



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

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

MATTER OF X-J-X-

DATE: SEPT. 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 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, 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

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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 seven-employee construction company in [REDACTED]. The Petitioner claimed a peakload need, stating that its temporary need is unpredictable, and requested an extension of H-2B classification for four full-time carpenters.

The Petitioner indicated it specializes in the construction of single-family residences. The Petitioner asserted that it has a peak load demand for the “continued employment of H-2B workers to supplement its permanent staff of U.S. workers, in order to carry out the substantial increase in its construction projects resulting from the current U.S. Military projects rather than the housing projects.” The Petitioner further stated in the response to the Director’s request for evidence that the “U.S. military build-up bears a direct and causative relationship to the current increase in the Petitioner’s construction business.”

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.

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 on January 22, 2015, an H-2B petition filed by the Petitioner was approved for five carpenters and was valid until January 31, 2016; and (2) that the Petitioner filed the present petition to retain four of the carpenters for a period from February 1, 2016 to January 31, 2017.¹ Thus, the record indicates that the Petitioner’s asserted need for the Beneficiaries’ carpentry services encompasses a continuous period of approximately two years.

On appeal, the Petitioner states that the regulations specifically provides that a temporary need can last up to three years due to a one-time event. However, the evidence on record does not establish that the Petitioner’s need (or the demand for the Petitioner’s carpentry work) will end in the near, definable future. For example, the Petitioner stated on the Form I-129 that it has “incoming projects still on process.” Further, The Petitioner stated that the temporary demand is due to the military build-up but it is not clear when the build-up will end and, according to the documentation provided by the Petitioner, it will continue and peak in 2020 and 2021. Without further

¹ We note that the four carpenters were issued visas in April 2015.

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information/documentation, the Petitioner has not demonstrated that its request is for a temporary need as defined by the regulations.

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 to perform carpentry labor. In the H-2B petition, the Petitioner indicated that it has seven employees. The Petitioner did not provide sufficient documentation to establish the employment of these seven individuals. The Petitioner has not supplemented the record with copies of common business documents such as (but not limited to) payroll, timekeeping records, or employment contracts to establish the workers' positions and their employment periods. Moreover, the Petitioner submitted 2014 tax returns, which indicate that the company did not have any expenses in the following categories: contract labor; employment benefit programs; legal and professional services; pension and profit-sharing plans; wages. Further, the owner reported that there were no costs of labor. Based upon the evidence provided, the Petitioner has not demonstrated, by a preponderance of the evidence, that it employs permanent employees (carpenters) 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 is contributing to an increase of construction. On appeal, the Petitioner cited to the Supplemental Environmental Impact Statement, Socioeconomic Impact Assessment Study for the [redacted] and [redacted] from Japan to [redacted] "which evidence an increased demand for housing as a result of the military build-up in 2016 of 235 housing units and 497 housing units in 2017." But the record does not establish that the Petitioner seeks to continue to supplement its staff to address this development. According to the Itinerary of Services and construction contract documents, the Petitioner seeks to employ the Beneficiaries in the construction of 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, or any authoritative source establishing a causal connection between the construction projects for which the Petitioner filed this extension petition and the military buildup.

Further, even assuming the military buildup caused a spike in the number of its construction projects, without more 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). Yet, the Petitioner has provided insufficient evidence to support a conclusion that the Petitioner’s need for carpenters is due to a “seasonal or short-term” demand.²

Further, the record does not establish a near and definite end to whatever impacts the military buildup may have upon the Petitioner’s staffing needs. 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, from January 2015 to January 2017 - 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 carpenters 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 approximately two continuous years of claimed need for these H-2B carpentry workers, without further evidence, the record does not establish that the Beneficiaries would not become a part of the Petitioner’s regular operations.

IV. ONE-TIME OCCURENCE

The Petitioner did not claim that its need for carpentry labor 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 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 has regularly employed carpenters in the past. Therefore, we do not find sufficient evidence for a one-time occurrence under the first prong.

² 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 need for the labor or services in question.

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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,” such as, for example, 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 approximately 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 provided sufficient evidence to establish 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 X-J-X-*, ID# 19988 (AAO Sept. 30, 2016)