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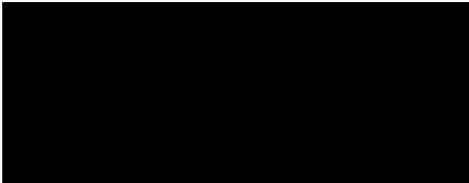
DA

FILE: SRC 04 237 50704 Office: TEXAS SERVICE CENTER Date: **AUG 10 2009**

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

AUG1005-10DU101

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

The petitioner is a private citizen who desires to extend the authorization to employ the beneficiary as a personal home care aide for one year. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made and denied the petition.

On appeal, counsel states that the beneficiary was not issued a labor certification and that the letter stating the reasons the labor certification was not issued is attached. Counsel also states that the petitioner has provided information to refute the reasons the petitioner's labor certification was denied. Counsel requests that the director's decision be reversed.

The regulations stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on September 2, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On appeal, counsel submits a copy of the final determination notice from the DOL dated September 9, 2004. The notice states that the Application for Alien Employment Certification, Form ETA 750A, has not been certified and is being returned. However, neither the statute nor regulations allow for the acceptance of a notice detailing the reasons why the labor certification could not be made subsequent to the filing of the petition. This notification must have been issued prior to the time of filing. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

This petition cannot be approved for an additional reason. 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).

The petition indicates that the dates of the intended employment for the beneficiary are from September 10, 2004 to September 9, 2005. The beneficiary has been in the United States in H-2B classification working for the petitioner as a personal home care aide since December 26, 2003. The petitioner has not established that the need for the beneficiary's services is temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.