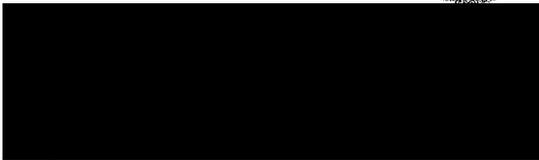




U.S. Citizenship
and Immigration
Services

DH



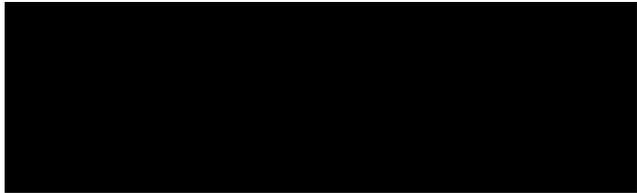
FILE: LIN 04 061 51178 Office: NEBRASKA SERVICE CENTER

Date: AUG 19 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 of the Administrative Appeals Office 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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The nonimmigrant visa petition was approved by the Acting Director, Nebraska Service Center, who certified his decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn, and the matter remanded for further action and consideration.

The petitioner is a private citizen who desires to employ the beneficiary as a live-in care giver and general house worker for one year. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the objections of the Department of Labor (DOL) and approved the petition.

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 shall 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 petition indicates that the employment is a one-time occurrence, and that the temporary need is unpredictable.

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate that it has not employed workers to perform the services or labor in the past and 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(I).

The petition was properly filed on November 12, 2002. The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

The above alien worker shall work as a live in care giver and her major responsibilities are as follows: Organize, manage and maintain the general day to day welfare of the household. Keep track of inventory in the pantry, replenish stock according to family requirements. Will be responsible for cleaning, laundry, ironing, setting table for every meal, changing linens, vacuuming, taking care of 2 children, cooking for family/guests and other household chores.

The DOL stated in its decision that the beneficiary's duties are considered to be a combination of duties of two occupations, one of housekeeping and one of child monitoring. The DOL regards this and the fact that the employer is requiring the beneficiary to live-in as unduly restrictive inasmuch as the requirements are not normal to the occupation of house worker, general.

In its decision, the director states that the combination of duties is not unduly restrictive since according to the *Occupational Outlook Handbook*, 2000-2001 Edition, the classification of private household workers allows for cleaning of homes and caring for children. Therefore, the director found that the position was not unduly restrictive, and approved the petition. However, this petition cannot be approved for another reason.

In this case, the petition indicates that the proposed employment is for a general house worker. Form ETA 750 lists the offered position differently, as a live-in care giver. The petitioner's description of the job duties on Form ETA 750 are related to the occupation of house worker, and was classified as such by the DOL. The job description on Form ETA 750 shows that the majority of the duties to be performed by the beneficiary are housekeeping duties, and housekeeping duties are ongoing and cannot be classified as duties that will not need to be performed in the future. The petitioner also claimed that the beneficiary would perform childcare duties. Certain monitor positions may be temporary. *Blumenfeld v. Attorney General*, 762 F.Supp. 24 (D. Conn. 1991). However, to the extent that the beneficiary would be performing any childcare duties, the position does not appear to be temporary. The petitioner has not sufficiently established that its need is limited to the care of their children, for the duties they listed, and has a credible, definite ending date. Accordingly, the petitioner has not sufficiently established that its housekeeping and childcare needs are consistent with the test set forth in *Artee*. The petitioner has not established that the need for the beneficiary's services is a one-time occurrence and temporary.

Since this matter was not discussed in the director's decision, the case will be remanded so that the director can examine this issue further and provide the petitioner with the opportunity to submit an explanation and additional evidence. The director shall examine the record in its entirety and request any additional evidence that is pertinent to a determination regarding the issue discussed in this decision. The director shall then render a new decision based upon his findings, which, if adverse to the petitioner, shall be certified to the AAO for review.

ORDER: The decision of the director is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.