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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: EAC 03 088 51992 Office: VERMONT SERVICE CENTER Date: **MAR 30 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:

[Redacted]

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.


for Robert P. Wiemann, Director
Administrative Appeals Office

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The director, Vermont Service Center, denied the non-immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded for further action.

The petitioner is a private citizen who desires to employ the beneficiary as a child monitor/live-in from January 28, 2003 to January 27, 2004. 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 duties of the position were not temporary as the beneficiary had worked for the petitioner for more than two years and the petitioner was requesting a third year of employment.

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).

To establish that the nature of the petitioner's need is a one-time occurrence, the petitioner must demonstrate that he will not need workers to perform the services or labor in the future. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). To establish an intermittent need, the petitioner must establish that he has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods. 8 C.F.R. § 214.2 (h)(6) (ii)(B)(4).

The issue in this proceeding is whether the need for childcare for the petitioner's children is temporary.

The non-technical description of the job on the Application for Alien Employment Certification (Form ETA-750) reads: "care of two boys: 18 month old and 2 ½ year old. Bathe them, prepare their meals and snacks, feed them, do their laundry and organize recreational activities. Maintain children's quarters in hygienic conditions and perform general housekeeping duties when time allows." In the original I-129 petition submitted to the director on January 24, 2003, the petitioner stated that the need for the position was intermittent. The petitioner's letter of support explained the work schedules of both the petitioner and his wife and stated the following:

We are in dire need for the services of a Child Monitor/Live-in to care for our two children. Someone must be present in the morning, when our children wake up to take care of them, clean them, prepare their breakfast, feed them, play with them., etc. In addition a live-in child monitor

will be easier to call upon when both my wife and I need to travel or leave the house on business or social occasions. We also desire a live-in to be available in case of emergency situations such as if one child needs to be taken to the hospital, the live-in care provider will be available to assist with the other child.

On March 26, 2003, the director requested that the petitioner submit a temporary labor certification from the Department of Labor (Form ETA-750). On June 12, 2003, counsel submitted a copy of the Department of Labor's denial of the petitioner's Form ETA-750. In this denial, dated March 6, 2003, the DOL found that the duties of the petitioner's position are normally associated with the operation of a household, and that child care duties did not cease because the children attend school. The DOL determined that the need for such duties was not temporary.

In a statement signed June 3, 2003, and submitted with the DOL denial of the labor certification, the petitioner stated that when his 20 month old son was old enough and gained more independence, he would go to a full-time nursery school and the beneficiary's services would no longer be required. The petitioner described the nature of the need as temporary infant/toddler care. The petitioner also submitted a letter from the Ark Academy, a pre-school program in Sterling, Virginia, confirming enrollment for the petitioner's older child for the 2003-2004 school year. Finally counsel submitted a copy of *Wilson v. Smith*, 587 F. Supp 470, 472 (D.D.C. 1984), a Federal Circuit court case that examined another H-2B visa petition involving child care.

On August 29, 2003, the director denied the petition. The director stated that while it was true that the petitioner's children will eventually no longer require a caregiver, the beneficiary had worked with the petitioner for more than two years. According to the director, the record suggested that the petitioner would also like to continue the beneficiary's employment beyond a third year. On appeal, counsel asserts that the household described in the instant petition and the household described in *Wilson v. Smith* were identical with regard to the temporary nature of the need for toddlercare.

On the original I-129 petition, the petitioner noted that he sought the services of the beneficiary on an intermittent basis, but the record does not clearly reflect why the petitioner indicated such a basis. The documentation submitted along with the petition indicates that the petitioner seeks the services of the beneficiary on a one-time occurrence basis. This one-time occurrence, as stated by the petitioner, is until the petitioner's infant son is capable of attending pre-school. Therefore, for purposes of this proceeding, the petitioner's need for the beneficiary's services 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 he 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 petitioner has stated that the services of the beneficiary will not be needed after his youngest child enters full-time pre-school.

In this case, the petitioner has sufficiently established that his childcare needs are consistent with the test set forth in *Matter of Artee, supra*. The petitioner has provided persuasive testimony that his need for child-care would end in the near, definable future. See *Blumenfeld v. Attorney General*, 762 F. Supp. 24 (D. Conn. 1991). Furthermore, the job description for the beneficiary is focused primarily on the care of two toddlers. Although the petitioner mentioned housekeeping duties in the original job description, and such duties are ongoing, these duties are secondary to the care of the two toddlers. This fact distinguishes this petition from the childcare H-2B petition denied in *Blumenfeld*. The petitioner's need is essentially limited to the care of his children and has a credible, definite ending date. Therefore, it is reasonable to conclude that the petitioner's childcare needs, for the duties he

listed, will end in the near, definable future. The petitioner has overcome the objections of the DOL and of the director.

Beyond the decision of the director, two issues appear unresolved in the record. First, the petitioner does not appear to have met the regulatory requirement with regard to the submission of Form ETA-750. With regard to the filing of an H-2B visa petition, 8 C.F.R. § 214.2(h)(6)(iii) states:

- (A) Prior to filing a petition with the director to classify an alien as an H-2B worker, the petitioner shall apply for a temporary labor certification with the Secretary of Labor The labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers.

* * *

- (C) The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor . . . within the time limits prescribed or accepted . . . and has obtained a labor certification determination as required by 8 C.F.R. § 214.2(h)(6)(iv) or (v).

The petitioner did not obtain a labor certification determination prior to filing the H-2B petition. The petitioner filed the Form I-129 petition on January 24, 2003, while the DOL response with regard to the labor certification was dated March 6, 2003. Although the director requested this form in his request for further evidence, he made no further comment on its untimely submission to the record. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Second, pursuant to 8 C.F.R. § 214.2 (h)(13)(iv), an H-2B alien who has spent three years in the United States under section 101(a)(15)(H) of the Act may not seek extension, change status, or be readmitted to the United States under the same section of the Act unless the alien has resided and been physically present outside the United States for the immediate prior six months. The beneficiary was first approved for H-2B status on April 28, 2000. Two other subsequent H-2B petitions were approved, while the present H-2B petition is the fourth one submitted on behalf of the beneficiary. The director, in his decision dated August 29, 2003, stated that the beneficiary had worked for the petitioner for more than two years, whereas, in actuality, at the time of the director's decision, the beneficiary had been in H-2B status for over three years. According to her passport, the beneficiary was admitted into the United States as a B-2 on August 29, 1999. There is no evidence in the record that supports any absence from the United States following her 1999 entry. The present petition, based on 8 C.F.R. § 214.2 (h)(13)(iv), could not have been approved for a period longer than April 28, 2003, even if the petitioner had met the requirements of 8 C.F.R. § 214.2(h)(6)(iii).

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. Although the petitioner has established that the nature of the need for the beneficiary's services is temporary, other issues remain unresolved. First, although the director requested the Form ETA-750, he made no further comment on the date of the DOL determination and its overall impact on the

petition. This issue needs to be addressed by the director. Second, the director made no comment on the regulatory criteria outlined in 8 C.F.R. § 214.2 (h)(13)(iv). This issue also needs to be addressed by the director. Therefore the director's decision dated August 29, 2003 is withdrawn. Accordingly, the matter will be remanded to make determinations on these two issues. The director may request additional evidence that is deemed necessary. The petitioner may also provide additional documentation within a reasonable period to be determined by the director. Upon receipt of all evidence and representations, the director shall enter a new decision.

ORDER: The decision of the director is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. The director's new decision is to be certified to the AAO for review.