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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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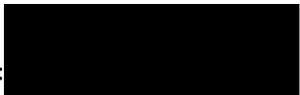


FILE: EAC 02 028 52912

Office: Vermont Service Center

Date: **JAN 09 2004**

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved, although the approval is now moot.

The petitioner is a private citizen who desires to employ the beneficiary as a live-in, child-care provider 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 established that the need for the services to be performed is temporary. In a subsequent motion to reconsider, the director affirmed his decision.

On appeal, counsel states that the petitioner's need for live-in help is temporary, based on her child's youth.

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 ETA-750 form indicates that the child's age is 11 months. The petitioner indicates in her affidavit that the employment is intended to last until the child's second birthday.

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

Provide in temporary in-home childcare for infant, including bathing, clothing, feeding, cooking, cleaning and recreational activities.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(E) states that a petition not accompanied by a temporary labor certification must be accompanied by countervailing evidence from the petitioner that addresses the reasons why the Secretary of Labor could not grant a labor certification.

In this case, the petitioner has submitted sufficient countervailing evidence to show that the position offered is temporary. The petitioner has sufficiently established that its childcare needs are consistent with the test set forth in *Artee*. The description of the position includes living in the employer's household for a 40 hour workweek, and caring for one child. The beneficiary will care for the petitioner's child for one year due to the parents' work schedules. After that date, the child will be enrolled in pre-school during the day, and no longer need child care. The petitioner's need is limited to the care of her child and does have a credible, definite ending date. Therefore, it is not unreasonable to conclude that the petitioner's childcare needs, for the duties she listed, would end in the near, definable future. See *Wilson v. Smith*, 587 F.Supp. 470 (D.C.D.C., 1984). Accordingly, the petitioner has overcome the objections of the director.

The regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) states that, if a petition is approved after the date the petitioner indicates that the service will begin, the approved petition and approval notice should show a validity period commencing with the date of approval and ending with the date requested by the petitioner.

The petition should have been approved for the requested time period. This decision will have no practical effect because the period of requested employment has passed.

ORDER: The appeal is sustained. The petition is approved, although the approval is now moot.