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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: EAC 05 043 53380 Office: VERMONT SERVICE CENTER Date: AUG 24 2005

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:

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

The petitioner filed this H-2B petition in order to employ the beneficiary as a live-in child monitor for the period December 1, 2004 to November 30, 2005. The governing statute, section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality 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 . . . .

In conformity with this statute, the pertinent part of the regulation at 8 C.F.R. § 214.2(h)(6)(i) limits H-2B nonagricultural temporary workers to those aliens who are "coming temporarily to the United States to perform temporary services or labor" but "not displacing United States workers capable of performing such services or labor."

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). As noted by counsel, 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).

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).

If the petitioner receives a notice from the Department of Labor (DOL) that certification cannot be made, a petition containing countervailing evidence may be filed with the director, as the petitioner has done here. The countervailing 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. 8 C.F.R. § 214.2(h)(6)(iv)(D).

The countervailing evidence presented by the petitioner shall be in writing and shall address the availability of U.S. workers, the prevailing wage rate for the occupation in 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. 8 C.F.R. § 214.2(h)(6)(iv)(E).

On the application for temporary labor certification the petitioner described the proposed duties as follows:

> TEMPORARY – Care of three[-]year old twins and an 8 month old boys [sic]. Bathe them, prepare meals and snacks. Prepare the twins['] lunch box and drive them to and from preschool; organize recreational activities and supervise play periods. Take them swimming and any other extra curricular activities. Maintain children's quarters in hygienic conditions.

The petitioner's October 18, 2004 "Statement of Business Necessity for a Temporary/Intermittent Child Monitor Live-In Requirement" includes the following information. The petitioner is a marketing manager who is being promoted to partner in his company. He currently works "more than full time, including many nights and weekends," and, because of the new partnership position, he "will be required to travel constantly." The petitioner's wife, who has just moved to the United Sates from Turkey, does not speak English, but is enrolled in an intensive ESL course. She will be required to travel back and forth from Turkey to ensure the well being of her father, who is old and sick and for whom she was the only companion. When she is visiting Turkey to attend to her ailing father, the petitioner's wife "may need to leave the kids in the U.S." This document specifically addresses the need for the beneficiary's services as follows:

> We are in dire need for the services of a Child Monitor/Live-in to care for our three children. Someone must be present in the morning, when our children wake up to take care of them, clean them[,] prepare their breakfast, feed them, play with them, take them to preschool, pick them up, take them to their extra curricular activities, and attend to our 8 month old baby. We need a live-in to be available in case of emergency situations such as if one child needs to be taken to the hospital, the live-in care provider will be able to assist with the other children. Thus, we seek the temporary need of [the beneficiary] for approximately one year.
>
> When our children are old enough and gain more independence, they will be prepared to start full time preschool[.] Consequently, at that time the services of the child caregiver will no longer be required.

According to its notice of determination, DOL declined to issue a temporary labor certification because the petitioner had failed to establish that the proffered position is temporary in nature. The most pertinent part of the determination states:

> You state that your employment requires you to work full-time plus nights and weekends, as well as to travel constantly. You state your wife will be traveling intermittently back and forth to Turkey to care for an aged parent. You state your need for someone to perform Child Monitor services when [sic] end when the child are [sic] older and gain more independence and start full time pre-school.

> The need for someone to continue these duties will continue indefinitely into the future. As both parents are often away from the home, the children will need care and attention on a continuing basis. Even if the children are enrolled in preschool, they will need care on nights and weekends, as well as when both parents are out of the home, either for business or to travel out of the country. Your letter simply fails to support temporary need.

Documents filed with the Form I-129 (Petition for Nonimmigrant Worker) included an "Employment Confirmation" sheet, signed by the petitioner and the beneficiary, which states, in part, that the beneficiary would work from 8:00 a.m. to 4:00 p.m., five days per week (Monday through Friday), for a total of 40 hours per week, with provision for increased pay for overtime. The petitioner's reply to the director's request for additional evidence (RFE) includes a letter from counsel, written when the youngest child was one-year old. In the letter, counsel stated that the beneficiary's services will no longer be required "in approximately a few months," when the youngest child is able to walk and talk and "will be prepared to go to nursery school." (Counsel's RFE reply letter, page 2). Counsel asserts (at page 3) that the petitioner's wife will look for an appropriate person to take care of her father in Turkey, and that the need for childcare would not extend beyond the children's toddler stage. Counsel also states (at page 4) that the children will be enrolled in a pre-school extended day care program from 7 a.m. to 6 p.m., and will be attending summer camp June through August 2005.

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position is temporary:

> [T]he decision of the Department of Labor not to issue labor certification appears correct. In your petition you have requested validity dates covering a one-year time period. You state that the beneficiary would care for your three young children. The beneficiary would feed them, take them to pre-school, take them to extra curricular activities and attend to your one year old baby. It is stated that when your children are old enough and gain more independence they will be prepared to start full time pre-school and the services of the beneficiary would no longer be required. However, in the case of your youngest child this would not be for several years. In addition, the need for the beneficiary would not end when your children are in full time preschool. They still need to be fed breakfast, taken to and from school, cared for when you and your spouse are away, etc. Obviously any child monitor position is temporary to the degree that all children eventually grown old enough to take care of themselves. But your need for a child-care monitor is of an indefinite duration and therefore not temporary.

The AAO has considered the entire record, including counsel's brief on appeal and each document attached thereto as Exhibits A through H. Exhibit G includes copies of two contracts for preschool attendance of the twins for the period May 16, 2005 through May 2006.

The AAO notes that the petitioner has mistakenly described the proffered position as intermittent, both on the Form I-129 and in its aforementioned October 2004 statement. 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 evidence of record is not indicative of this type of

need. However, the totality of evidence establishes that the need is temporary and is a "one-time occurrence." In accordance with the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*), to establish this type of temporary need, the petitioner has demonstrated 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. Specifically, the evidence of record is sufficient to establish that the live-in child monitor is a temporary need that will not extend beyond the November 2005 date that counsel and the petitioner represented as the time when child monitor services would no longer be required.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The petition is approved.