



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

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

MATTER OF R-, INC.

DATE: JULY 19, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a rehabilitation and recovery center, seeks to employ the Beneficiary as a web marketing specialist under the H-2B nonimmigrant classification for temporary nonagricultural services or labor. See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The H-2B program allows a qualified U.S. employer to bring certain foreign nationals to the United States to fill temporary nonagricultural jobs. The Petitioner's service or labor need must be a one-time occurrence, seasonal, peak load, or intermittent.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not established an H-2B temporary need for the Beneficiaries' services, based upon a one-time occurrence.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the evidence in the record of proceeding was sufficient to establish its claim by a preponderance of the evidence.

Upon *de novo* review, we will dismiss the appeal.¹

I. 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:

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. . . .

The regulation at 8 C.F.R. § 214.2(h)(6)(i)(A) largely restates this statutory definition, but adds that employment of H-2B workers will not adversely affect the wages and working conditions of

¹ We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

similarly employed U.S. workers. The scope of employment within the H-2B category is addressed at 8 C.F.R. § 214.2(h)(6)(ii):

(ii) *Temporary services or labor.*—

- (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 a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.
 - (1) *One-time occurrence.* The petitioner must establish 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 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 that it regularly employs permanent workers to perform the services or labor at the place of employment and 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 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 has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

II. TEMPORARY NEED

In the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it is a 29-employee rehabilitation and recovery center in Florida. The Petitioner claimed a temporary need for one web marketing specialist based upon a one-time occurrence.

The Petitioner describes its temporary need as follows (note: errors in the original text have not been changed):

[The Petitioner] is looking to expand to reach new clients on an international level which will become a permanent part of its business. [The Petitioner] recently added a Partial Hospitalization Program (PHP) level of care so that patients can be treated on an inpatient basis and stay in its facilities for the duration of their program. The addition of PHP opens the facility to many new potential patients and as such the company needs to revise its marketing techniques to expand and reach new audiences.

To date, [the Petitioner's] marketing plans have solely been geared to Florida and the United States domestic audience. [The Petitioner] is now beginning its expansion into Europe, specifically to the United Kingdom and The Netherlands. [The Petitioner] offers various treatment modalities that are not available in Europe. The nature of the position will be to complete the implementation and maintenance of our international marketing plan. [The Petitioner] needs to determine, through thorough research, what needs are of our target market and how to meet them. With that information, the company can tailor its marketing campaigns to the needs of those abroad. Once the campaigns have been created and 'go live' within our targeted market, [the Petitioner] will evaluate feedback and revise accordingly to finalize the campaigns and marketing plan. The goal will be to have the international marketing campaign managed by full-time permanent staff members.

[The Petitioner] is seeking to employ a temporary worker as this is a new endeavor and the company needs someone who is able to implement a new international web marketing plan and strategy. Once the marketing and sales strategies are created for the international marketing place and successfully tested, the need for the temporary position of Web Marketing Specialist will end. We anticipate this to be completed no later than December 1, 2017.

Matter of R-, Inc.

The nature of the position of Web Marketing Specialist will require the temporary worker to: Employ search marketing tactics to increase visibility and engagement with content, products, or services in Internet-enabled devices/interfaces. Examine search query behaviors on general/specialty search engines/other Internet-based content. Analyze research, data, or technology to understand user intent, measure outcomes for ongoing optimization. Manage complex web marketing strategies including tapping into European market. Design and update marketing plan for company website and tailor to target new customer base in Europe (beginning with the United Kingdom and Netherlands). Analyze information to determine how to align web marketing with marketplace and competitors. Prepare reports to relay market research. Gather data on competitors and their marketing. Analyze customer demographics and specific needs to tailor marketing. Measure success and evaluate to make any updates to marketing strategies. Collaborate with other marketing staff to integrate and complement marketing strategies across multiple sales channels. Collaborate with web/multimedia/art design staffs to create multimedia web sites or other internet content that conforms to brand and company visual format. Conduct market research analysis to identify search query trends; real-time search and news media activity, popular social media topics, electronic commerce trends, market opportunities, or competitor performance.

The record of proceedings contains two affidavits from the Petitioner's Chief Executive Officer (CEO). The CEO describes its "one-time occurrence" temporary need as follows, in relevant parts:

8. Our current website was developed by [REDACTED] a third party web page designer. Due to the temporary need to revise our marketing techniques to expand and reach our new target market in Europe, [the Petitioner] made the business decision to hire an in-house Web Marketing Specialist for a temporary period of three years for the purpose of developing an overall international web marketing campaign

....

11. Although [the Petitioner] has a Marketing Department and employs a Chief Marketing Officer, a Marketing Coordinator and a Marketing Strategist, these individuals do not have the qualifications or required twelve months of experience in a Web/email Marketing position. . . .

....

18. [The Petitioner's] request for temporary labor certification satisfies the one-time occurrence standard as we need a Web Marketing Specialist to assist in creation of the marketing plan and to train its employees in its use. Once the marketing and sales strategies are created for the international marketplace and successfully tested, the need for the temporary position of Web Marketing Specialist will end. . . .

III. ANALYSIS

Upon review of the record in its totality and for the reasons discussed below, we conclude that the Petitioner has not established that its need for the Beneficiary's services qualifies as an H-2B temporary need, based upon a one-time occurrence.

A. General Time Limit for Temporary Need

A petitioning employer must establish that its need is temporary in that it "will end in the near, definable future," generally "limited to one year or less." 8 C.F.R. § 214.2(h)(6)(ii)(B). In the case of a one-time occurrence, the temporary need could last as long as three years. *Id.*

The statutory and regulatory framework further requires a petitioning employer to establish an H-2B temporary need through the duties that the Beneficiary would perform if the petition were approved. For example, 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." Likewise, the regulatory definition of an H-2B worker at 8 C.F.R. § 214.2(h)(6)(i)(A) identifies 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, 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." Similarly, 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, 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.

On appeal, as throughout the record, the Petitioner maintains that it has never before hired a web marketing specialist, and that the position would terminate within the period requested in the petition, that is, as soon as the Beneficiary had completed all his other duties and trained permanent employees of the Petitioner to perform the duties of the web marketing specialist.

The Petitioner offers its CEO's two affidavits to support its assertions regarding the temporary need. We note that the affidavits are consistent with each other and with the assertions that the Petitioner has made throughout the proceedings.² However, for the reasons discussed below, we find that they carry little probative weight.

² Depending on the specificity, detail, and credibility of an affidavit, letter or statement, we may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000). However, the Board also stated, "We not only encourage, but require the introduction of corroborative testimonial and

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 CEO attests that “the *need for the subject position* will no longer exist” (emphasis added) once the marketing and sales strategies are created for the international marketplace and successfully tested. However, he does not attest that the Petitioner will not need someone in the future to perform the type of services or duties that it outlined in pursuit of other, future projects, either domestically or abroad. 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.

Further, we note several statements the Petitioner has made that contradict the assertions in the affidavit that the need is not a temporary one-time occurrence. For example, the Petitioner stated that it intends to “reach new clients on an international level which will become a permanent part of its business” and that the Beneficiary would “[d]esign and update [the] marketing plan for [the] company website and tailor to target new customer base in Europe (beginning with the United Kingdom and Netherlands).” This indicates that the Petitioner intends to continually expand its marketing beyond the United Kingdom and the Netherlands to other countries in Europe, rather than stopping once markets in the United Kingdom and the Netherlands have been reached.

In addition, the Petitioner’s goal is “to have the international marketing campaign managed by full-time permanent staff members,” meaning that others would continue performing the proffered duties after the Beneficiary’s employment ends. Although the Petitioner states that PHP is a new addition to its business services, it does not appear that PHP is temporary. In fact, PHP appears to be a permanent addition to the Petitioner’s business that will allow the Petitioner to expand its services internationally as well as domestically. The Petitioner has not explained how its need for someone to perform the proffered duties (whether or not that person will have the position title of web marketing specialist) will end given the permanent addition of PHP to its business and that the Petitioner eventually intends to expand its marketing beyond the United Kingdom and the Netherlands.

Consequently, we conclude that the Petitioner’s need for the services proposed for the Beneficiary of this petition extends across a continuous period that exceeds the regulation’s three-year-or-less general limitation to qualify as a “temporary,” “one-time-occurrence” within the meaning of the H-2B program. For this reason alone, the petition may not be approved.

documentary evidence, where available.” *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the affected party to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

B. One-Time Occurrence

To establish the existence of a temporary need based upon a one-time occurrence, the record must satisfy one of the two alternative prongs set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1): (1) that the Petitioner has not employed workers to perform the services or labor in the past and will not need workers to perform them in the future; or (2) that the Petitioner has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. The record satisfies neither prong.

1. No Prior Employment of Workers to Perform the Services or Labor and No Need to Do So in the Future

Incorporating our discussion above, we find that the Petitioner has not established that it has not needed the services or duties in the past and will not need them in the future. We find that neither the CEO's affidavits nor any other documents in the record state that the Petitioner "has not employed workers to perform the services in the past" except, perhaps, to the extent the services up until now have only been targeted toward a domestic market.³ The attestations are that the Petitioner has not employed a web marketing specialist in the past – not that the Petitioner has not employed workers to perform the services proposed for the Beneficiary 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 assigns the title of "web marketing specialist." Nor has it established that it will not need someone to perform these services in the future.

In any event, the Petitioner has not provided documentary evidence to support the attestations in its CEO's affidavits. In light of the deficiencies that we have noted in the CEO's affidavits, and in the absence of supportive documentary evidence in the record, we find that the affidavits merit little probative value towards establishing the two material requirements for a "one-time occurrence" H-2B temporary need mentioned earlier. "[G]oing 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 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 accurately reflect the CEO's statements with regard to the issues of its past and future needs for persons performing the services upon which it asserts H-2B temporary need. However, insufficient supporting evidence has been provided in this record of proceedings for us to extrapolate the extent and accuracy of the relevant knowledge upon which the Petitioner's CEO bases his affidavit.

³ The Petitioner has not established that different duties are typically performed by web marketing specialists who only target U.S. markets versus those who also target international markets.

2. Permanent Employment Situation Created by Event of Short Duration

Nor has the Petitioner satisfied the second alternative criterion. Even if we assume that the Petitioner has “an employment situation that is otherwise permanent,” it has not established the second half of this alternative criterion – that such employment situation has been created by a temporary event of short duration. Read within the context of 8 C.F.R. § 214.2(h)(6)(ii)(B), a temporary event is an occurrence that will end “in the near definable future,” like a World’s Fair. To meet these conditions, a one-time event must have a start and end date and last no more than “3 years.” *Id.* As discussed above, it is not at all clear whether the Petitioner’s need for the *services* described in the H-2B petition will ever end, let alone that they will end within three years.

IV. CONCLUSION

The Petitioner has not established that it has a temporary need, based upon a one-time occurrence, that will end in the near, definable future. The burden is on the Petitioner to show 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-, Inc.*, ID# 17257 (AAO July 19, 2016)