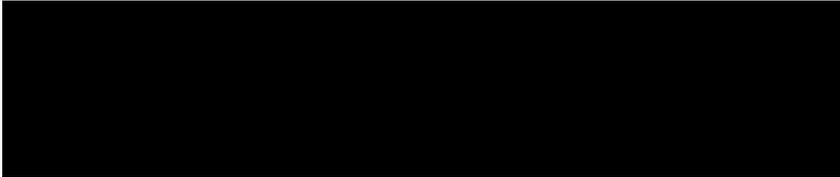




U.S. Citizenship
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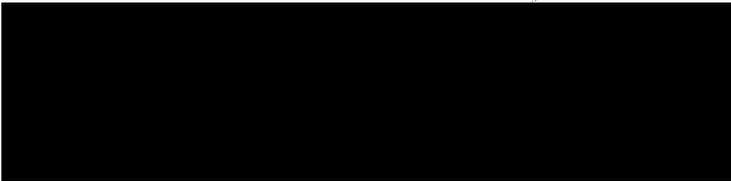
FILE: WAC 04 099 53621 Office: CALIFORNIA SERVICE CENTER

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 The director's decision will be withdrawn although the petition is now moot.

In order to employ the beneficiary as its creative director for a period of eleven months, the petitioner, a business engaged in the marketing and sale of martial arts trading cards and action figures, seeks 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).

The director denied the petition, ruling that the petitioner had not established that its temporary need for the beneficiary's services qualified as a "one-time occurrence." 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.

The petitioner states the following in regards to its desire to employ the beneficiary:

We have an urgent need for a Creative Director in the initial phase of our product design and development. The position will report directly to the Chief Executive Officer. During the development phase, the Creative Director will support the entire design team and marketing effort that the [c]ompany intends to employ on a contractual basis. The Creative Director's mission is to design [the petitioner's] product, brand, and image[,] and then drive its development throughout the children's consumer market. This position will guide every

aspect of [the petitioner's] product look, feel, and attitude. The role is a combination of all outbound marketing functions including but not limited to design, brand development, direct marketing, web marketing, product [demonstrations], and industry development.

As noted above, there are two ways a petitioner can prove that its temporary need is a one-time occurrence. Here, the petitioner has satisfied the first prong. As a startup company, the petitioner has never employed someone in this position in the past. Also, the AAO finds reasonable the petitioner's explanation that it will not need an individual to perform these duties in the future, after the company has been established.

The regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) states that, if a petition is approved after the date the petitioner indicates that the service will begin, the approved petition and approval notice should show a validity period commencing with the date of approval and ending with the date requested by the petitioner.

The petition should have been approved for the requested time period. However, remanding this case to the director would have no practical effect because the period of requested employment has passed. Therefore, the petition must be denied.

ORDER: The petition is denied because the matter is moot due to the passage of time