

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: EAC 05 116 51669 Office: VERMONT SERVICE CENTER Date: MAY 09 2006

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, Chief
Administrative Appeals Office

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

The petitioners are private citizens that seek to extend their authorization to employ the beneficiary as a live-in child monitor pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for one year. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiary's services. The director agreed with the DOL and determined that the petitioner had not established that the need for the beneficiary's services is temporary.

On appeal, counsel states that the nature of the care in the present matter is infant/toddler care, and therefore, there can be no doubt that the nature of the need is temporary.

As discussed below, the AAO agrees with the finding of the DOL that the petitioner has not established a temporary need for the beneficiary's services. Upon careful review of the entire record of proceeding, the AAO finds that the director's decision to deny the petition was correct. The AAO will dismiss this appeal.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (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 regulation at 8 C.F.R. § 214.2(h) provides, in part:

(6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B):*

(i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

(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.* 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 shall be a one-time occurrence, a seasonal need, a peakload 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.

(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 temporary workers to perform services or labor for short periods. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states 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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner seeks approval of the proffered position as an intermittent need.

To establish that the nature of the need is "intermittent," 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 temporary workers to perform services or labor for short periods. 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

TEMPORARY – Provide care for 20 month old child including clothing, bathing and changing diapers, preparing, serving and feeding meals and snacks. Organize recreational activities with playmates, willing to participate in plays and supervise play periods and read books. Wash child's linens, clothes and fold them and keep child's room tidy and clean.

In its final determination notice, the DOL states that the employer had not established a temporary need for the beneficiary's services. The DOL also states that the employer's need for an employee to perform the job duties listed on its application are permanent and ongoing. The DOL concludes that the employer's need for child care is likely to continue indefinitely into the future and denied the temporary labor certification. A petition containing countervailing evidence may be filed with the United States Citizenship and Immigration Services (CIS) and CIS will consider all such evidence in adjudicating the petition. Such a petition has been filed and thereafter denied by the director. It is this petition that is before the AAO on appeal.

The instant petition was filed on March 17, 2005 to continue the previously approved employment of the beneficiary until March 22, 2006. Counsel for the petitioner submitted with the petition a copy of the Form I-797A, Notice of Action, indicating a previous petition [EAC-04-110-50222]¹ was filed on behalf of the beneficiary by the petitioner on March 5, 2004. The petition was approved on December 7, 2004 for the beneficiary to perform services for the petitioner under H-2B classification from December 6, 2004 until March 22, 2005.

The petitioner explains in his letter dated February 4, 2005, submitted with the instant petition, that the petitioners wish to continue the temporary employment of the beneficiary as a live-in child monitor for approximately one year. Counsel states in his appeal brief that the petitioners are seeking the temporary services of the beneficiary for approximately one year because of their work and their son's youth. The letter from La Petite Academy, dated February 4, 2005, submitted as part of the response to the request for evidence (RFE), states that [REDACTED] (the beneficiary's child) has been enrolled in La Petite Academy, and is scheduled to start in April 06."

The petitioner was previously granted H-2B classification in its previous petition [EAC-04-110-50222] as a one-time occurrence. The petitioner, in his letter dated February 4, 2005, states that the temporary need of a live-in child monitor is "intermittent".

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).

¹ This petition was approved by the Director, Vermont Service Center, on August 17, 2004 and certified to the AAO for review. Upon review, the AAO affirmed the director's decision in November 2004 and determined that the petitioner's need for the beneficiary's services for one year was a "one-time occurrence" and temporary.

The record of proceeding clearly indicates that the petitioner employs the beneficiary as a full-time worker² to perform the services or labor in the proffered position. The countervailing evidence submitted by the petitioner with the Form I-129, in response to the RFE, and on appeal has not overcome the certifying officer's determination that the employer's need is permanent and ongoing. The petitioner has not established through the evidence presented that it occasionally or intermittently needs the beneficiary's services or labor for short periods. The petitioner states that it needs the beneficiary's continued services for one year. Absent evidence of the petitioner's "intermittent" situation, to justify its need for the beneficiary's services, this petition cannot be approved.

Counsel states that this case is similar to the facts in *Wilson v. Smith*, 587 F. Supp. 470 (D.C.D.C., 1984), as the petitioner indicates that his child will no longer need live-in care at an older age. However, in *Wilson v. Smith*, the plaintiffs were not requesting an extension of the beneficiary's services. The plaintiff, the plaintiff's sister and the beneficiary, who did similar work for the plaintiff's sister in El Salvador, agreed that the beneficiary could come to the United States to help the plaintiffs for one year and return to the sister's employ. In the instant case, the petitioners seek to prolong the period of need in which the beneficiary's services are required. Accordingly, the petitioner has not credibly established that their need will end in the definable future. Moreover, the period of the requested employment³ for which the petitioner requested the beneficiary's services has passed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden. Thus, the AAO will not disturb the decision of the director.

ORDER: The appeal is dismissed. The petition is denied.

²The beneficiary has been working for the petitioner under the H-2B classification from December 6, 2004 until March 22, 2005.

³ The petitioner requested the beneficiary's services from March 23, 2005 until March 22, 2006.