U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-C-C-(G-)

DATE: JULY 20, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a construction company, seeks to extend the Beneficiaries' employment as cement masons 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, peakload, or intermittent.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner had not established an H-2B temporary peakload need for the Beneficiaries' services.

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

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

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:

> [A]n 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 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 48-employee construction company in The Petitioner claimed a temporary, peakload need and requested an extension of H-2B visas for four cement masons.

The Petitioner indicated it specializes in the construction of commercial and residential projects. The Petitioner asserted that ' is currently experiencing a significant increase in U.S. military related construction from the build-up of U.S. military facilities and other federally funded projects on The Petitioner also indicated that an "upswing in tourism industry is contributing to an increase in private sector construction." On appeal, the Petitioner lists three projects which it is undertaking.

III. ANALYSIS

Upon review of the record in its totality and for the reasons explained below, we conclude that the Petitioner has not established that its need for the Beneficiaries' services qualifies as an H-2B temporary, peakload need.

We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). In evaluating the evidence, it directs us - and the Director - to determine the truth not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating this appeal, we have examined and weighed 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.

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). The record reflects that the Petitioner had a previously approved H-2B petition for one worker from September 2013 to July 2014, and eight workers from August 2014 until July 2015. The Petitioner also had a previously approved H-2B petition for one of the four Beneficiaries from July 2014 to July 2015. The Petitioner is now filing the present petition to retain the Beneficiaries from August 2015 to July 2016. Thus, the record indicates that the Petitioner's need for the Beneficiaries' services encompasses a continuous period of approximately 2 years and 9 months.

The Petitioner asserts that it has established that its need will end in the near, definable future because its construction projects will be completed or substantially completed by the end of the employment period sought in this extension petition. But, the Petitioner's need for cement masons is

for a continuous period that exceeds the regulation's year-or-less general limitation to qualify as "temporary" within the meaning of the H-2B program.

B. Peakload Need

To establish a peakload need, the record must satisfy all three prongs of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*): (1) that the Petitioner regularly employs permanent workers to perform the services or labor at the place of employment; (2) 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 (3) that the temporary addition to its staff will not become a part of the Petitioner's regular operation. The record does not satisfy any of these prongs.

1. Regular Employment of Permanent Workers for the Services or Labor

The Petitioner has not established that it regularly employs permanent workers as cement masons. In the H-2B petition, the Petitioner indicated that it has 48 employees and provided pay statements to substantiate their employment. However, the pay statements do not provide information about whether the individuals are currently employed temporarily or permanently by the Petitioner, or what their positions are. We find the Petitioner did not demonstrate, by a preponderance of the evidence, that the Petitioner employs permanent cement masons on a regular basis.

2. Need to Supplement Permanent Staff

The Petitioner also has not established its need to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand. An employer must establish that it needs to temporarily supplement its permanent staff on a peakload basis "due to a seasonal or short-term demand." 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

The Petitioner asserts that the U.S. military buildup and an "upswing in tourism industry" are contributing to its increased construction business. But the record does not support the Petitioner's claim that it has a need based on the U.S. military buildup and tourism is seasonal or short-term. Specifically, as the construction-project demand for H-2B carpenter services extends from approval of the first petition to the instant petition's employment end-date – that is, to July 2016 – we find that the Petitioner's claimed need to supplement its permanent staff is not due to a "seasonal" or "short-term" demand, defined in the regulations as generally a year or less. Any greater period would generally conflict with a "temporary need."

Nor does the record establish a near and definite end to whatever impacts the military buildup and tourism may have upon the Petitioner's staffing needs. According to one of the news articles submitted for the record, the U.S. military build-up in will span several years and will "peak" in 2021 (in approximately five years). In addition, contrary to the Petitioner's assertions that tourism industry is "unpredictable" and "erratic," the Petitioner submitted news clips reporting that the number of tourists in has grown in the past two years. These news reports

also reflect that new hotels are being built in line with the country's "Tourism 2020" plan to increase tourism through 2023. While the Petitioner provided statistics regarding the number of tourists in 2014, 2009, 2007, and 2003, the Petitioner did not provide statistics for all the other years during this time span. Thus, the record does not support the conclusion that the Petitioner's need for workers due to either the military build-up or increased tourism would end in the near future. Furthermore, the record does not support the Petitioner's claim that there is an increase in its business which will require it to employ temporary workers to supplement its permanent staff.

On appeal, the Petitioner submits an amended itinerary listing three contracts for the Beneficiaries.[1] One is a subcontract to work on the " project from February 6, 2015, to April 29, 2016. Notably, the Petitioner submitted an October 19, 2015, letter stating that this contract has been suspended "until the Contracting Officer lifts the suspension notice." But the Petitioner has not submitted evidence that this suspension has been lifted, and if so, when the project is slated to begin and be completed. The Petitioner also has not submitted evidence of the project's claimed 1-year warranty period. Without more, we find the record insufficient to establish that the Beneficiaries would be assigned to this particular project.

Another contract is a project to construct ' ' for from August 7, 2015, to August 6, 2016, with an additional 1-year warranty period. As of the time of filing, however, the Petitioner had not yet been given notice to proceed with this contract, and accordingly, did not list this contract on the initial itinerary submitted with the H-2B petition. We thus find this particular contract insufficient for purposes of establishing the Petitioner's need for the Beneficiaries' services at the time of filing.[2]

The one and only remaining contract is to upgrade and expand the owned by the from May 6, 2015, to February 13, 2016 (with an additional 18-month warranty period). However, the Petitioner has not sufficiently explained and documented how this project is directly related to either the U.S. military build-up, or the tourism industry. In fact, the Petitioner states that this project is "[i]n addition to [the Petitioner's] U.S. military projects."[3] Regardless, evidence of this one project, without more, is insufficient to support the Petitioner's claimed peakload need for four additional workers to supplement its permanent staff.

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[1] The Petitioner's initial itinerary (submitted with the Form I-129) listed two contracts which had been completed or substantially completed prior to the petition's filing date of July 15, 2015. In particular, one contract was to upgrade gas dispensers for the completed in 2014. Another contract was for repair work on Hangar Doors at to have been completed by August 14, 2015. The Petitioner later deleted these projects from its amended itinerary.

[2] The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

[3] We also observe the news article which states that "the housing demand associated with the proposed [build-up] 'would not exceed existing vacant housing supply and the need to construct new housing will be limited.'"

3. Temporary Addition of Workers

We further find that the Petitioner has not demonstrated that the temporary additions to its staff will not become a part of its regular operation. The record reflects (1) that the Petitioner has been employing the Beneficiaries as cement masons under the prior H-2B petitions, and (2) that the Petitioner filed the present petition to retain them for an additional year. As the record indicates almost three continuous years of dependence upon these H-2B mason workers to meet its contract needs, the Petitioner has not established that the Beneficiaries would not become a part of its regular operations.

IV. ONE-TIME OCCURENCE

The Petitioner did not claim that its need for cement masons would be a one-time occurrence under 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*), but we will evaluate the petition through this alternate basis for H-2B labor. To establish a one-time occurrence, the record must establish either (1) 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 (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*).

There is insufficient evidence of record to establish either that the Petitioner regularly employs permanent cement masons or, conversely, that it had never previously employed such workers. To support its claimed peakload need, the Petitioner submits evidence of its employees' pay statements but does not submit further details or evidence regarding these employees and their job duties. Therefore, we do not find sufficient evidence for a one-time occurrence under the first prong.

With regard to the second prong, the record does not contain sufficient evidence of 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." While the Petitioner's nearly three-year need for cement masons may possibly be acceptable for a one-time occurrence under appropriate circumstances, the record here does not support an H-2B classification under the one-time occurrence ground.

V. CONCLUSION

The Petitioner has not established that it has a temporary need, whether peakload or 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 O-C-C-(G-)*, ID# 17878 (AAO July 20, 2016)