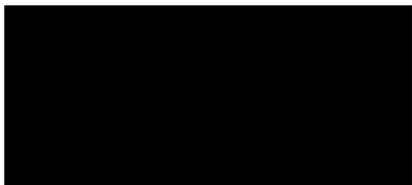


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FILE: SRC 04 078 52900 Office: TEXAS SERVICE CENTER Date: JUN 14 2005

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:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner, self-described as an elderly man, filed this H-2B petition in order to employ the beneficiary as his housekeeper. The Director denied the petition because he determined that the content of the Application for Employment Certification (ETA-750) in this proceeding is not relevant to an H-2B petition. The decision states:

You have filed Form I-129, Petition for Nonimmigrant Worker[,] to classify the beneficiary as an H-2b, Nonagricultural Worker.

It appears that you have filed the incorrect form. You have provided a certified ETA-750 from the Department of Labor. The ETA-750 should be attached to and filed with the Form I-140, Petition for Immigrant Worker, not the Form I-129. In view of this, your petition must be denied.

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

The following comments at Section 3 of the Form I-290B (Notice of Appeal) are the petitioner's only statements about the basis of his appeal:

When I received the approved ETA-750 from the Department of Labor[,] I called your 800 number and ask[ed] for assistance as to what form to file, and the officer I spoke to told me Form I-129 would be the one and not [F]orm I-140. However, this could be my mistake[;] maybe I did not explain myself well enough to the officer. At this time I do apologize for filing the wrong form, and I would like to be given the opportunity to file the correct form. Thank you.

The petitioner's comments fail to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As the petitioner presents no additional evidence on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

The petitioner should note that, as stated in the Final Determination document that the Department of Labor issued on December 2, 2003, the ETA 750 in this case was approved as a permanent labor certification for filing with a Form I-140, which is a petition for an alien worker to become a permanent resident in the United States.

The petition filed in this case is for a temporary worker, not a permanent worker. The petitioner should be aware that the 3-year to permanent term of employment that he indicated on the Form I-129 is not consistent with an H-2B petition. 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 [Italics added.]

Temporary service 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).

The petitioner cannot convert this defective H-2B petition into a petition for permanent employment, as Citizenship and Immigration Services regulations make no allowance for amending a petition, other than by the filing of a new petition - here, a Form I-140 Petition for Immigrant Worker - with fee. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

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. Accordingly, the petition will be denied.

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