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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



FILE: SRC 03 126 50658 OFFICE: TEXAS SERVICE CENTER DATE:

DEC 12 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:



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prevent identity unwarranted
invasion of personal privacy

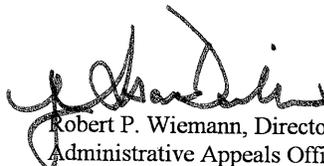
INSTRUCTIONS:

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 and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be overturned. The petition will be approved.

The petitioner is a private citizen who desires to employ the beneficiary as a child monitor from December 1, 2002 to November 30, 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 and the employer had not advertised the position for three consecutive days in a newspaper of general circulation. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the Department of Labor (DOL) with regard to the job advertisements. However, the director determined that the employer's need for the beneficiary's services was not temporary.

On notice of certification, neither counsel nor the petitioner presents any additional evidence.

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. 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 nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Assume complete responsibility for the care and supervision of one infant and one toddler dur[i]ng the day while parents are at work. Daily duties include: supervision and participating in children's activities, dress, bathe, change diapers, oversee play, and prepare children's meals according to dietary rules of our religion. This person will take care of children's clothes and rooms and provide [a] healthy, happy, safe environment. Person must be willing to refrain from eating pork, smoking, drinking or keeping alcoholic beverages in our home since such items are forbidden to be in our home by our religion. Must be able to care for children should law practice require that parents work after hours.

In the cover letter for the I-129 petition, dated March 9, 2003, counsel stated that the need for the beneficiary's services was a peak-load situation and the petitioner needed live-in help temporarily with the children until they reach three years of age and/or the petitioner's responsibilities have been reduced allowing her additional time to devote to the children. Counsel also stated that the need was also a one-time occurrence as envisioned in the H-2B regulations. Counsel stated that the infancy of the petitioner's two children is temporary and it would pass by the time they reached the age to enter pre-school. In further support of the nature of the need for the beneficiary's services being temporary, counsel stated that the petitioner had accepted a position as Associate Judge in the Juvenile Court of Newton County, as of October 1, 2002. Counsel further stated that the petitioner had begun to reduce her law practice and the petitioner anticipated that by November 30, 2003, her private legal practice load would be reduced and the demands of the bench sufficiently stabilized so that she could accommodate the needs of her profession and the needs of her family without live-in child care.

The petitioner stated that by November 30, 2003, her daughter would be old enough to participate in a daycare program and her son would be enrolled in a three year old pre-school. The petitioner submitted applications forms for the proposed daycare attendance.

Upon review of the record, the I-129 petition clearly states that the need for the position is a one-time occurrence. For purposes of this proceeding, the need for the beneficiary's services are on a one-time occurrence. 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's need is limited to the care of her infant and toddler prior to their

attendance at daycare or pre-school. Furthermore the petitioner's need can be distinguished from the nature of the need for childcare described in *Blumenfeld v. Attorney General*, 762 F.Supp. 24(D. Conn. 1991). The petitioner listed no housekeeping chores, nor care of any additional adolescent children in its job description or in any supporting documentation. In addition, the proposed time period for initial childcare for the petitioner's two children and the petitioner's changed work schedule appear to support an end to the fulltime childcare needs in the near, definable future. Therefore, it is reasonable to conclude that the petitioner's childcare needs, for the duties she listed, would end in the near, definable future. The petitioner has overcome the objections 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 met that burden.

ORDER: The director's undated decision is overturned. The petition is approved.