

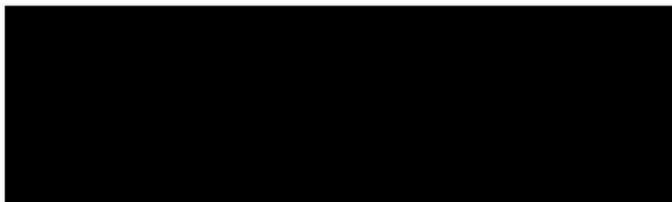
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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
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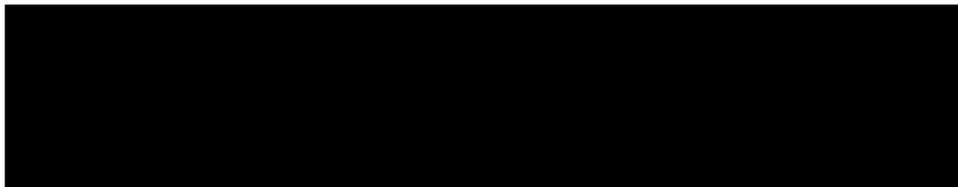
FILE: EAC 07 214 53336 Office: VERMONT SERVICE CENTER Date: **MAR 17 2008**

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is a wholesale watch company. It desires to continue to employ the beneficiary as a web designer pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from May 30, 2007 to May 29, 2008. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made.

The director determined that sufficient countervailing evidence had not been submitted to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed and that the need for the services to be performed is temporary.

Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record contains sufficient evidence to overcome the DOL's concerns regarding the petitioner's ongoing need for the beneficiary's services. The totality of evidence establishes a one-time occurrence as defined in the H-2B regulations and extraordinary circumstances that justify the beneficiary's H-2B employment in accordance with 8 C.F.R. § 214.2(h)(6)(ii)(B). However, the petition cannot be approved for another reason. The record of proceeding does not contain evidence that the beneficiary possesses the minimum amount of experience to perform satisfactorily the job duties described in the proffered position. Accordingly, the case will be remanded.

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)(6)(vi) requires the petitioner to submit:

(C) *Alien's qualifications.* Documentation that the alien qualifies for the job offer as specified in the application for labor certification, except in petitions where the labor certification application requires no education, training, experience, or special requirements of the beneficiary.

The regulation at 8 C.F.R. § 103.2(b) states:

(3) *Translations.* Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The Application for Alien Employment Certification (Form ETA 750) at Part A, item 14 indicates that the minimum amount of experience needed to perform satisfactorily the job duties is two years of computer school training and three years of experience in the job being offered. The Form ETA 750 also lists other special requirements as:

Position requires skills in graphic design & web design/mgt. Must be experienced in Adobe Illustrator & Photoshop; Macromedia Dreamweaver Ultra-Dev, Flash & Fontographer; Swift 3D, 3D Studio Max, HTML, DHTML, XHTML, CSS Javascript and Flash Action Script.

The record, as it is presently constituted, does not contain evidence of the beneficiary's training, experience or knowledge of the special requirements as required by the regulations.

The petitioner states that the beneficiary was hired in May 2005. The petitioner has not provided any evidence to substantiate this statement. A Notice of Action (Form I-797) included in the record indicates that the beneficiary was previously petitioned by [REDACTED] under the receipt number, WAC-06-187-50487, and that the petition was valid from June 15, 2006 until May 30, 2007. The record of proceeding does not contain any other evidence attesting to the beneficiary's three years of experience, two years of computer school training and the other special requirements listed at item 15 on Form ETA 750. Simply 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)). Further, the AAO notes that even if the beneficiary began working for the petitioner in May 2005, he would not have accumulated three years of experience prior to the filing of the current petition on July 18, 2007.

In conclusion, the evidence contained in the record of proceeding does not demonstrate that the beneficiary had the requisite three years of experience in the job being offered, two years of computer school training, and the special requirements listed at item 15 on Form ETA 750 prior to filing the petition. 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). Absent documentary evidence of the beneficiary having three years of experience in the job being offered, two years of computer school training and the skills and experience requirements listed at item 15 on Form ETA 750, the petition may not be approved.

Since this deficiency was not mentioned in the director's decision, this case will be remanded to the director in order to give the petitioner an opportunity to submit proof of the beneficiary's three years of experience in the job being offered, two years of computer school training and the special requirements listed at item 15 on Form ETA 750. The director may also request any additional information or evidence that he deems necessary to adjudicate the matter at hand.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of September 24, 2007 denying the petition is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse to the petitioner shall be certified to the AAO for review.