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U.S. Department of Homeland Security

Citizenship and Immigration Services

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DH

ADMINISTRATIVE APPEALS OFFICE  
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Washington, DC 20536

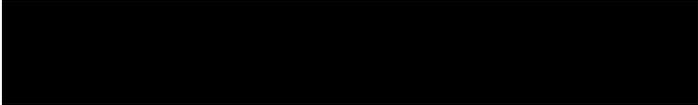


FILE: SRC 02 272 52522

Office: Texas Service Center

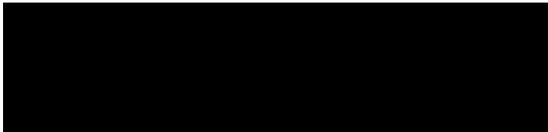
Date: NOV 26 2003

IN RE: Petitioner:  
Beneficiaries:



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 nonimmigrant visa petition was found not to be readily approvable by the Director, Texas Service Center. Therefore, the director properly served the petitioner with notice of her intent to deny the visa petition and her reasons therefore, and the director ultimately denied the petition. The director advised the petitioner that the decision could not be appealed, but that a motion to reopen or reconsider may be filed. 8 C.F.R. § 103.2(b)(15). A motion to reconsider was subsequently filed. The director granted the motion and certified her decision to deny the nonimmigrant visa petition to the Administration Appeals Office (AAO) for review. The decision of the director will be affirmed and the petition will be denied.

The petitioner is engaged in the business of providing skilled health care services for aging, physically challenged, sick, or terminally ill individuals. It seeks to employ the beneficiaries as certified nursing assistants for one year. 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 petitioner had not submitted sufficient countervailing evidence to overcome the objections of the Department of Labor (DOL).

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

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), 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 petitioner states in its letter dated March 4, 2002, that its need is a one-time occurrence, and the assignment will last for one year.

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, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

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

Care of patients in hospital, nursing home and private home settings under the direction of nursing and medical staff. Bathes, dresses and undress patients. Answers call bells and lights. Feed patients requiring help. Transports patients using wheel chairs or assist in walking. Change bed linens and clean patient rooms.

The petitioner's need for certified nursing assistants for one year cannot be considered a temporary event of short duration, as there is no indication when the petitioner operates with only its permanent employees. Further, the petitioner's need to have certified nursing assistants available for placement in healthcare facilities, nursing homes, and in the homes of families with healthcare needs, which is the nature of the petitioner's business, will always exist. The duties listed in the job description are ongoing and cannot be classified as duties that will not need to be performed in the future. The petitioner has not demonstrated that the nature of its need for certified nursing assistants is a one-time occurrence and temporary.

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 decision of the director is affirmed. The petition is denied.