

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

FILE: EAC 02 175 50956

OFFICE: VERMONT SERVICE CENTER

DATE: DEC 04 2003

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:

SELF-REPRESENTED

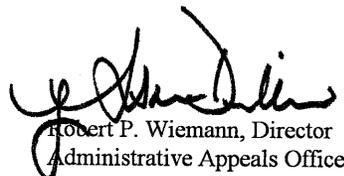
INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a soccer coaching and services provider that desires to employ the beneficiary as a soccer development officer from June 1, 2002 to June 1, 2003. The director determined that the beneficiary was not qualified to perform the position.

On appeal, the petitioner asserts that it was misinformed with regard to the completion of part 14 on the Department of Labor Form ETA 750, and that its job only requires a high school education for the position. It submits additional documentation of the beneficiary's work experience.

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

With regard to the qualifications of the beneficiary, 8 C.F.R. § 214.2(h)(6)(vi) states, in part that an H-2B petition shall be accompanied by: (1) a temporary labor certification or a notice that certification cannot be made, issued by the Secretary of Labor; (2) evidence to rebut the Secretary of Labor's notice that certification cannot be made, if appropriate; (3) documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary; and (4) a statement describing in detail the temporary situation or conditions which make it necessary to bring the alien to the United States.

The issue in this proceeding is whether the beneficiary qualifies for the job offer as specified in the application for labor certification, the Department of Labor (DOL) Form ETA 750. In the original petition, the petitioner filled in both the education and experience sections on the DOL document. The petitioner indicated that the minimum education and experience for a worker to perform the position of soccer development director was four years of college with a bachelor of science in physical education as well as four years of experience in the job offered.

On September 2002, the director requested further evidence with regard to the beneficiary's educational background. In particular, the director requested documentation of both the beneficiary's work experience, and formal education. The director also noted that the record did not contain the attachments mentioned in the ETA Form 750.

In response, the petitioner stated that, when it was assisted by the Department of Labor in filling out the Form ETA 750, it was instructed to complete both parts of Section 14. The petitioner submitted the newspaper advertisement for the job in which only a high school degree was required, along with a document that listed its qualifications for the job. This latter document states that the academic requirement for the job is a high school degree. In addition, the petitioner submitted copies of the beneficiary's certificates in soccer education courses, and his studies in management, and also placed in the record references from former employers.

On February 21, 2003, the director denied the petition. The director stated that the petitioner had not established that the beneficiary had either the required bachelor's degree, or that he possessed the required four years of work experience. With regard to the work experience, the director stated that the letters verifying the beneficiary's employment did not state specific dates of employment for each employer.

On appeal, the petitioner submits a letter that reiterates the reason for the original inclusion of the educational requirement of a bachelor's degree in physical education on the original labor certification, and states that it is submitting a new labor certification to the Department of Labor. It also submits three letters from former employers that outline the beneficiary's dates of employment for periods of times from 1988 to 2001.

Upon review of the initial ETA Form 750 submitted by the petitioner, this document clearly states that the minimum educational requirement for the position is a college degree in the field of physical education. Based on the documentation submitted by the petitioner, the beneficiary does not meet the qualifications listed on the DOL form. Based on the regulatory criteria outlined in 8 C.F.R. § 214.2(h)(6)(vi), the petitioner has not established that the beneficiary qualifies for the job offer specified in the DOL document. In addition, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248,249 (Reg.Comm.1978) While the job advertisements that only list a requirement of a high school education are dated December 2001 prior to the filing of the instant petition, this fact is insufficient to resolve the educational requirement discrepancy between the original ETA Form 750 and the actual position.

Beyond the decision of the director, the petitioner also has not established that the nature of the beneficiary's position is temporary. 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 peak-load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

On the original I-129 petition, the petitioner indicated that it wanted to employ the beneficiary from June 1, 2002 to June 1, 2003; however, it provided no information in Section 2 of the I-129 petition as to the nature of the employment and how the employment met any of the four criteria outlined in 8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioner only noted that the temporary need was recurrent annually. If the petitioner wants to employ the beneficiary for an entire year and then request a repeat of the annual employment, the nature of the position appears to be permanent, rather than temporary. Without more persuasive evidence, the petitioner has not established that the need for the beneficiary's services is temporary. Since the petition is denied on other grounds, this issue will not be discussed further.

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 not met that burden.

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