



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

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

MATTER OF T-B-S-, INC.

DATE: JULY 25, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a construction company, seeks to temporarily employ the Beneficiaries as construction laborers 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 it meets the requirements for the H-2B program. Upon *de novo* review, we will dismiss the appeal.<sup>1</sup>

#### 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):

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<sup>1</sup> This decision does not prejudice or otherwise prevent the Petitioner from filing a new petition on behalf of the Beneficiaries or other individuals, especially if the facts and circumstances have since changed such that eligibility for the immigration benefit can be established.

(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

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services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

## II. PETITIONER'S STATEMENT

In the petition, the Petitioner asserted a need for 35 full-time construction laborers to work in [REDACTED] North Dakota. The Petitioner specified this need as a peakload need that is unpredictable. It requested that the construction laborers be approved for employment from February 12, 2016 to October 30, 2016 (approximately an eight month period).

In the statement of temporary need, the Petitioner stated the following:

[The Petitioner] is engaged in the business of residential and commercial construction. The Company provides construction services in North Dakota, Louisiana, Mississippi and Texas. . . .

[The Petitioner] currently requires the services of Thirty-Five (35) Construction Laborers for a period of 9 months. The job opportunity is Peak Load under the H-2B classification due to the fact that our company has received a large number of temporary projects for our services. We have several projects in the area of [REDACTED] in North Dakota. These projects will be finalized by the end of October, 2016. . . .

## III. ANALYSIS

Upon review of the record in its totality and for the reasons explained below, we find that the record of proceedings does not sufficiently document the existence of work in North Dakota to require 35 full-time H-2B laborers during the employment period specified in the petition. Absent evidence of sufficient work for the Beneficiaries to perform, we cannot ascertain whether such work would constitute a peakload need, as claimed by the Petitioner.

More specifically, the Petitioner submitted various documents in support of the H-2B petition, including evidence regarding the proffered position and its business operations; however, the submission does not establish that the Petitioner is eligible by a preponderance of the evidence for the benefit sought.<sup>2</sup> For instance, the Petitioner provided three contracts with the initial petition for "wood framing," and three contracts in response to the Director's request for evidence (RFE) for "framing" and "drywall/texture."<sup>3</sup> However, the contracts do not sufficiently describe essential

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<sup>2</sup> While we may not discuss every document submitted, we have reviewed and considered each one.

<sup>3</sup> The contracts submitted in response to the RFE were executed on March 14, 2016, after the Director's RFE. Thus, they do not establish that the Petitioner had secured these work assignments as of the time of filing the petition. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa

aspects of the projects such as the scope of the work to be performed, the number of workers needed to complete the work, the duration of the projects, or when the projects are expected to begin. Further, each contract references a “summary of work” but the Petitioner did not submit these documents.

The Petitioner also provided payroll charts for 2014 and 2015. The Petitioner stated that the charts represent its employees in North Dakota. The charts provide the following information:

Company Payroll for 2014

	Total Earnings	Total Earnings
Month	Permanent Workers	Temporary Workers
January	22,694.00	0.00
February	16,464.00	17,613.00
March	40,593.00	58,948.00
April	42,352.00	65,868.00
May	83,082.00	79,933.00
June	38,801.00	79,107.00
July	83,501.00	70,141.00
August	147,201.00	80,237.00
September	121,312.00	60,158.00
October	156,959.00	103,452.00
November	101,205.00	130,833.00
December	121,537.50	6,600.00

Company Payroll for 2015

	Total Earnings	Total Earnings
Month	Permanent Workers	Temporary Workers
January	84,771.00	700.00
February	82,076.50	1,600.00
March	87,155.00	105,841.45
April	122,645.00	154,343.91
May	178,959.00	119,790.57
June	224,913.00	127,297.34
July	173,163.00	135,208.93

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petition may not be approved at a future date after the Petitioner or the 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).

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August	128,060.00	117,781.57
September	163,120.50	130,689.96
October	265,522.82	170,633.07
November	238,527.00	193,592.24
December	157,656.50	4,900.00

The Petitioner stated that due to an issue with its accounting system, it was not able to provide the exact number of permanent workers for 2014 and 2015, but that it employed at least 6-9 permanent workers in 2014 and at least 7-10 permanent workers in 2015.<sup>4</sup> In addition, the Petitioner stated that it employed three subcontractors in 2014 and four subcontractors in 2015. On appeal, the Petitioner submitted tax documents issued to individuals in 2014 and 2015 (i.e., Form W-2, Wage and Tax Statements, and Form 1099, Miscellaneous Income). The Petitioner states that it employed 68 permanent workers and 35 H-2B workers in 2014. According to the Petitioner, it employed 73 total workers in 2015 – and approximately 9 were permanent employees and 35 were H-2B workers.

In support of the petition, the Petitioner also submitted a monthly payroll summary for 2012-2014. The summary includes three charts, along with the following information:

\*Please Note the Temporary Employment Workers indicate the total number of H-2B Visa workers for [the Petitioner].

\*Please note that the [the Petitioner] applied and was certified 25 Temporary Workers in the states Mississippi and North Dakota.

\*Please Note that [the Petitioner] employed 25 Temporary Workers in Mississippi.

\*Please Note that [the Petitioner] employed 25 Temporary Workers in North Dakota.

\*Please Note that this report only includes the payroll information for the 25 Temporary Workers in Mississippi.

The payroll summary raises a number of issues. For instance:<sup>5</sup>

- The first statement indicates that all of the H-2B workers are included in the charts, but the last statement indicates that the charts only represent the temporary workers in Mississippi.
- The Petitioner claims to have employed 25 temporary workers in North Dakota; however, the Petitioner states that it employed 35 H-2B workers in North Dakota on appeal.

<sup>4</sup> The Petitioner has provided inconsistent information regarding the number of people it employs. For instance, on the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it has 18 employees. In response to the RFE, the Petitioner stated that it has “at least 9-12 permanent workers that we employ year round for work in [redacted] North Dakota.” Yet, it also states that it had at least 6-9 permanent employees during 2014. On appeal, the Petitioner states that it employed 68 permanent workers in 2014, and approximately nine permanent workers in 2015.

<sup>5</sup> We note that these are simply a few examples of the inconsistent statements provided by the Petitioner in the record of proceedings.

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We reviewed all of the evidence submitted, but without more, the probative value of the documentation submitted by the Petitioner is limited as the Petitioner does not explain how the evidence supports its request.<sup>6</sup> In addition, the Petitioner did not provide further clarification about the work of these individuals within its business operations (e.g., job titles, full- or part-time, subcontractor) and how the information substantiates a peakload need for 35 H-2B laborers for an eight month period from February 12, 2016 to October 30, 2016.

While the Petitioner claimed that it would require 35 H-2B construction laborers for its construction work, the record includes neither descriptions nor substantive evidence regarding whatever methodologies and factual bases the Petitioner may have used to arrive at 35 as the number of H-2B workers required to fill the asserted peakload need. On appeal, the Petitioner states that 35 H-2B temporary workers were employed in [REDACTED] North Dakota in 2014 and 2015. However, on its company payroll, the Petitioner reported that it employed 25 workers in North Dakota in 2015 (and it did not submit its company payroll for 2015.) Moreover, there is insufficient evidence for us to conclude that its current construction work would require 35 full-time H-2B workers.

When a petitioner files an H-2B petition, it represents that it has a need for full-time workers during the entire requested period. It is important to the integrity of the program, which is a capped visa program, to have a methodology for ensuring that employers have fairly and accurately estimated their temporary need. This guarantee deters employers from misusing (whether intentionally or unintentionally) the program by overstating their need for full-time, temporary workers, such as by deliberately or carelessly/mistakenly calculating the dates of their temporary need, the hours of work needed per week, or the total number of individuals required to perform the work available. Furthermore, by accurately describing the amount of work available, U.S. and foreign workers are able to realistically evaluate the desirability of the offered job.

While specific evidence may not be required to establish a peakload need, the burden of proof in these proceedings nonetheless remains with the Petitioner to demonstrate that it qualifies for the benefit sought. Here, the Petitioner has not sufficiently established how it calculated its request for 35 H-2B workers. The evidence submitted by the Petitioner also does not sufficiently corroborate that it has full-time work available for 35 H-2B laborers for the period of requested employment. Therefore, we cannot determine whether the claimed temporary need is a peakload one.

#### IV. CONCLUSION

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.

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<sup>6</sup> The Petitioner also provided printouts relating to its unemployment insurance which show that its insurance covered thirteen to forty workers from the second quarter of 2014 to the fourth quarter of 2015

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**ORDER:** The appeal is dismissed.

Cite as *Matter of T-B-S, Inc.*, ID# 11003 (AAO July 25, 2016)