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AUG 17 2005

FILE: EAC 03 096 51564 Office: VERMONT SERVICE CENTER Date:

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, 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 endeavors to employ the beneficiary as a live-in child monitor for the period December 4, 2002 to November 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, the petitioner's description of the proposed position at section 13 of the Form ETA 750A, the application for DOL to issue a temporary labor certification, indicates that the petitioner is seeking the beneficiary's services as a one-time occurrence:

TEMPORARY – Provide care for 2 boys aged 19 months and 5 years old, including bathing, clothing, preparing their meals and feeding them, do their laundry, and organize recreational activities. Prepare the child's lunch box and take him to and from school. Perform general housekeeping such as vaccuming [sic], dusting, etc. once a week.

The petitioner's January 27, 2003 letter in support of the application for temporary labor certification includes the following information:

We have one child, Paul aged 5 years old, and a 19 month old baby, [REDACTED]. My husband and I work full time Monday through Friday. I am a Registered Nurse and work for Quantico Clinic in Quantico, VA and my husband is a Battalion Commander and works for the U.S. Army currently based in Arlington, VA (National Guard Bureau).

We are in dire need for the services of a Child Monitor/Live-in to care for our two children. Someone must be present early in the morning when our children wake up to take care of them, clean them, dress them, prepare their breakfast, feed them, play with them and prepare the lunch box for our son, [REDACTED] and take him to and from school, etc.

....

When John Joseph is old enough, can talk and gains more independence, he will be prepared to start full-time preschool and consequently at that time, the services of a child care giver will no longer be required. More specifically, we would like to provide this in[-]home care until such time that [REDACTED] can talk and thus go to nursery school. Therefore, we seek the temporary need of [the beneficiary] for approximately one year.

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 normally associated with the operation of a household, are performed on an ongoing basis, and will continue so long as there are children in the household." The DOL noted, in part, that the petitioner failed to indicate who would take care of the children and perform the beneficiary's duties after her proposed period of employment, and that it appears that the petitioner would thereafter have a continuing need for someone "to take [the children] to and from school, take care of them during the summer months and holidays."

In his June 3, 2003 letter responding to the service center's request for additional evidence, counsel asserted that, as corroborated by a letter of acceptance from the school, the petitioner's older son would begin full-time kindergarten in September 2003. Counsel also stated that this child would be attending summer camp during the months of June, July, and August 2003. Also according to counsel, the petitioner anticipates that by the end of the proposed employment period the younger son would be attending the petitioner's "chosen nursery school during the day."

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 employment 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). Furthermore, the job description for the beneficiary is focused primarily on childcare. Although the petitioner mentioned housekeeping duties, these duties are secondary to the care of the children and minimal in comparison with the time and responsibilities involved in the child care. This fact distinguishes this petition from the childcare H-2B petition denied in *Blumenfeld*. The petitioner's need here is essentially limited to childcare and has a credible, definite ending date. Therefore, it is reasonable to conclude that the petitioner's childcare needs, for the duties listed, will end in the near, definable future. 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 January 29, 2003, prior to filing the Form I-129 on February 3, 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 was not obtained until March 17, 2003, subsequent to the filing date of the petition. Thus the petition could not have been approved by the director.

This case is moot because the period of proposed employment has passed, and 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.