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APR 04 2008

FILE: EAC 07 255 52119 Office: VERMONT SERVICE CENTER

Date: APR 04 2008

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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was recommended to be approved by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The decision of the director will be withdrawn and the petition will be denied.

On September 4, 2007, the petitioner filed the Form I-129, Petition for a Nonimmigrant Worker and allied documents. The petitioner desires to continue to employ the beneficiary as a data entry keyer pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b), from August 1, 2007 to June 1, 2008. The petition was filed after the Department of Labor (DOL) decided to not issue a temporary labor certification, having determined the petitioner was previously granted an H-2B temporary labor certification on September 27, 2006 citing a one-time occurrence to employ three (3) data entry staff from October 1, 2006 to August 1, 2007. The DOL also determined that this is the second application filed by the petitioner requesting the same data entry staff for the same project.

On notice of certification, the petitioner did not present additional evidence for consideration. Therefore, the record is considered complete.

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 regulation at 8 C.F.R. § 214.2(h) provides, in part:

(6) Petition for alien to perform temporary nonagricultural services or labor (H-2B):

(i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

(ii) *Temporary services or labor:*

(A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* 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:

(1) *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 regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The 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. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* 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 of 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.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states 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. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner seeks approval of the proffered position as a one-time occurrence.

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 petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

Read periodicals and publications in Urdu language. Operate keyboard to enter data into computer data base in Urdu language. Maintain data and keep record of work completed.

In rebuttal to the DOL's findings, the petitioner states that it originally required the services of the beneficiary in conjunction with a special project from October 1, 2006 to August 1, 2007. The petitioner explains that the beneficiary was issued a visa at the United States Embassy in Islamabad, Pakistan on June 21, 2007 and the delay in visa issuance was due to the security check. The petitioner states that the beneficiary entered the United States on July 6, 2007 and immediately applied for a social security card. The petitioner also states that the beneficiary was unable to start work on the project without the social security card which he received on July 31, 2007. The petitioner explains that it is because of these delays that they need an extension of the beneficiary's H-2B status.

Upon review, the record contains a copy of the beneficiary's nonimmigrant visa, I-94 Departure Record, and the beneficiary's social security card. The I-94 Departure Record reflects the beneficiary's entry as July 6, 2007, 25 days prior to the expiration of his H-2B classification. Therefore, the petitioner's explanation as to why he needs an extension of stay for the beneficiary is reasonable and overcomes the objections made by the DOL. However, the petition cannot be approved for another reason.

Beyond the decision of the director, the petitioner had not obtained a valid temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made prior to the filing of the petition.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii) states in pertinent part:

(C) The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor . . . within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv). . . .

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 4, 2007 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent a timely certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On November 7, 2007, the director requested the petitioner to submit a temporary labor certification issued by the DOL (Form ETA 750). In its response to the director's request for evidence, the petitioner submitted the final determination notice from the DOL, dated September 13, 2007. The determination notice states that the Application for Alien Employment Certification, Form ETA 750A, has not been certified and is being returned. The petitioner applied for a temporary labor certification on July 9, 2007 and a determination was not rendered until September 13, 2007, subsequent to the petition's filing date.

Neither the statute nor regulations allow for the acceptance of a notice detailing the reasons why the labor certification could not be made that was issued subsequent to the filing of the petition. As earlier noted in this decision, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) prohibits filing an H-2B petition prior to a labor certification determination. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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 director's decision dated February 26, 2008 is withdrawn. The petition is denied.