



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

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

MATTER OF G-F-, LLC

DATE: OCT. 27, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company providing forestry services, seeks to employ 32 named Beneficiaries as H-2B temporary nonagricultural workers in what it designates as forestry-worker positions. *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 the seasonal need 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.

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:

[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*.¹ The regulatory

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.

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)(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 filed the petition for what it identified as an H-2B “seasonal need” as defined at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(2), that is (1) traditionally tied to a season of the year by an event or pattern; and (2) is of a recurring nature. 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 the Petitioner entered the following as its explanation of the temporary need that it claimed as the basis for the petition:

[The Petitioner] performs manual reforestation services with forestry workers. The season for reforestation is determined by the climate of the areas it is performed in; therefore, the season is recurring and not subject to change. Our work begins with the planting of seedlings, then moves into the maintenance of trees by cutting and clearing the encroaching vegetation.

Reforestation requires the seedlings to be planted within a seasonal window conducive in the production of the seedlings['] growing process. The maintenance of the planted seedling which [sic] can only be performed while the trees and brush have live foliage. The season ends approximately in the hotter month of August as the risk for forest fires and gasoline powered equipment is at a high risk. The reforestation industry has an annual seasonal need and does not comprise the use of year round workers.

Our season of need is December until end of July. During our downtime months of August, September[,] October, [and] November, our management pursues contracts for the upcoming year and plans for the coming season.

III. ANALYSIS

To merit approval of this petition for Beneficiaries to provide H-2B seasonal services or labor for the 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

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evidence does not satisfy the latter two elements of proof. Accordingly, the appeal will be dismissed, and the petition will be denied.

We accept the Petitioner's explanation that, as a company only established in [REDACTED] it does not have internal records to substantiate that it has the need for the number of H-2B workers that it specified in the petition. However, the fact that the Petitioner does not yet have a history of hiring temporary workers (because it is just starting its business) does not relieve the Petitioner from the burden to establish eligibility. The Petitioner must establish not only that it is entering an industry with work appropriate for temporary workers on a seasonal basis, but also that, at the time of the petition's filing, the Petitioner had secured sufficient work for the number of H-2B workers requested for that season, and for the period specified by the Petitioner as the season. The evidence of record does not meet that burden.

The petition was filed for 32 named Beneficiaries to perform temporary reforestation services for the period December 8, 2014 to July 30, 2015.

The petition was not filed with any documentary evidence that the Petitioner had secured any reforestation work for the Beneficiaries for the period sought. Consequently, the RFE's "not inclusive list" of suggested types of evidence to establish the Petitioner's H-2B seasonal need for the Beneficiaries' services included "[c]opies of signed work contracts, letters of intent, or statements of work between your business and the employer ultimately utilizing the beneficiaries' services." The Petitioner responded to this portion of the RFE by submitting a copy of a "Contractor General Tree Planting Agreement between Independent Contractors" (TPA) that was signed by the Petitioner and [REDACTED] Virginia, on December 15, 2014.

The TPA specified that the Petitioner would plant approximately 7,262,000 Loblolly Premium pine trees on 15,000 acres in Virginia and North Carolina, at a rate of \$30 per acre, with total payments amounting to \$450,000. The TPA does not specify the number of workers required, and it does not specify a particular period within which the planting would occur (referring, instead, to such dates as specified by "the Department," which in context, appears to mean the Virginia or North Carolina Department of Forestry).

On appeal, the Petitioner submits four letters of intent:

- The letter from [REDACTED] states that company's intent to use the Petitioner in its timber-planting efforts this year on 800 to 1200 acres.
- The letter from [REDACTED] states that company's intent to retain the Petitioner's services "to complete 250 planting acres [in five named counties] and 30 thinning acres," with the work starting on January 1, 2015 and finishing by July 30, 2015.
- In its letter, [REDACTED] states that, it is a contractor that projects having approximately 9,000-10,000 acres for tree planting and 500-1,000 acres for pre-commercial thinning in Virginia and North Carolina for 2014-2015, and that it intends to

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use the Petitioner's labor services as a subcontractor from January 1 through July 30, 2015 for the tree-planting and thinning season.

- In his letter, the president and sole shareholder of [REDACTED] states his intent "to retain the services of the Petitioner to complete (+/- 100 acres of tree planting) and +/- 100 acres of pre-commercial thinning" in 10 named North Carolina counties for the period starting on January 1, 2015 and finishing by July 30, 2015.

As with the TPA, the letters of intent do not specify the number of workers that would be required. Further, we find that the letters of intent have very little evidentiary weight, for each of two reasons. First, there is the timing aspect, that is, the fact that the letters were authored in February 2015 but relate to a petition that was filed in December 2014 and for an employment period also commencing in December 2014. Second, the content of those letters does not reference or reflect any binding obligation by the companies submitting them to retain the Petitioner to perform any of the work described in the letters. USCIS 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 based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 Reg'l Comm'r 1978).

The Petitioner also submits a one-page document identified as the Petitioner's itinerary for 2014-2015. Among six crews of 15 workers, the Petitioner distributes blocks of work sectioned by starting and finishing times and various counties, commencing in December 2014 and ending in July 2015. The Petitioner does not explain how it determined that it would require workers for all of the counties that it details. Further, neither here nor anywhere else in the record does the Petitioner document the methodology it used to arrive at the number of workers that it specified in the petition, its division into 15-person crews, and its determination of how much time would be required of the workers in the various counties. Thus, we accord no significant weight to the Petitioner's chart.

In short, upon review of the entire record of proceeding, we conclude that the Petitioner has established neither its need for the number of workers sought in the petition nor the length of time that would be required to perform the work that the Petitioner specifies for the Beneficiaries sought in the petition. 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)).

As the evidence of record does not provide an evidentiary basis 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, 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). Accordingly, the appeal will be dismissed.

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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 H-2B employees in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

The regulation at 8 C.F.R. § 214.2(h)(6)(vi)(C), *Alien's Qualifications*, states, in pertinent part, that, where, as here, the petition's temporary labor certification application requires certain education, training, experience, or special requirements of a beneficiary who is present in the United States, the H-2B petition shall be accompanied by "documentation that the [beneficiary] qualifies for the job offer as specified in the application for such temporary labor certification."

The Petitioner's H-2B Application for Temporary Employment Certification (ETA Form 9142B), specified that the position required three months Commercial Brushsaw/Chainsaw experience, indicating that the Petitioner excluded from consideration any U.S. workers who did not have that experience. However, we see no documentation in the record that the Beneficiaries meet this experience threshold – and, in this regard, we have also considered the documentation that the Petitioner has submitted into the record from [REDACTED]. Therefore, the petition lacks essential evidence required for approval of the petition.

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 we conduct 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

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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 G-F-, LLC*, ID# 14371 (AAO Oct. 27, 2015)