



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

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

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

DATE: JULY 25, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a construction contractor in [REDACTED] seeks to extend the Beneficiaries' employment as carpenters 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, 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 its claim 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.

Matter of O-C-C-(G-)

- (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

The Petitioner describes itself as a firm that “engages in construction contracting services and has constructed numerous U.S. military, federal government, [REDACTED] commercial and residential projects.” The Petitioner asserts an H-2B “peakload” need to continue employing the 10 Beneficiaries as carpenters in order to meet its contractual obligations.

At the time of filing, the Beneficiaries were in [REDACTED] in H-2B status as carpenters, pursuant to a previously approved petition that the Petitioner had filed for their services. USCIS records show that the previous petition was approved for the validity period August 15, 2014 to July 14, 2015. The Petitioner filed the instant petition to extend the previously approved petition’s validity period for an additional year, from July 15, 2015 until July 14, 2016.

According to the Petitioner’s “Itinerary of Services” document, it intends to employ the Beneficiaries on multiple construction projects. This document includes the following information about the projects:

1. Upgrade of gas dispenser at an [REDACTED] on a [REDACTED] U.S. military installation
Start: September, 2014
Complete: July 31, 2015
2. Repair of hangar doors on [REDACTED]
Start: February 6, 2015
Complete: August 14, 2015
3. POL (Petroleum, Oil, and Lubricants) system structures on [REDACTED]
Start: February 6, 2015
Complete: August 29, 2016
4. Upgrade and expansion of a community recreational facility for [REDACTED]
[REDACTED]
Start: May 06, 2015
Complete: February 13, 2016

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Matter of O-C-C-(G-)

The Petitioner also emphasizes the ongoing U.S. military build-up in [REDACTED] and growth in [REDACTED] tourism industry.¹

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.

Before we delve into the specific requirements of the H-2B classification, we will address the Petitioner's position on appeal that "one-time event which can last up to three years is not restricted to one-time occurrences." Specifically, the Petitioner asserts "8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B) provides that the temporary employment must end in the near, definable future but specifically provides that in the case of a one-time event the temporary need could last up to three years (emphasis added)."

The pertinent language at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B), as modified in December 2008, states (modification italicized):

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.

The Department of Homeland Security (DHS) inserted the modified language into the H-2B final rule it published in the *Federal Register* on December 19, 2008. This final rule amended the regulatory definition of "temporary services or labor" so that an H-2B petition's approval period could last up to three years without the Petitioner having to establish "extraordinary circumstances."² However, as evident above, the final rule's modified language states a general principle that employment lasting more than one year is not temporary in nature. The *Federal Register* further states: "While a petitioner need no longer demonstrate 'extraordinary circumstances' to justify an H-2B petition validity period of longer than one year, the 3-year maximum validity period is not intended to be a default, but would be available only where the petitioner can demonstrate a specific and typically one-time need for the worker's services for that period of time."³ In this case, it is

¹ The Petitioner submitted documentation to support the H-2B petition, including evidence regarding its business operations, the Beneficiaries, and the claimed temporary need. While we may not discuss every document submitted, we have reviewed and considered each one.

² Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers; Final Rule, 73 Fed. Reg. 78104, 78118 (Dec. 19, 2008).

³ *Id.*

indisputable that, by its extension petition, the Petitioner is seeking to extend its employment of non-permanent-staff carpenters for more than one year.

We further refer to the U.S. Department of Labor's (DOL) supplementary information in the *Federal Register* on the final rule that it published on February 21, 2012.⁴ In particular, we note the following comment:

We proposed to define temporary need consistent with DHS regulations, so that both agencies make consistent decisions on applications/petitions. The majority of commenters asserted that our reliance on DHS regulations, in this instance, is misplaced. These commenters focused on the examples relied upon by DHS in the preamble to its 2008 regulations at 73 FR 78104, Dec. 19, 2008 to explain the operation of the 3-year, one-time occurrence. *Although we adopt the DHS regulatory standard, we acknowledge, as DHS did, that it did not intend for the 3-year accommodation of special projects to provide a specific exemption for the construction industry in which many of an employer's projects or contracts may prove a permanent rather than a temporary need.* Therefore, we will closely scrutinize all assertions of temporary need on the basis of a one-time occurrence to ensure that the use of this category is limited to those special and rare circumstances where the employer has a non-recurring need which exceeds the 9 month limitation [that this DOL final rule set for approving temporary labor certifications]. . . .

Further, we also refer to the recent interim final rule (IFR) jointly issued by DHS and DOL.⁵ It is important to note that the IFR's supplementary information's discussion of temporary need addresses the possibility of accommodating up to a three-year period of temporary need only in the context of a one-time occurrence as defined at 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)(1).⁶ Finally, the regulatory provisions at 20 C.F.R. § 655.6(b) on temporary need, which DHS and DOL promulgated through the IFR, plainly recognize that only an H-2B "one-time occurrence" need could provide a possible basis for approving an H-2B temporary-need petition where a petitioner's need would exceed 8 C.F.R. § 214.2(h)(6)(i)(A)(ii)(B)'s general temporary-need limitation of one year or less. The provisions at 20 C.F.R. § 655.6(b) state:

The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations. Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H-2B Registration or an Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.

⁴ Temporary Nonagricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10038, 10055 (Feb. 21, 2012).

⁵ Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042 (Apr. 29, 2015).

⁶ *Id.* at 24055-56.

Matter of O-C-C-(G-)

Upon our review of the entire record of proceedings, we conclude that the Petitioner has not established a specific, one-time need. Rather, we find that the evidence of record demonstrates that the Petitioner bases its claim of an H-2B temporary need upon a series of construction projects which the Petitioner has not established as comprising a specific, one-time need.

Further, the Petitioner has not demonstrated that the Director's ultimate determination to deny the petition was erroneous for the reasons stated herein. 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 (1) that the Petitioner has already been employing the Beneficiaries pursuant to the prior H-2B petition that was approved for them to work as carpenters, on a peakload-need basis, for the period August 15, 2014 to July 14, 2015, and (2) that the Petitioner filed the present petition to retain them for an additional year. Thus, the record indicates that its need for the Beneficiaries' carpentry services encompasses a continuous period of approximately 22 months.

We acknowledge the Petitioner's statements to the effect that its need for the H-2B carpentry services will end in the near, definable future. However, the fact remains that, with this extension petition, the Petitioner has now petitioned for H-2B carpentry services for a continuous period that exceeds the regulation's year-or-less general limitation on a claimed peakload-need qualifying as "temporary" within the meaning of H-2B program.⁷

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

⁷ We also note that the need for carpenters that the Petitioner claims as an H-2B peakload need would extend beyond the July 15, 2015 to July 14, 2016 period for which this extension petition was filed. For example, the Petitioner identified August 29, 2016, as the completion date of the POL structures project. Also, the record contains a contract awarded after filing this petition, to build a single-story [REDACTED] for the [REDACTED] by July 27, 2016. We further note that in the itinerary, the Petitioner includes three one-year-after-project-completion warranty periods and the one warranty period until August 13, 2017 (18 months after substantial completion). In other words, the Petitioner's itinerary indicates that its claimed H-2B need for carpentry services would not end with the completion of the four construction projects that had been awarded at the time of filing this extension.

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 to perform carpentry labor. The Petitioner provided copies of employees' pay records for the period July 15, 2015 to September 20, 2015. However, the Petitioner has not provided supportive evidence explaining which employees identified in those records worked as carpenters for the Petitioner, how long such people may have been employed as carpenters by the Petitioner, and the part-time or full-time nature of the periods during which the Petitioner may have employed them. In any event, the evidence of record does not satisfy the regulation's requirement that H-2B peakload-need petitioners "must establish" that they *regularly employ permanent workers* providing the type of services or labor for which they are petitioning. We find the Petitioner did not demonstrate, by a preponderance of the evidence, that it employs permanent carpenters on a regular basis.

2. Need to Supplement Permanent Staff

The Petitioner also has not established 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.

The record establishes that the particular construction projects specified in the petition constitute the demand which the Petitioner seeks to meet by continuing to employ the Beneficiaries. As the construction-project demand for H-2B carpentry services extends from approval of the first petition to the instant petition's employment end-date – that is, from August 15, 2014 to July 14, 2016 – we are compelled to find that the Petitioner's claimed need to supplement its permanent staff is not "due to" a short-term demand. In reaching this conclusion, we reasoned that in the context of the regulation in which it appears, "short-term" means generally one year or less. Any greater period would generally conflict with a "temporary need."

3. Temporary Workers and the Petitioner's Regular Operation

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 already been employing the Beneficiaries pursuant to the prior H-2B petition that was approved for them to work as carpenters until July 14, 2015, and (2) that the Petitioner filed the present petition to retain them as additions to its staff for an additional year. In the absence of countervailing evidence from the Petitioner, we find that the totality of the evidence in this particular case, showing what would amount to at least 22 continuous months of dependence upon H-2B carpentry workers to meet its

contract needs, the Petitioner has not established that the Beneficiaries would not become a part of its regular operations.⁸

IV. ONE-TIME OCCURENCE

To establish a one-time occurrence, the record must establish either (1) that the employer 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) that the employer 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)(I). We find that the Petitioner has satisfied neither prong.

Specifically, we find insufficient evidence to establish either that the Petitioner regularly employs permanent carpentry workers or, conversely, that it had never previously employed such workers. To support its claimed peakload need, the Petitioner asserts, but does not substantiate in the record, that it regularly employed carpenters in the past. 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 two-year need for carpentry services 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# 17844 (AAO July 25, 2016)

⁸ We note that the Petitioner does not specifically address this portion of the Director’s decision.