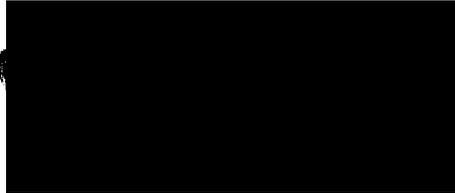


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04

FILE: EAC 05 013 50934 Office VERMONT SERVICE CENTER Date: AUG 10 2005

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:

SELF-REPRESENTED

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

The petitioner operates a nursing home facility. It desires to employ the beneficiary as a caregiver for six months. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that its need for the beneficiary's services is temporary.

On appeal, the petitioner states that it understands that it will take three years to petition for permanent foreign workers. Therefore, the petitioner states that it has a temporary need for temporary workers annually until its petitions for permanent foreign labor are completed.

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 recurs annually.

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)(1).

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

Provide personal care to handicapped Chinese-speaking senior citizens including cooking ethical [sic] Chinese food, bathing, dressing, feeding, laundry and housekeeping. Communicate with clients in Chinese.

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary's services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

The evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as a one-time occurrence. The petition (Form I-129) states that the dates of intended employment are for six months while the Form ETA 750 indicates that the exact dates of employment are for 11 months. The record does not contain an explanation as to why the time periods for the beneficiary's employment are different on the two forms.

The petitioner states, in its letter to supplement Form I-129 that ". . . We also understand that it will take three years in process to petition for permanent foreign workers. Therefore, we have temporary needs of these temporary workers recurrent annually until our petitions for permanent foreign labor are completed, so that our business can continue. . . ." Consequently, the petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational.

Moreover, the petitioner has not demonstrated that it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future. The petition indicates that the petitioner currently employs 20 individuals. The petitioner's need for a caregiver to perform the duties described on Form ETA 750, which is the nature of the petitioner's business, will always exist. Therefore, the petitioner has not established that a temporary event of short duration has created the need for a caregiver and that its need for the beneficiary's services 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 appeal is dismissed.