



U.S. Citizenship
and Immigration
Services



FILE: EAC 02 291 53785 Office: VERMONT SERVICE CENTER Date: **OCT 27 2004**

IN RE: Petitioner:
Beneficiary:

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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. In a subsequent motion to reopen and reconsider, the director affirmed his decision. 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 child monitor for one year. The director determined that the petitioner had not established that the need for the beneficiary's services is temporary. The director also 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, counsel states that the requirement of a labor certification has been determined to be advisory only, and that the duty of determining the temporary nature of the position lies with Citizenship and Immigration Services (CIS).

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 September 20, 2002 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.

On appeal, counsel states that pursuant to *Matter of Golden Dragon Chinese Restaurant*, 19 I&N Dec. 238 (Comm. 1984), the requirement of a labor certification has been determined to be advisory only. However, this consideration does not preclude the petitioner from obtaining and submitting a labor certification or notice stating the reasons why such certification cannot be made with the petition. Further, the regulations stipulate that a temporary labor certification determination is to be overridden only upon presentation by a petitioner of countervailing evidence that serves to demonstrate the error or inapplicability of such determination. 8 C.F.R. 214.2(h)(6)(iv)(D).

The director also determined in his decision that the offered position is not temporary. However, it is the petitioner's need for the services that is controlling. Therefore, it must be shown that the petitioner's need for the beneficiary's services 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 indicates that the employment is 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).

In this case, the petitioner has not sufficiently established that her childcare needs are consistent with the test set forth in *Artee*. The petitioner contends that the position and the need are temporary, but in her letter dated September 17, 2002 she states, in pertinent part, "In 2-3 years, therefore, the need for a live-in [c]hild [m]onitor to travel with us and/or monitor the child in the home for long hours will be minimized. . . ." The petitioner's need does not have a credible, definite ending date. Therefore, it is not unreasonable to conclude that the petitioner's childcare needs, would not end in the near, definable future. The petitioner has not established that her need for the beneficiary's services is 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.