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U.S. Citizenship  
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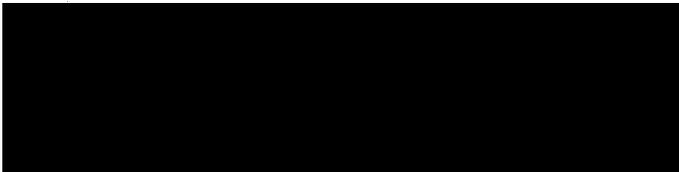
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FILE: EAC 04 221 51299 Office: VERMONT SERVICE CENTER Date: MAR 02 2005

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:



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.

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner desires to employ the beneficiary as a live-in child monitor for one year. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that the need for the beneficiary's services is temporary and denied the petition.

Counsel states that the appeal is being submitted with a supporting letter from the petitioner explaining the circumstances creating the temporary need for a live-in child monitor and establishing that the need for the duties to be performed by the beneficiary is temporary.

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:

an 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 test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

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 does not indicate whether the employment is seasonal, peakload, intermittent or a one-time occurrence.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

To establish that the nature of the need is "intermittent," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

To establish that the nature of the need is "seasonal," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Takes care of three (3) children ages 4 years old and 1½ years old twins; do some reading, taking to and from school, preparing meals for children. Perform light housekeeping duties, cleaning, vacuuming, light cooking, and takes care of dogs.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event.

In this case, the petitioner has not sufficiently established that her childcare needs are consistent with the test set forth in *Artee*. The petitioner's need is not limited to the care of her children and does not have a credible, definite ending date. The petitioner contends that the position and the need are temporary, but in her letter dated November 19, 2004 she states, in pertinent part, "Until the children are at school for most of the day, which will occur in September 2005, they need care while we are at work. . . ." The petitioner has not provided a letter of acceptance from a preschool indicating an enrollment date for her children and the hours her children would attend the preschool. Further, the job description states that the beneficiary will be taking the children to and from school. Consequently, it is not unreasonable to conclude that the petitioner's childcare needs, for the duties she listed, would not end in the near, definable future. See *Blumenfeld v. Attorney General*, 762 F.Supp. 24 (D. Conn. 1991). The petitioner has not established that her need for the beneficiary's services is a seasonal need, peakload need, intermittent need, or a one-time occurrence and temporary.

The petition cannot be approved for another reason. The record does not contain evidence that the beneficiary has one year of experience in the job offered as stipulated on Form ETA 750. 8 C.F.R. § 214.2(h)(6)(vi)(C).

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.