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Citizenship and Immigration Services

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

FILE: EAC 02 263 53407

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:

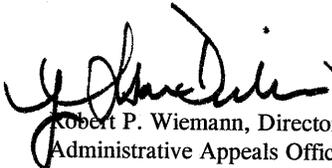
INSTRUCTIONS:

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 non-immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn. The appeal will be sustained. The petition will be approved.

The petitioner is a private citizen who desires to employ the beneficiary as a child monitor/live-in from August 15, 2002 to August 14, 2003. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made because the employer had not established a temporary need. The director determined that the duties of the position were normally associated with the operation of a household, and the need for such duties was not temporary.

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 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).

On the Form I-129 petition, the petitioner states that the need is intermittent and unpredictable. To establish an 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 issue in this proceeding is whether the need for childcare for the petitioner's children is temporary.

The non-technical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads: "Care of one 2 month old baby and one 4 year old child, including bathing, clothing, preparing their meals and feeding them and [doing] recreational activities. Prepare the child's lunch box and take her to and from school." In the original I-129 petition submitted to the director on August 15, 2002, the petitioner stated that the need for the position was intermittent. The petitioner's letter of support stated the following:

We are in dire need for the services of a [c]hild [c]are [g]iver/[l]ive-in to care for our two children. Someone must be present early in the morning, when our children wake up to take care of them, clean them, dress them, prepare their breakfast, feed them, play with them and prepare [a] lunch box for our daughter, Penelope, and take her to and from school."

The petitioner stated the ages of the children as four years old and two months.

On November 1, 2002, the director requested that the petitioner submit a temporary labor certification from the Department of Labor (Form ETA-750) and more evidence to establish that the need for the beneficiary's services was temporary. On January 8, 2003, counsel submitted a copy of the Department of Labor's denial of the petitioner's Form ETA-750. In this denial, the DOL found the duties of the petitioner's position to be normally associated with the operation of a household, and determined that the need for such duties was not temporary.

In an additional letter for the record, the petitioner stated that when its infant son was older, he would be prepared to start full-time pre-school and the services of the beneficiary would no longer be required. The petitioner stated that it sought in-home care until the time that the infant could walk, talk and go to pre-school. The petitioner stated that the time period for the beneficiary's service would be approximately one year. The petitioner also submitted a letter from the Nest Academy, a program in Lorton, Virginia, that stated the petitioner's son could be enrolled in the school at any time after he was one year of age. Finally counsel submitted a copy of *Wilson vs. French*, 587 F. Supp 470, 472 (D.D.C. 1984), which examined another H-2b visa petition involving child care.

On April 7, 2003, the director denied the petition. The director stated that the duties outlined by the petitioner are duties that are normally associated with the operation of a household, and that childcare duties were performed on an on-going basis, and would continue as long as there are children in the household.

On appeal, counsel submits information taken off the Internet with regard to age requirements for admission to five pre-school programs in the Washington, D.C. area. Counsel asserts that once the petitioner's infant son is old enough to attend a pre-school chosen by the petitioner, the need for in-home child-care would cease.

Upon review of the record, while the petitioner indicates on the original I-129 petition, that it sought the services of the beneficiary on an intermittent basis, the record is not clear as to why the petitioner indicated this basis. The documentation submitted along with the petition indicates that the petitioner seeks the services of the beneficiary on a one-time occurrence basis. This one-time occurrence, as stated by the petitioner, is from the present time until the petitioner's infant son is capable of attending pre-school. Therefore, for purposes of this proceeding, the petitioner's need for the beneficiary's services is a one-time occurrence.

To establish that the nature of the petitioner's need is a one-time occurrence, the petitioner must demonstrate that she will not need workers to perform the services or labor in the future. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The petitioner has stated that the services of the beneficiary will not be needed after the youngest child enters pre-school. The documentation submitted on appeal with regard to age requirements for pre-school programs appears to indicate that specific pre-school programs are available to children as early as 18 months of age or two years of age. The documentation is not clear as to whether the age requirements refer to full-day, five-day pre-school attendance, or a more limited attendance.

In this case, the petitioner has sufficiently established that its childcare needs are consistent with the test set forth in *Matter of Artee, supra*. The petitioner has stated that it requires the services of a child monitor until its youngest child is ready for pre-school. In addition, the petitioner has provided enough persuasive testimony that its need for child-care would end in the near, definable future. See *Blumenfeld v. Attorney General*, 762 F. Supp. 24 (D. Conn. 1991). Furthermore, the job description for the beneficiary is focused primarily on the care of one at-home infant. The childcare duties associated with the older child, a preschooler, who attends a full day program, appear to be secondary. There are no housekeeping duties listed in the job description. This fact distinguishes this petition from the childcare H-2B petition denied in *Blumenfeld*. The petitioner's need appears to be limited to the care of her children and has a credible, definite ending date. Therefore, it is reasonable to conclude that the petitioner's childcare needs, for the duties she listed, will end in the near, definable future. The petitioner has overcome the objections of the DOL.

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. The director's decision is withdrawn. The appeal is sustained. The petition is approved.

ORDER: The director's decision is withdrawn. The appeal is sustained. The petition is approved.