



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

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

MATTER OF G-B-, INC.

DATE: JUNE 15, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a construction business, seeks to temporarily employ the Beneficiaries as construction laborers under the H-2B nonimmigrant classification for temporary nonagricultural services or labor. *See* section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 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, revoked the petition's approval. The Director partly relied on information from the U.S. Consulate General in Mexico that the Petitioner had previously assigned some of its H-2B workers to work at locations beyond the geographical areas specified in the temporary labor certification. The Director concluded that the statement of facts contained in the petition was not true and correct.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred in revoking the approval of the petition.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter to the Director for further proceedings consistent with this opinion.

I. REVOCATION

A. Legal Framework

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-2B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:¹

¹ The record reflects that the Petitioner is not contesting the Director's compliance with the notice of intent to revoke (NOIR) and decision requirements in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B), which states:

Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

B. Analysis

Upon review of the record in its totality, we find that the Petitioner has overcome the grounds for revocation. Specifically, the Director relied on the consular return memorandum which contained statements from workers that previously worked for the Petitioner in H-2B status. The workers described the locations of their previous employment; based on that information, the consulate concluded that the workers had worked outside of the approved geographical locations certified in the temporary labor certifications (TLC) in their previous employment with the Petitioner. The consular memo also included a site visit report from 2010, which verified that the Petitioner appear to be in compliance but recommended improving the TLC process by expanding the geographical area of employment to cover unanticipated contract needs. Based on the evidence in the record including information provided in response to the NOIR and on appeal, we find that there is no evidence in the record that the Petitioner intends to violate geographical locations specified in the TLC filed with this petition or that the Petitioner provided untrue and incorrect statement of facts. We further note that this petition was revoked prior to the Beneficiaries entering the United States and there is no evidence to suggest that the Beneficiaries indicated that they will work outside of the geographical locations. Therefore, we withdraw the Director's revocation decision.

evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

However, we will remand the petition because it appears that the petition had been approved despite insufficient evidence to substantiate a temporary peakload need for the number of workers requested in the petition.

II. TEMPORARY NEED

A. 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 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.

. . . .
- (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)] that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or

(b)(6)

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short-term demand and [(C)] that the temporary additions to staff will not become a part of the petitioner's regular operation.

B. Analysis

Upon review, it appears that at the time of approval, the record of proceedings did not include evidence substantiating a peakload need. Specifically, the evidence did not sufficiently document the volume of work that would require the type of labor identified in the petition, and the number of workers to perform that type of labor during the employment period specified in the petition.

In the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner asserted an H-2B peakload temporary-need for 50 construction laborers. On page 13 of the Form I-129 Supplement II, the Petitioner further explained its temporary need as follows:

[The Petitioner] is a cement construction company in [South Dakota]. The biggest challenge for any cement contractor is to find temporary workers who will stay and work the entire peak period. We have a peak load that runs from April all the way through December. In the northern states the severe cold becomes too extreme to properly pour cement in the winter months and therefore this is the main cement pouring period in the state of South Dakota. There is always a rush to pour as much cement as possible in the summer months when it is warm enough for the cement to be worked and dry properly. This naturally creates a peak load for cement construction in the state of South Dakota. By December the temperatures cool down so dramatically that the workforce greatly diminishes throughout the winter months due to increased pouring activity and overall business. Labor shortages are detrimental to any business and we are therefore requesting certification [sic] for workers to assist for the entire peak period.

The documents filed with the Form I-129 include an "Anticipated Worksite Itinerary" which specified multiple work-locations from April to December 2013. The Petitioner identified various worksite locations in [redacted] and [redacted] of South Dakota. The document also contains the following asterisked statement regarding the anticipated worksites:

* Please note that most jobs are still in bid status by industry standard at this time, and have not been finalized. Therefore, an exact itinerary cannot be given at this time. Workers will be performing cement construction work at various jobsites in [redacted] [redacted] of South Dakota, many of which still are to be determined.

While the Petitioner attested that peakload construction work would require 50 H-2B laborers, at the time of the petition's approval, the record included neither descriptions nor substantive evidence regarding whatever methodologies and factual bases the Petitioner may have used to arrive at 50 as the number of H-2B workers required to fill the asserted peakload need. For example, at the time of approval, the record of proceeding did not contain documents that pertain to its business operations

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such as contracts, payroll records, staffing/workload data, its annual historical need, or employment agreements. Further, the Petitioner stated, without further discussion, that “most jobs are still in bid status.”

In response to the NOIR and on appeal, the Petitioner supplemented the record with bid proposals and invoices. However, 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); and 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, 249 (Reg’l Comm’r 1978).

Further, the record as currently constituted, still does establish a peakload need. Specifically, the record does not establish that the Petitioner: (1) regularly employs permanent workers to perform the services or labor at the place of employment; (2) 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 additions to staff will not become a part of its regular operations. For example, the Petitioner did not submit evidence to demonstrate that it employs permanent workers to perform the specified labor at the place of employment.

For the reasons discussed above, it appears that the petition’s approval involved gross error in that the record of proceedings upon which the approval was based lacked sufficient evidence to establish an H-2B peakload temporary-need. Therefore, in light of the above discussed aspects of the record of proceedings as constituted when the petition was approved, the Director may wish to initiate a revocation-on-notice proceedings again, this time pursuant to the direction at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) if he or she finds that “[t]he approval of the petition violated [8 C.F.R. § 214.2(h)] or involved gross error.”

III. CONCLUSION

For these reasons, the Director’s decision will be withdrawn and this matter will be remanded to the Director.

ORDER: The decision of the Director, California Service Center, is withdrawn. The matter is remanded to the Director, California Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of G-B-, Inc.*, ID# 16717 (AAO June 15, 2016)