, manufacturer and distributor of Halloween costumes and accessories." The Statement also describes the Petitioner as:

- Operating as a family-run business for [redacted] years;
- Providing an extensive line of products for infants, children, teens adults[,] and pets;
- Offering consumers over 150 exclusive licenses "that appeal to their ever-changing needs";
- Distributing its products wherever [redacted] and masquerade products are sold, including national retail chains, toy stores, costume shops, variety stores, party stores, and other specialty retailers throughout the United States, Canada, Europe, Latin America, South America, Australia, and Asia.

The Statement of Temporary Need also provides an explanation for the Petitioner's characterizing its need for the Beneficiary's Project Manager/Production Coordinator labor or services as an H-2B "one-time occurrence" temporary-need. For example, the Petitioner points to its exclusive licensing agreement with [redacted] to sell several [redacted] costume designs (e.g., costumes produced according to [redacted] style guides for [redacted] and [redacted] style guides). According to the Statement, the temporary worker for the proffered position would "assist with the production that the [licensing] agreement will entail," by shouldering responsibilities described as follows:

Work with design team(s) to help guide [the] design process so that they will be more "production friendly"; responsible for keeping lists and spreadsheets of items to keep process moving forward, produced and shipped to customers on [a] timely basis; streamlining designs to move from development from patterns to photography to insert artwork etc.; responsible to work with Quality Assurance and management on

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factory price and target price; negotiate prices and finalize contracts to place orders; some travel required.

The Statement of Temporary Need states that the need for the proffered position will no longer exist once the licensing agreement with [REDACTED] expires. The Petitioner submitted a copy of the agreement into the record: it was signed in September 2013, and it specifies January 1, 2014 to December 31, 2016 as its effective term.

III. ANALYSIS

We conduct appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)). Thus, we base our decisions upon our independent review of the entire record of proceeding, without deference to contrary findings and conclusions that may have been reached by the Director. In our *de novo* review, we apply the “preponderance of evidence” standard of review as articulated in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). Accordingly, we examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. If the Petitioner submits relevant, probative, and credible evidence that leads us to believe that the related claim is “more likely than not” or “probably” true, the Petitioner will have satisfied the standard of proof. However, upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the Petitioner has not established that it is “more likely than not” or “probably” true that its need for the proffered labor or services is an H-2B “one-time occurrence” need as claimed.

As the Petitioner asserts that it has an H-2B “one-time occurrence” temporary need as defined at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(1), it has the burden to satisfy one of this provision’s two alternative prongs. The Petitioner would satisfy the first alternative prong by evidence establishing:

- That it has not previously 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.

The Petitioner would satisfy the second alternative prong by evidence establishing:

- That the Petitioner has an employment situation that is otherwise permanent, but
- That a temporary event of short duration has created the need for a temporary worker.

The record reflects that the Petitioner asserts the first prong of the regulation at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(1) as the basis of its petition. The record contains an affidavit from the Petitioner’s chief operating officer (COO), of which the seventh numbered paragraph reads: “7. [The Petitioner] has never previously employed a Product Development/Production Coordinator. The need for the subject position will no longer exist once the [REDACTED] agreement has ended. This position therefore satisfies the one-time occurrence standard.”

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To satisfy the requirements of the prong of 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(1) at issue, it is not sufficient that the Petitioner establish that it has not previously hired and does not intend to again hire a person for a position with the particular title of “Project Manager/Production Coordinator.” Rather, the Petitioner must establish both (1) that not one of its workers in the past performed the labor or services underlying that job title, and (2) that none of its workers would perform such services or labor in the future. The “temporary services” definition at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(A) focuses not upon the job title, but upon the nature of the labor and services to be performed, as manifested in the job’s underlying duties. So, too, the concern of the main paragraph of 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B), *Nature of the Petitioner’s Need*, is whether “the services or labor” that a petitioner asserts for the proffered position is temporary within the H-2B sense. In the same vein, the focus of the pertinent prong at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(1), *One-time occurrence*, is not upon whether the Petitioner has ever before classified a job as it does in the instant petition (i.e., as a “Project Manager/Production Coordinator”), but whether the underlying services or labor are such that employees of the petitioner had performed in the past.

Thus, in line with the requirements of the first alternative prong at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(1) for an H-2B one-time occurrence, we look to the record of proceeding to see if the evidence establishes that the Petitioner’s implementation of the [REDACTED] licensing agreement would generate a need for product-management and production-coordination labor or services that workers of the Petitioner (1) have not performed before and (2) would not perform in the future.

The Statement of Temporary Need presents the Petitioner as a business which has been operating in the [REDACTED]-costume industry for [REDACTED] years and held over 150 exclusive licenses at the time of the petition’s filing.

The Petitioner’s organizational chart reflects that the Petitioner has staffed 30 persons to Product Development, a fact that indicates that project management and product development are significant aspects of the Petitioner’s normal business operations. Also, the Petitioner’s information about operating since [REDACTED] and having over 150 exclusive licenses at the time of the petition’s filing strongly suggests that project management and product coordination are integral features of the Petitioner’s normal business. In this regard, we note that the Petitioner does not demonstrate either that its workers have not in the past performed the types of duties ascribed to the proffered position or that they would not perform those types of duties in the future. Rather, upon consideration of the totality of the evidence of record, we find that the Petitioner has not established that the types of duties ascribed to the proffered position (e.g., helping guide the Petitioner’s design teams towards an optimum production process, maintaining lists and spreadsheets to optimize efficiency, and streamlining designs) were not an intrinsic part of the petitioner’s operations by the time of the petition’s filing, more than [REDACTED] years into the Petitioner’s history, when the Petitioner described itself as a 700-employee firm, with a “+500 million” gross annual income, a “+50 million dollar” net annual income, the organizational structure depicted in the record, and the stature that the Petitioner

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claims for itself as the world's largest designer, manufacturer, and distributor of [REDACTED] costumes and accessories.

Further, while the Petitioner asserts that its exclusive-licensing arrangement with [REDACTED] requires the services ascribed to the proffered position, the evidence of record does not establish that the labor or services required by the [REDACTED] licensing requirements are substantively different from those that the Petitioner must employ in producing costumes pursuant to other exclusive licenses, which the Petitioner numbered as over 150 current as of the time of the petition's filing. Nor does the Petitioner establish that the labor or services that the Beneficiary would perform are substantively different from those that Petitioner's workers would perform with regard to future exclusive-licenses obtained by the Petitioner to produce [REDACTED] costumes.

In reaching the above conclusion, we of course fully considered the March 2, 2015, affidavit from the Petitioner's COO, submitted on appeal. The Petitioner suggests that we should accord decisive weight to that affidavit. However, the fact that the COO has provided this information in affidavit form is not in itself sufficient to invest it with decisive probative value. While we have taken into account the fact that the COO attested to the accuracy of his information under oath, we accord little probative weight to the COO's affidavit, after also weighing the limited extent of substantive detail in the affidavit.

The COO attests that the [REDACTED] costumes will be manufactured in Thailand and Vietnam and that the Petitioner's need for quality assurance will require travel to the costume-producing factories in Thailand and Vietnam. However, the COO does not attest or provide evidence that the Petitioner has not had its exclusive-license costumes produced by factories in Thailand, Vietnam, or other foreign countries in the past, or that the Petitioner's employees had not made quality-assurance trips to such factories in the past. The COO declares that "the requirements of the [REDACTED] contract are unlike any contract [the Petitioner] has entered into." However, the COO does not specify the factors upon which he bases this assertion and, more importantly, the COO does not demonstrate that the [REDACTED] contract's requirements produce a need for services or labor materially different from the needs for services or labor that the Petitioner's employees have had to satisfy in the past for the Petitioner's costume business to survive and prosper.

While the COO attests that none of its current employees "were willing, able, and qualified for the proffered position," he does not substantively address whether the Petitioner has in the past had employees perform the types of services or labor ascribed to the proffered position. In this regard, we specifically find that the COO's attestations that the Petitioner has never previously employed a product manager/production coordinator and that the position "will no longer exist" and "will be eliminated at the expiration of the [REDACTED] exclusive license" do not substantively address the regulation's requirements to establish that the services or labor that the Petitioner now identifies with the proffered position are not such that its workers have performed in the past and would perform in the future.

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For the reasons discussed above, we conclude that the Petitioner has not established that it has a “one-time occurrence” need as defined in the controlling H-2B regulations. Accordingly, the appeal will be dismissed.

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.

Cite as *Matter of R-C-C-, Inc.*, ID# 13974 (AAO Oct. 14, 2015)