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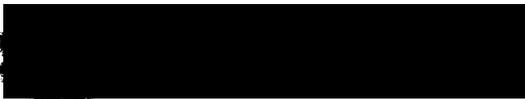
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FILE: EAC 05 046 51946 Office: VERMONT SERVICE CENTER

Date: 10 04 28

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 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In order to employ the beneficiary as a door-to-door salesperson for a period of one year, the petitioner, a retail sales business, endeavors to classify the beneficiary as a temporary nonagricultural 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).¹

The Department of Labor (DOL) denied the petitioner's request for temporary labor certification, stating that the position and the petitioner's need "is considered to be on-going and not of a temporary nature." The director then denied the H-2B petition, stating that it was "not apparent that the beneficiary's services would be temporary or that your need for the beneficiary's [services] would be temporary as identified in the regulation." The director noted that the advertisements for the position did not identify it as temporary, and that the time period for which the petitioner requested the beneficiary's services had changed between the time of the filing of the temporary labor certification and the H-2B petition.

On appeal, the petitioner contends that the director erred in denying the petition.

The statute at section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(ii)(b), defines an H-2B temporary worker as an alien:

[H]aving 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.

Pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), in order to establish that the nature of the petitioner's need is a "one-time occurrence,"

The petitioner must establish 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.

¹ It appears from the record that the petitioner separately filed six identical petitions to this one under consideration, rather than filing one combined petition for all seven named workers.

On appeal, counsel concedes that it will need workers to perform these services in the future; in fact, the beneficiary would be coming to the United States in part to train her replacements. Thus, the duties of this position are permanent in nature, so the petitioner must clearly demonstrate that its need for the beneficiary's services is of a short, identified length, limited by an identified event.

The petitioner has not made such a demonstration. The "identified length" of the petitioner's needs for the beneficiary's services was altered: on the temporary labor certification application, the one-time occurrence was to begin on August 10, 2004 and end on August 11, 2005, but on the H-2B petition the petitioner indicates that the one-time occurrence was to begin January 15, 2005 and end January 15, 2006. On appeal, counsel states "[t]he dates incorporated in each application depended on the date of application; but the temporary time period remained the same (that is, exactly one year)." That the starting and ending dates of the one-time occurrence can be easily changed, due simply to the date the application was submitted, demonstrates that the petitioner's need is not a one-time occurrence of short duration as defined by the regulation.

The petitioner has not established that its need is limited by an identified event of short duration. The beneficiary would enter the United States and train other workers to perform the same duties. There is no guarantee that there would be anyone for her to train (as noted by the director, the fact that the petitioner cannot locate United States workers to perform the job duties indicates that there may be no one for the beneficiary to train) and, if such persons were found, there is no guarantee they would be found early enough in her period of stay to train to them. Conversely, if such persons were found very early in her period of stay, there would be no reason for her to remain in the United States for an entire year. There is no information in the record of proceeding regarding the length of time that the beneficiary requires in order to train a suitable replacement.

Even if the AAO were to assume that suitable trainees for the beneficiary to train could be located within the one-year period, the petitioner has still not established that its need is temporary, as there will be periods in the future, beyond the one-year period, where new employees would be hired, and those employees would need training. The only way that the training of new employees could be considered temporary, would be if counsel were to contend that no employees in the future will ever require training.

Counsel next seeks to establish that the petitioner's need for the services of the beneficiary are temporary in nature by asserting the following:

Regarding the argument that a case has not been made to show that these workers are coming to work temporarily, the petitioner included a letter certifying under oath that these people are coming to Puerto Rico from January 2005 thru [sic] January 2006.

However, counsel's contention fails for three reasons. First, it is not the statements of the petitioner saying its need is temporary but rather whether the evidence presented in the petition meets the legal definition of "temporary" that establishes whether the petitioner's need for the beneficiary qualifies as temporary. Second, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Third, even if the AAO were to accept the petitioner's statements with no supporting documentation as evidence, the fact that the dates of the petitioner's temporary need have already changed, due simply to the timing of the filing of the applications, lessens the weight the AAO will accord such statements.

The director noted the following in the denial:

You have provided newspaper clippings for the proffered position from before the labor certification was filed. However, it is not evident that the positions were identified as being temporary or contain temporary duties when the positions were initially advertised.

Counsel concedes that in these advertisements the position was not advertised as a temporary one, stating “of course they were not.” This further undermines counsel’s contention that the petitioner’s need is temporary.

The petitioner has not demonstrated that its temporary need is seasonal, which would require it to specify a period of time during each year that the beneficiary’s services or labor would be required. Nor has the petitioner demonstrated that its temporary need is intermittent, which requires a showing that the beneficiary’s services or labor are needed only on an occasional or intermittent basis for short periods of time.

The director was correct to deny the petition. As noted above, 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. The record does not establish that the petitioner’s need is temporary.

If the petitioner is experiencing a severe labor shortage, that shortage may be alleviated through the issuance of immigrant visas. The services to be performed by the beneficiary are ongoing and the petitioner’s need to have workers perform these services is not a one-time occurrence.

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 sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.