U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-E-C-, INC.

DATE: JUNE 30, 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 proceeding 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.

(*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 10-employee construction company in The Petitioner claimed a temporary, peakload need and requested an extension of H-2B visas for two cement masons.

The Petitioner indicated it specializes in the construction of single-family residences. The Petitioner asserted " 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 further stated:

> The U.S. military build-up bears a direct and causative relationship to the current increase in [the Petitioner's] business. In order to carry-out the U.S. military build-up, is experiencing and will continue to experience a temporary increase in Department of Defense workers and their dependents as well as civilian contract workers and their dependents. The influx of [a] new civilian population related to military build-up is driving a demand for additional housing. In response to this increased need for new housing, [the Petitioner] is currently providing construction services for seven single family residences [as referenced in contractual documents submitted with the petition.]

The Petitioner also indicated "an upswing in tourism industry is contributing to an increase in private sector construction."

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 contention regarding the Director's evaluation of the evidence. On appeal, the Petitioner asserts that the Director misapplied precedent decisions in the following passage of the decision: "[G]oing on record without independent and objective supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec 158, 164 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972))."

The Petitioner claims these cases do not require "independent and objective documentary evidence" but rather that the Petitioner provide supporting documentary evidence to meet the burden of proof.

The Petitioner is concerned that the Director applied a higher evidentiary threshold in her decision. But the Director's citation was preceded by the signal "*See*," which simply introduces an authority that supports but does not state the proposition.[1] The Director's proposition follows the *Matter of Soffici*, and we find that the citation was proper.

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 had a previously approved H-2B petition for two cement masons from September 2014 until July 2015, and (2) that the Petitioner filed the present petition to retain them from August 2015 to July 2016. Thus, the record indicates that its need for the Beneficiaries' cement masonry services encompasses a continuous period of approximately 22 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 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] *The Bluebook: A Uniform System of Citation* 58 (Columbia Law Review Ass'n et al eds., 20th ed. 2015).

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

The Petitioner has not established that it regularly employs permanent workers to perform cement masonry labor. In the H-2B petition, the Petitioner indicated that it has 10 employees and provided Forms I-9, Employment Eligibility Verification, to substantiate their employment. The Form I-9 is used to verify the identity and employment authorization of individuals hired for employment in the United States.[2] These forms contain individuals' biographical information and their citizenship or immigration status, but they do not provide information about whether the individuals are currently employed by the Petitioner or what their positions are.

In response to the Director's request for evidence, the Petitioner submitted copies of Forms I-9 where some have the word "cement masons" as a handwritten annotation. But these forms do not substantiate the indicated individuals are actually employed as cement masons. The Petitioner has not supplemented the record with copies of common business documents such as payroll, timekeeping records, or employment contracts to establish the workers' positions and their employment periods. 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 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 Petitioner asserts that the U.S. military buildup and "an upswing in tourism industry" are "contributing to an increase of private sector construction." But the record does not establish that the Petitioner seeks to continue to supplement its staff to address either of those developments. According to the Itinerary of Services and construction contract documents, the Petitioner seeks to employ the Beneficiaries in the full-construction of seven single-family houses. However, the construction appears to be outside any military installation; and the record does not include documentation from the Petitioner's clients, the U.S. military, the tourism industry, or any authoritative source establishing a causal connection between the construction projects for which the Petitioner filed this extension petition and either the military buildup or an upswing in tourism.

Further, even assuming the military buildup or an upswing in the tourism industry caused a spike in the number of its construction projects, the record does not substantiate a peakload need in this case. 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 record does not support a finding that the Petitioner's need for cement masons is due to a "seasonal or short-term" demand, regardless of which sector - military, tourism, or other - may be driving the present construction boom.[3]

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[2] For more information about the Form I-9, see https://www.uscis.gov/i-9 (last visited June 29, 2016).

[3] While an H-2B petitioner must also substantiate its actual need for the number of workers specified in its petition, we need not address that issue where, as in the case before us, the Petitioner has not first established an H-2B temporary

Moreover, discrepancies in the contract documentation further cloud the asserted peakload need. For example, the itinerary indicates that project #1 runs from July 2015 to December 2015. But the agreement for project #1 was signed in May 2014, and states that "[the Petitioner] agrees to commence work hereunder within 35 calendar days . . ." and "shall achieve substantial completion of the entire work no later than 180 calendar days." Therefore, it appears that project #1 would have been completed prior to filing this petition.[4] Further, some documents do not provide dates of commencement and completion for the specified projects and, therefore, they do not establish that the Petitioner needs additional workers for the employment period requested. The Petitioner must support its assertions with relevant, probative, and credible evidence sufficient to meet its burden of proof. *See Matter of Chawathe*, 25 I&N Dec. at 369.

Further, the record does not establish a near and definite end to whatever impacts the military buildup and tourism may have upon the Petitioner's staffing needs. Specifically, as the construction-project demand for H-2B cement masonry services extends from approval of the first petition to the instant petition's employment end-date – that is, from September 2014 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."

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 petition, and (2) that the Petitioner filed the present petition to retain them for an additional year. As the record indicates almost two continuous years of dependence upon these H-2B cement masons 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 masonry labor would be a one-time occurrence under 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*), but we'll 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*).

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need for the labor or services in question.

[4] This same project was submitted in support of the previously approved H-2B petition.

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 asserts, but does not substantiate in the record, that it has regularly employed cement masons 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 cement masonry 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 F-E-C- Inc.*, ID# 17845 (AAO June 30, 2016)