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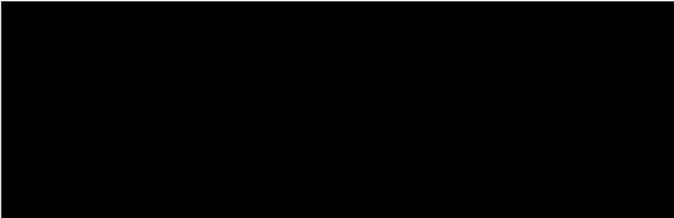
U.S. Department of Homeland Security
20 Mass Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 07 095 53572 Office: VERMONT SERVICE CENTER

Date: FEB 12 2008

IN RE: Petitioner:
Beneficiaries:



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 of the service center, and it is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn; the petition will be denied because it is now moot due to the passage of time.

The petitioner is a marble and granite shop. In order to continue to employ the beneficiary as operator of a computer-aided design (CAD) marble-cutting machine, the petitioner filed the present petition to continue the beneficiary's H-2B classification and extend his stay as a temporary nonagricultural worker in accordance with 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), and its implementing regulations at 8 C.F.R. § 214.2(h)(6).

The AAO notes that the period of employment covered by the petition - September 29, 2006 to September 27, 2007 - has expired. Therefore, the petition is moot due to the passage of time.

The record indicates that, at the time the petition was filed, the beneficiary had been employed by the petitioner since January 7, 2006, pursuant to a previous petition approved, under the criterion of one-time occurrence, for the period October 1, 2005 to September 29, 2006. September 29, 2006 to September 27, 2007 is the employment period specified in the present petition.

The Department of Labor (DOL) decided against issuing a temporary labor certification. According to its Final Determination letter, dated October 20, 2006, DOL found that the information presented in support of the application for labor certification indicated a permanent need for the job in question. DOL noted that justification for the labor certification issued in the previous year included the employer's need for the beneficiary to train workers to operate a CAD marble-cutting machine. In this regard, DOL stated that the beneficiary had only trained one employee; that this sole trained employee later left the petitioner; that persons that had been identified for training left the petitioner's employ before they could be trained; and that the petitioner had acquired an additional CAD marble-cutting machine since the filing of the prior application for labor certification. DOL stated that there is "no guarantee" that the petitioner's U.S. workers would stay with the petitioner after training, and it concluded that "the employment of an individual with the capability of operating employer's specialized machinery warrants permanent employment."

In addition to expressly adopting the DOL findings, the director found the history of the training efforts as inconsistent with an H-2B temporary position:

[F]urther, the Service finds issue with the apparent fact that the petitioner cannot retain permanent workers to be trained on the specific machine, or that none of its 20 workers can be trained on the machine, and that it acquired a second machine when it apparently did not have an employee, other than the beneficiary alien, to operate the first machine.

On appeal, the petitioner successfully addresses the critical finding of DOL and the director to the effect that the beneficiary's training function cannot be successfully completed within the limited time afforded by the H-2B program. The petitioner submits the names, social security numbers, and dates of hire of two employees who have been trained and continue working with the petitioner and of two employees presently being trained.

On the basis of the entire record in this proceeding, the AAO finds that the petitioner has overcome the grounds of the director's denial. Further, this particular record of proceedings supports approval of the present petition as satisfying a continuing H-2B one-time-occurrence need, in accordance with the regulation 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), which states:

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.

In this regard, the AAO finds that the petitioner has established extraordinary circumstances that establish its H-2B need as extending longer than the period of the previously approved petition, in accordance with 8 C.F.R. § 214.2(h)(6)(B), which recognizes that "there may be extraordinary circumstances where the temporary services or labor might last longer than one year."

For the reasons discussed above, the director's decision will be withdrawn. However, the petition cannot be approved, because it is moot due to the passage of time.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The petition is denied because the petition is moot due to the passage of time.