



U.S. Citizenship
and Immigration
Services

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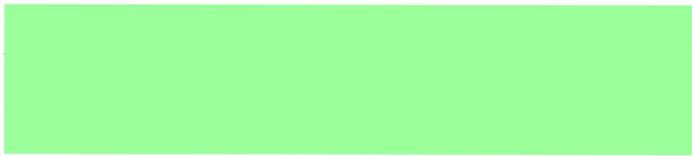


DATE: **JUN 14 2013** OFFICE: VERMONT SERVICE CENTER FILE:

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:

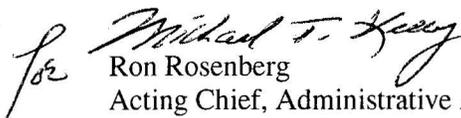


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a “[f]amily with [a] need for [a] nanny.” In order to employ the beneficiary in what it designates as a nanny position, the petitioner seeks to classify her as a temporary nonagricultural worker pursuant to 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).

The director denied the petition on the basis of his determination that the petitioner had failed to establish a temporary need for the services of the beneficiary based upon a one-time occurrence.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the RFE; (4) the director’s decision denying the petition; (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director’s ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Applicable Law

Section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker, in pertinent part, as follows:

[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 regulation at 8 C.F.R. § 214.2(h)(6) states, in pertinent part, the following:

Petition for alien to perform temporary nonagricultural services or labor (H-2B)—

(i) *Petition.*

(A) *H-2B nonagricultural temporary worker.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.

* * *

(ii) *Temporary services or labor—*

- (A) *Definition.* 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.
- (B) *Nature of petitioner's need.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.
- (1) *One-time occurrence.* The petitioner must establish 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.
- (2) *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.
- (3) *Peakload need.* The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.
- (4) *Intermittent need.* The petitioner must establish 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.

In accordance with the precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), the test for determining whether an alien is coming “temporarily” to the United States in order to “perform temporary services or labor” is whether the petitioner’s need for the beneficiary’s services is temporary. Accordingly, pursuant to *Matter of Artee* it is the nature of the petitioner’s need rather than the nature of the duties that controls.

Pertinent Facts and Procedural History

The petitioner stated on the Form I-129 that its need for the services of the beneficiary is a temporary one, based upon one-time occurrence. In order to establish that the nature of its claimed temporary need is a one-time occurrence pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), the petitioner must demonstrate either: (1) 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 (2) 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. *Id.*

The petitioner explained on the Form I-129 that she and her husband have two sons: (1) [REDACTED] born on September 18, 1998; and (2) [REDACTED], born on June 22, 2001. She claimed that because both she and her husband are engaged in demanding careers, they need a nanny to care for their sons during the periods of time they are away from the family home.

In relevant part, the petitioner stated the following with regard to her need for the services of the beneficiary in her May 21, 2012 letter:

I have a one time need for a nanny to provide services to my two sons . . . primarily, for [REDACTED] has nearly outgrown the need for a nanny’s supervision.

We have had a nanny employed since 2001, shortly after [REDACTED] was born. She, however, has given notice that she would like to retire. Out of loyalty she is staying on until we can retain a replacement. We need the replacement for a few months more concerning [REDACTED] and for less than three years, concerning [REDACTED]. . .

* * *

Although it is imperative that I have a nanny for my children for a short while longer, that time will come to an end shortly. I do not anticipate having any other children and therefore will not have the need for a nanny again.

In his June 5, 2012 RFE the director notified the petitioner that the record of proceeding did not establish that its need for the services of the beneficiary met the requirements set forth above. In his April 6, 2012 letter submitted in response to the RFE,¹ counsel argued that the petitioner satisfies the second alternative criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1): 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. Counsel argued as follows:

¹ Counsel appears to have dated the letter April 6, 2012 in error, as the director issued the RFE nearly two months after that date.

Thus the petitioner has an employment situation that is otherwise permanent, the need for a nanny until her children outgrow it, but a temporary event of short duration, the time between the imminent retirement of the present nanny and the time when [the petitioner's] two children outgrow the need for a nanny, has created the need for a temporary worker.

The petitioner also submitted a June 13, 2012 affidavit from [redacted] who claims to be a pediatric nurse practitioner, in response to the RFE. [redacted] stressed the general need for children to be adequately supervised and, with regard to the petitioner's children, stated the following:

10. Here in New York there is no law stipulating the appropriate age of "aleness," though parents can be charged with reckless endangerment if a tragedy occurs while the children are home alone without supervision.
11. The need for such supervision, however, is time limited based on a child's development.
12. Turning to the particular needs of [redacted] they are both on a trajectory that will make the necessity of having a nanny end within a predictable time.
13. I anticipate that sometime after the age of 13 and likely prior [to] the age of 14, [redacted] will no longer need such close supervision. By that time [redacted] will have already outgrown the need for a nanny.
14. Therefore it is my conclusion that [the petitioner's] temporary need for a Nanny will come to an end by approximately March of 2015.

In his June 20, 2012 decision denying the petition, the director found that the petitioner had failed to satisfy either alternative criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) for establishing that the nature of its claimed temporary need is a one-time occurrence. With regard to the first criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), which requires the petitioner 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, the director noted that the petitioner currently employs a nanny. With regard to the second criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), which requires the petitioner demonstrate 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, the director stated that "[a]lthough your need for the beneficiary's services will come to an end, three years is not a short duration."

The petitioner, through counsel, submitted a timely appeal.

Discussion

Upon review, the AAO agrees with the director's determination that the petitioner has failed to establish that the nature of its need for the services of the beneficiary is based upon a one-time occurrence under either of the two alternative criteria described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The AAO also finds that, at a more basic level, in addition to its failure to demonstrate that its need for such services is based upon one-time occurrence the petitioner has also failed to make even the foundational demonstration that its need for such services is "temporary," as that term is defined at 8 C.F.R. § 214.2(h)(6)(ii)(A) and supplemented at 8 C.F.R. § 214.2(h)(6)(ii)(B).² For this additional reason, the petition must also be denied.

The AAO will first address the petitioner's failure to meet its foundational responsibility of establishing that its need for the services of the beneficiary as nanny is temporary, as defined at 8 C.F.R. §§ 214.2(h)(6)(ii)(A)-(B). It will then address the director's determination, with which it agrees, that the petitioner also failed to establish that its need for such services is based upon a one-time occurrence.

As noted, the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(A) defines "temporary" as "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." Similarly, pursuant to *Matter of Artee*, it is the nature of the petitioner's need, rather than the nature of the duties, which is the controlling factor for determining whether an alien is coming "temporarily" to the United States in order to "perform temporary services or labor."

Pursuant to the guidance set forth in 8 C.F.R. § 214.2(h)(6)(ii)(A) and in *Matter of Artee*, the AAO must look to the nature of the petitioner's need for the services of a nanny rather than the nature of the duties proposed in this particular petition in order to determine whether the petitioner's need for such services is in fact "temporary."

In reviewing the evidence of record for evidence of relating to the nature of the petitioner's need for the services of a nanny (as opposed to the nature of the duties proposed for the beneficiary in this petition), it becomes quite clear that the petitioner's need for those services cannot be accurately described as "temporary." The petitioner's need for the services of a nanny did not begin on May 9, 2012, the first day of the period of requested employment. Instead, that need began in 2001 when, according to the petitioner, she first began employing a nanny. According to [REDACTED] whose statements were submitted as expert testimony, the petitioner's need for the services of a nanny will extend through "approximately March of 2015." Thus, the evidence of record establishes that the petitioner's need for

² The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

the services of a nanny which, again, is the controlling factor pursuant to *Matter of Artee*,³ encompasses the period from 2001 to March 2015, but not definitely only to March 2015 (as Ms. [REDACTED] did not assign a definite end-time for the petitioner's need, but stated only that the need for a nanny "will come to an end by approximately March of 2015."

Again, the text at 8 C.F.R. § 214.2(h)(6)(ii)(B) supplementing the definition of "temporary" found at 8 C.F.R. § 214.2(h)(6)(ii)(A) states the following:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.

This regulatory language establishes a three-year ceiling on the usage of the term "temporary." Given the apparent fourteen-year nature of the petitioner's need for the services of a nanny, its need for such services far exceeds the three-year threshold. Further, the AAO finds that, in light of [REDACTED] approximation of when the need for a nanny would end, the petitioner has not, in the words of 8 C.F.R. § 214.2(h)(6)(ii)(B), established "that the need for the employee will end in the near, definable future." For each of these reasons the petition may not be approved, as the petitioner has failed to establish that its need for the services of a nanny is temporary.

Having made this foundational determination that the record of proceeding does not establish the need as "temporary" within the meaning of the pertinent regulations, the AAO will now address the basis upon which the director denied the petition – his assessment that the petitioner had failed to satisfy either alternative described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(I) for establishing that the nature of its "temporary" need for the services of the beneficiary is based upon a one-time occurrence.

The first alternative criterion set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(I) for establishing that its need for the services of the beneficiary is a temporary one based upon a one-time occurrence requires the petitioner to establish both: (1) that it has not employed workers to perform the services or labor in the past; and (2) that it will not need workers to perform the services or labor in the future. As noted, the petitioner concedes that it has employed a nanny since 2001, which precludes approval under this criterion.

The second alternative criterion set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(I) for establishing that its need for the services of the beneficiary is a temporary one based upon a one-time occurrence requires the petitioner to establish that it has an employment situation that is otherwise permanent,

³ It is noted that the excerpt from the *Immigration Procedures Handbook* submitted by counsel (counsel did not provide the names of the author or publisher, or the year of this book's publication) provides for this same analysis. In part, the excerpt submitted by counsel states the following:

The temporariness of the employer's need for the alien's skills, and not just the temporariness of the employer's need for the particular alien, is the crucial element of the H-2B category.

but a temporary event of short duration has created the need for a temporary worker. Based upon the AAO's analysis regarding the "temporary" nature of the petitioner's need set forth above, the petitioner fails to satisfy this alternative criterion. Again, it is the nature of the petitioner's *need* for the services, rather than the nature of the duties proposed in a particular petition which controls. The petitioner's "temporary event of short duration" is its claimed fourteen-year need for the services of a nanny. Such a lengthy need does not constitute the type of "temporary event of short duration" described by the second alternative criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(I).⁴

For all of these reasons, the petitioner has failed to establish either: (1) that it has not previously employed workers to perform the duties proposed for the beneficiary in the past and that it will not need workers to perform them in the future; or (2) that it has an employment situation that is otherwise permanent, but that a temporary event of short duration has created the need for a temporary worker. *See* 8 C.F.R. § 214.2(h)(6)(ii)(B)(I). Accordingly, the petitioner has failed to demonstrate that its need for the services of the beneficiaries is a temporary one, based upon one-time occurrence, as required by 8 C.F.R. § 214.2(h)(6)(ii)(B).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

⁴ On appeal counsel notes that the second alternative criterion of 8 C.F.R. § 214.2(h)(6)(ii)(B)(I) allows for a period of approval of up to three years. However, pursuant to regulatory criteria and the caselaw set forth above, as well as the H-2B guidance submitted by counsel, is the nature of the petitioner's *need*, rather than the nature of the *duties*, which is the controlling factor for determining whether an alien is coming "temporarily" to the United States in order to "perform temporary services or labor." The evidence of record establishes that the petitioner's *need* for the services of a nanny, encompasses the period lasting from 2001 to 2015.