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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: LIN 00 204 50258 Office: Nebraska Service Center

Date: JUL 30 2001

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

IN BEHALF OF PETITIONER: Self-represented

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

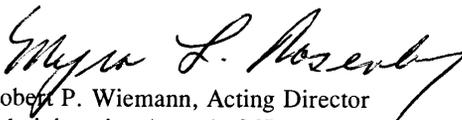
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiary for one year as a housekeeper and caregiver to her two children, one of whom is autistic. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that the need for the services to be performed is temporary. The director also determined that the petitioner had not established that the position must be live-in and there are no alternatives to a live-in child monitor, such as centers that specialize in caring for special needs children.

On appeal, the petitioner provided evidence to show that the position should be live-in and that there are no centers for special needs children available in the community in which she lives. Therefore, this issue will not be further addressed in this proceeding. The remaining issue is whether the need for the services to be performed is temporary.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), 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, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that 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. See 55 Fed. Reg. 2616 (1990).

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 and the temporary need is unpredictable. The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750A) reads "caregiver: drive two children of school age to and from school, to after school activities, play games with children, supervise homework completion. Housekeeper: do grocery shopping, cook one dinner meal for the family, clean inside house, do laundry, vacuum and shampoo carpet, wash dishes, clean bathrooms and basement regularly. One child is autistic impaired with no verbal communication ability, the caregiver must agree to live-in and work for one year. Working hours are flexible, seven hours a day from Monday to Friday and 5 hours during the weekend. Free meals."

The petitioner states that the temporary nature of the employment is for the term required to complete her CPA. However, there is no way to predict how long it will take the petitioner to complete her training, and obtain her CPA certification. Further, the position offered is that of a caregiver and housekeeper and the petitioner has not established that she will not need the beneficiary to perform these services in the future. The petitioner even states that she will spend most of her time on her children's education, as long as her husband has a job and earns an adequate income to support the family. If not, the petitioner states that as a married person, she shares the equal responsibility with her husband to support her family. Consequently, the petitioner has not established that the need for the services of a caregiver and housekeeper is temporary in nature.

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.

ORDER: The appeal is dismissed.