PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

D4

APR 2 0 2004

[redacted]

FILE: EAC 03 048 54915 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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

The petitioner provides services to elderly, disabled and other individuals who require medical and home care assistance. It desires to extend its authorization to employ the beneficiary as a home care aide for one year. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that its need for the beneficiary's services is temporary.

On appeal, the petitioner states that it manages to employ a number of local workers; however, this labor force is not sufficient for its operation during the winter and summer months.

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 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 intermittent and that the temporary need is unpredictable.

To establish that the nature of the need is "intermittent," the petitioner must demonstrate that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*4*).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Light housework: dusting, washing floors, vacuuming, cleaning bathroom and kitchen, etc. Preparing, meals, washing dishes, laundering, ironing, making and changing beds, food shopping and errands, etc.

Upon review, the evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as an intermittent need. The record contains a previously approved ETA 750 for the petitioner. The certification was valid from April 26, 2002 until March 30, 2003 for 30 home attendants. The present ETA 750 filed by the petitioner is also for 30 home attendants to perform the same services from April 1, 2003 through

March 30, 2004. The petitioner has not shown that it occasionally or intermittently needs home care aides to perform services, especially when the petitioner's need for workers is year-round.

Furthermore, the petitioner must demonstrate that it has not employed permanent or full-time workers to perform the services or labor but occasionally needs workers to perform services for short periods. The petition indicates that the petitioner currently employs 140 individuals. In a letter, dated April 12, 2003, the petitioner states that it manages to employ a certain number of local workers; however, this number is insufficient for its operation during the winter and summer months. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Consequently, the petitioner has not established that its need for the beneficiary's services is intermittent and temporary

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 appeal is dismissed.