U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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AUG 17 2006

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FILE: EAC 03 134 55107 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
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, Director
Administrative Appeals Office

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

The petitioner is a married couple that filed the petition in this case in order to continue employing the beneficiary as an H-2B live-in child monitor for the period March 31, 2003 to March 01, 2004. As noted by the petitioner on the Form I-129 Supplement H, the beneficiary has been working in this capacity pursuant to a previous H-2B petition that was approved for the period May 21, 2002 to March 30, 2003.

The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the employer had not established a temporary need. In turn, the director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the DOL's objections, pursuant to 8 C.F.R. § 214.2(h)(6)(vi)(B).

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. . . .

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. 8 C.F.R. § 214.2(h)(6)(ii)(A). 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 must 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).

At section 2 of the Form I-129 Supplement H, the petitioner checked the boxes that indicate that the proposed employment is "Intermittent" and "Unpredictable." However, it is evident that the petitioner presents the nature of the proposed position as a one-time occurrence. Section 13 of the Form ETA 750A, the application for DOL to issue a temporary labor certification, states:

> TEMPORARY – Care of a 19 month old baby girl with complex medical conditions including, bathing, clothing, feeding, preparing her meals and recreational activities.

The petitioner's December 11, 2002 letter in support of the application for temporary labor certification states that the child's father works full-time Monday through Friday, and sometimes on weekends, and it includes the following information:

> [The petitioner's child] is afflicted with a complex medical condition, Long-Chain Hydroxyacyl-Co A Dehydrogenase Deficiency (LCHAD), a Fatty-acid Oxidation Disorder. This condition prevents her body from metabolizing long chain fats, and as a result her body must obtain the necessary energy from other resources like Medium chain fats and glucose. . . .
>
> In order to understand more about the medical affliction and provide the best care for [our child], my wife is scheduled to attend various seminars on LCHAD throughout the U.S. in the next twelve moths. She also plans to visit various doctors throughout the U.S. to check into different research studies that [our child] may/may not participate in.
>
> Because of my work schedule and my wife's anticipated attendance to various seminars on LCHAD, we seek to temporar[il]y employ [the beneficiary] for approximately one year. . . . When our child is old enough and gains more independence, she will be prepared to start full time preschool and the services of the [beneficiary] will no longer be required. More specifically, we would like to provide this in-home care until such time that [our child] can walk, talk, and thus [be] able to go to nursery school.
>
> . . . .
>
> When [our child] is old enough and gains more independence, she will be prepared to start full time preschool. Consequently, at that time the services of the child caregiver will no longer be required.
>
> We reasonably anticipate to require the services of [the beneficiary] for a period of not more than a year.

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 DOL's certification denial notification stated that the duties of the proffered position "are not temporary in nature." DOL found that the proposed duties are "child care duties [that] are performed on an ongoing basis and will continue so long as there are children in the household." DOL asserted that, even when the petitioner's child attends school, the petitioner "will need someone to take them [sic] to and from school, prepare their [sic] meals, take care of them [sic] during the summer months, holidays, and when the children [sic] are sick." As specific reasons for denial, DOL noted that the petitioner had not indicated who would care for the child after the

proposed period of employment, that the mother's seminar schedule had not been provided, and that the duties stated in the application "are perceived as ongoing in nature."

In response to the service center's request for additional evidence, counsel submitted a letter, in which he advocated the merits of the petition, and supporting documents that include a letter from a Montessori school that confirmed the registration of the petitioner's child as a full-time student for the 2003-2004 academic year; a June 12, 2003 letter from the child's pediatrician that, in pertinent part, advised that "[w]e see no problem with the family making the necessary arrangements for [the petitioner's child] to attend preschool, starting in the near future," and documents related to conferences dealing with children with disabilities.

The AAO finds that the petitioner's countervailing evidence, in conjunction with the other evidence of record, is sufficient to establish a temporary one-time occurrence position that complies with the relevant DOL policies and Citizenship and Immigration Services [CIS] regulations.

In this case, the petitioner has sufficiently established that the childcare needs are consistent with the test set forth in *Matter of Artee, supra*. The petitioner has provided persuasive evidence that the need for child-care would end in the near, definable future. *See Blumenfeld v. Attorney General*, 762 F. Supp. 24 (D. Conn. 1991). The AAO finds that, on the particular facts of this case, the petitioner's request to extend the beneficiary's employment is not materially inconsistent with the beneficiary's position qualifying as one-time temporary employment within the meaning of the CIS regulations on H-2B petitions. The petitioner has overcome the objections of the DOL and of the director.

However, the AAO also finds that the director would not have had the authority to approve the petition in this case, as the record establishes that the petition was filed prior to DOL's determination on the labor certification application.

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

> 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).... [Italics added.]

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulates that an H-2B petition "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.

The petitioner filed the labor certification application on February 4, 2003, prior to filing the Form I-129 on March 27, 2003. However, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states:

> *After obtaining a determination from the Secretary of Labor* or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by the labor

> certification determination and supporting documents, with the director having jurisdiction in the area of intended employment. [Italics added.]

The denial of the labor certification application was not obtained until May 1, 2003, after the date of filing the petition. Thus, the petition would not be approvable. This case is moot because the period of proposed employment has passed, and because the temporary need as described by counsel and the petitioner in the record of proceeding no longer exists. The relevant CIS regulations clearly preclude approval of this H-2B petition because it was filed prior to the DOL determination on the related ETA Form 750A. For these reasons, no practical purpose would be served by the AAO's withdrawing the director's decision.

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