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FILE: EAC 04 265 50486 Office: VERMONT SERVICE CENTER Date: JUN 14 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:  
[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.

*Robert P. Wiemann*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The attorney-in-fact of a 93 year old woman filed the H-2B petition in her behalf in order to continue to employ the beneficiary as her live-in elder care taker. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because there are qualified workers who are available for the job. The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome DOL's objections.

On appeal, counsel submits the following documents with the Form I-290B (Notice of Appeal): a brief in the form of a February 23, 2005 letter styled as a motion to reconsider; a copy of the petitioner's Prevailing Wage Request Form, with handwritten annotations made by DOL during its processing of the form; and four "Report" sheets with OES Codes, brief duty descriptions, and samples of reported job titles regarding these occupational categories: Home Health Aides; Licensed Practical and Licensed Vocational Nurses; Nursing Aides, Orderlies, and Attendants; and Personal and Home Care Aides.

Here is the most pertinent portion of DOL's notice of its denial of the labor certification:

Employer advertised . . . for the job opportunity under petition. Five (5) U.S. workers responded to the newspaper advertisements and applied for the position. Employer rejected all five (5) U.S. applicants for having "no experience as a live-in elder caretaker." Resumes of 3 U.S. workers reveal that each applicant has many years experience in taking care of elders and thus meets [sic] the 3 months minimum requirement specified in Application Form ETA 750A.

When there are qualified, willing, and able U.S. workers who are available for the job, a Temporary Alien Employment Certification can not be issued.

The crux of the appeal is counsel's contention that none of the U.S. workers that responded to the advertisements (hereinafter referred to as the responders) were qualified for the position. Counsel asserts that all the responders lacked what the petitioner considers to be a material requirement for the position, namely, at least three month's experience as a live-in elder caretaker.

Upon consideration of the entire record of proceeding, including the Form I-290B, the brief, and all the other documents submitted on appeal, the AAO has determined that the Director's decision to deny the petition was correct. The petitioner has not presented sufficient countervailing evidence to rebut DOL's determination that there are U.S. workers who qualify for the job.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality 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

....

In conformity with this statute, the pertinent part of the regulation at 8 C.F.R. § 214.2(h)(6)(i) limits H-2B nonagricultural temporary workers to those aliens who are “coming temporarily to the United States to perform temporary services or labor” but “not displacing United States workers capable of performing such services or labor.” If the petitioner receives a notice from DOL that certification cannot be made, a petition containing countervailing evidence may be filed with the director, as the petitioner has done here. The evidence countervailing evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. 8 C.F.R. § 214.2(h)(6)(iv)(D).

The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation in the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence. 8 C.F.R. § 214.2(h)(6)(iv)(E).

Counsel argues, in part, that the jobs held by the five persons who responded to the job advertisements would be subject to different OES Codes than the one that DOL assigned to the proffered position in its prevailing wage determination (i.e., OES Code 39-9009 (Companion)). This argument is unpersuasive. The record contains no evidence that DOL would not consider the experience of the responders to be relevant to performing the job of Companion. There is no evidence of record to indicate that the Companion occupational category requires more knowledge, skills, competencies, or experience than indicated in the respondents’ resumes.

Counsel’s assertion to the effect that the proffered position “cannot be compared” to the positions held by any of the five responders is not substantiated by any evidence of record. Neither is counsel’s assertion that “only candidates who have been exposed to the rigors of ‘living-in’ and caring for an elderly person around the clock can be considered a qualified candidate.” Going on record without supporting documentary evidence is not sufficient for purposes 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)). Furthermore, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has not overcome DOL’s determination about the availability of U.S. workers. The countervailing evidence is not sufficient to establish that qualified U.S. workers are not available. The evidence of record does not establish that the proffered position cannot be satisfactorily performed by anyone with three months’ experience as a caretaker. Specifying as a necessary qualification that such experience must have been as a live-in exceeds the requirements of the proffered position, and it unduly excludes from hiring consideration U.S. workers who have applied for the position. Citizenship and Immigration Services must examine the ultimate employment of the alien to see if the hiring qualifications set by a petitioner are necessitated by the duties of the proffered position. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The record reflects

that the petitioner interviewed only one of the five responders. That person's desire to not work in the proffered position did not excuse the petitioner from the obligation to interview and evaluate the other responders in terms of their ability, willingness, and availability.

Beyond the decision of the director, it is noted that the petitioner has not established that the petitioner's need for the duties of the proffered position is temporary in nature, as required by 8 C.F.R. § 214.2(h)(6)(ii)(A). 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). 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 beneficiary has previously been serving in the same position, in accordance with a previous H-2B petition approved for the period April 6, 2004 to October 31, 2004. The June 17, 2004 letter of Doctor Gallagher states that the requirement for a live-in caregiver is "[d]ue to a chronic illness of a fairly severe nature." The attorney-in-fact's statement that the petitioner "will have to be placed in a special care nursing home within the next year" (letter dated September 16, 2004) is not corroborated by a medical opinion. In fact, Doctor Gallagher's letter indicates no time limit for the option of at-home instead of institutionalized care. For this reason also, the petition must be denied.

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.

This decision is without prejudice to the filing of a new petition accompanied by the proper documentation and fee.

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