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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 097 51772 Office: CALIFORNIA SERVICE CENTER Date: JAN 05 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner desires to employ the beneficiary as a primary caregiver for five years. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL), or notice stating that such certification could not be made and denied the petition.

On appeal, the petitioner states that she sent three copies of Form ETA 750, Application for Alien Employment Certification. The petitioner also states that she completed the five-page Labor Condition Application.

The regulations stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on February 19, 2003 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

The petitioner submits on appeal a copy of Form ETA 9035E that had been certified by the DOL. However, this form is a Labor Condition Application used for H-1B nonimmigrant classification. The petitioner is applying for H-2B classification and the petition must be accompanied by the certified Form ETA 750 or notice detailing why the certification could not be made.

This petition cannot be approved for an additional reason. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the dates of the intended employment are from April 15, 2003 to April 15, 2008. The petition does not indicate whether the employment is seasonal, peakload, intermittent or a one-time occurrence. Consequently, the petitioner has not shown that the need for the beneficiary's services is seasonal, peakload, intermittent, or a one-time occurrence and temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.