



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

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

MATTER OF G-C- CORP.

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 plumbers 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 intermittent need for the Beneficiaries' services.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director's finding was erroneous, and that the evidence in the record of proceedings was sufficient to establish its claim.

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 21-employee construction company in [REDACTED]. The Petitioner claimed a temporary, intermittent need and requested an extension of H-2B visas for two plumbers.

The evidence submitted indicates that the need for the H-2B workers is to work on two construction contracts and the Petitioner submitted a project summary from the Department of Labor of [REDACTED] listing these projects. The first project, [REDACTED] has commencement date of March 1, 2015, and a completion date of August 31, 2016. The second project, [REDACTED] has a commence date July 1, 2015, and has a completion date of April 30, 2016. The Petitioner stated the need is temporary because the workers will work for a limited period indicated on the project summary.

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 intermittent need.

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 plumbers from November 2014 to November 2015, and (2) that the Petitioner filed the present petition to retain them from November 2015 to November 2016. Thus, the record indicates that its need for the Beneficiaries' plumbing services encompasses a continuous period of approximately two years.

The Petitioner asserts that it has established that its need will end in the near, definable future because its construction project will be completed by the end of the employment period sought in this extension petition. However, the Petitioner's need for plumbers is for a continuous period that

(b)(6)

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exceeds the regulation's year-or-less general limitation to qualify as "temporary" within the meaning of the H-2B program.

In addition, the construction subcontract for the [REDACTED] project indicates that the date of commencement will be stipulated by a notice to proceed (NPT), but also states that a "soft start" occurred as of the date the building permit was obtained, which was February 9, 2015. Although the record contains a copy of the building permit, the Petitioner did not submit an NTP evidencing that the project actually began. Similarly, although the subcontract for the [REDACTED] project indicates a commencement date of no later than July 15, 2015, the Petitioner has likewise submitted no evidence demonstrating that this project commenced as scheduled. Thus, the contracts do not establish that they will end in the near, definable future.

B. Intermittent Need

To establish an intermittent need, the record must satisfy both prongs of 8 C.F.R. § 214.2(h)(6)(ii)(B)(4): (1) that the Petitioner has not employed permanent or full-time workers to perform the services or labor; and (2) that the Petitioner needs temporary workers occasionally or intermittently to perform services or labor for short periods.

1. Employment of Permanent or Full-Time Workers for the Services or Labor

In the H-2B petition, the Petitioner indicated that it has 21 employees. In response to the Director's request for evidence (RFE), the Petitioner submitted wage reports listing its current employees and their positions from September 14, 2015 through December 20, 2015. The reports indicate that two employees held the position of plumber during this period and they were both in H-2B status.

However, the record does not contain evidence of the Petitioner's workforce prior to September 14, 2015; notably, the Petitioner stated in the H-2B petition that it has been in business since 1987. Providing a list of personnel for three months does not sufficiently establish that it has not employed permanent or full-time workers when it has been in business for nearly twenty years. Therefore, the Petitioner has not submitted sufficient evidence to establish that it has not employed permanent or full-time workers for plumbing services.

2. Need for Temporary Workers Occasionally or Intermittently to Perform Services or Labor for Short Periods

The Petitioner has not established a need for temporary workers occasionally or intermittently to perform services of a plumber for short periods.

The Petitioner asserts that it has a temporary need for plumbers in order to fulfill two contracts. On appeal, the Petitioner states that "[e]very contract that the petitioner got could be the last project for the company and the petitioner has no way to project the scope for any construction contract to come; therefore, it is true that every construction contract is temporary due to construction industry

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characteristics.” However, in the H-2B petition, the Petitioner described its business as “construction.” Further, the Petitioner’s wage reports which list its employees by job title indicates that it employs a small number of workers in various sectors, with an almost-equal breakdown in the number of carpenters, cement masons, laborers, plumbers, heavy equipment operators, etc. It appears that nature of its business is providing general construction services and therefore, the Petitioner will continually need to have someone perform plumbing services in order to keep its business operational when working on construction contracts. The Petitioner did not submit sufficient documentation to establish that the need for temporary workers is occasional or intermittent.

On appeal, the Petitioner asserted “I believe that [our] need is under extraordinary circumstances for a given period and is temporary until the Military Buildup is done as it requires a huge number of skilled construction workers for a limited period per each small project[.]” However, the Petitioner did not provide any corroborating documentation to establish this claim. Although we note the Petitioner’s submission of a newspaper article discussing the influx of 2,500 [REDACTED] into a proposed [REDACTED] base in [REDACTED] by 2021, this article does not demonstrate that the Petitioner’s construction projects are a result of this potential movement. There is no evidence that its construction projects relate to the military buildup or an upswing in tourism. “[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

IV. ONE-TIME OCCURENCE

The Petitioner did not claim that its need for plumbing services 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 that the Petitioner: (1) 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) 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).

As discussed, there is insufficient evidence in the record to establish that the Petitioner has not employed workers to perform plumbing services in the past. To support its claimed intermittent need, the Petitioner submitted payroll records for the Beneficiaries from September 2015 to December 2015; however, the record does not reflect the Petitioner’s workforce prior to September 2015 when the Petitioner has been in business since 1987. 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 need for plumbing services, which exceeds two years, may possibly be acceptable

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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 intermittent need 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 G-C- Corp.*, ID# 27005 (AAO Sept. 30, 2016)