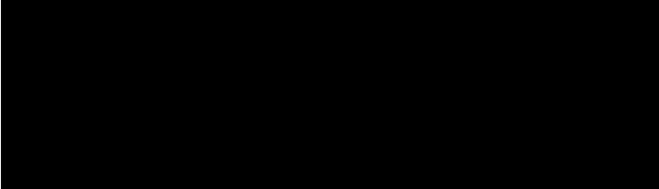


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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



FILE: SRC 02 270 53001 OFFICE: TEXAS SERVICE CENTER

DATE: DEC 05 2003

IN RE: Petition
Benefic



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

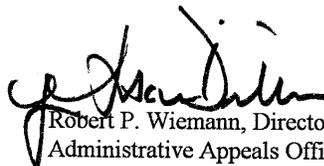
INSTRUCTIONS:

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

The petitioner is a dental laboratory that desires to employ the beneficiary as a dental technician from November 1, 2002 to October 20, 2003. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made because the employer had already received an H-2B classification for the beneficiary and the new petition reflected a continuous need for the beneficiary's services. The director determined that the petitioner had not established that its need for the beneficiary's services was a one-time occurrence.

On appeal, the petitioner states that due to delays in Department of Labor (DOL) and Citizenship and Immigration Services (CIS) processing of the petition, the beneficiary's H-2B visa expired after only six months in the United States. The petitioner also stated that the beneficiary was hired to train its Spanish-speaking technicians due to the extreme shortage of dental technicians in the petitioner's locality. The petitioner also notes that it was advised by CIS employees to pursue an H-2B visa petition, based on the beneficiary's lack of requisite education for an H-1B visa petition.

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).

The petitioner indicates on the Form I-129 that the employment is a

one-time occurrence and unpredictable. 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 non-technical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads: "Works in the fabrication of dental prosthetics with specialty in applying and containing porcelain ceramics to metal copings." The attached job description states, in part, the following: "Seeking dental technician with experience in dental ceramics for temporary position from November 2002 thr[ough] November 2003. One year of post high school dental lab education required. [Six] months on the job training and [one] year of dental lab experience in ceramics or [two] years in a related occupation required." An additional job description submitted with the petition provides a description of the more technical aspects of the beneficiary's duties and indicates that the beneficiary will assist in the training of technical assistants and new technologists.

In its cover letter that accompanied the petition, the petitioner stated that it was asking for the extension of the one-time occurrence because the beneficiary had only worked with it for three months, due to delays in the processing of the first H-2B visa petition by three U.S. government agencies. The petitioner also stated that it continues to have a shortage of skilled laboratory technicians and that it had an immediate need for a trained technician to handle the existing workload while it was seeking skilled technicians to assume a permanent position.

In this case, the petitioner has not sufficiently established that its dental technician needs are consistent with the test set forth in *Matter of Artee, supra*. The ETA Form 750 contains no mention of any training component to the beneficiary's services which could be seen as a temporary need. The petitioner's explanation of its needs appears to support an on-going need for trained technicians and suggests that the beneficiary will be doing more production work than training. The petitioner has demonstrated that it will need the services of other dental technicians in the future. The petitioner has not overcome the decision of the director.

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.