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FILE: EAC 07 085 53602 Office: VERMONT SERVICE CENTER

Date: **MAR 24 2008**

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center issued a decision recommending approval of the nonimmigrant visa petition, and he certified his decision to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The director's decision will be affirmed, although the petition is now moot.

The petitioner is a father who filed this H-2B petition in order to continue to employ the beneficiary as a live-in monitor to care for his children. According to the Form I-129 (Petition for Nonimmigrant Worker), the beneficiary has been in the United States since March 28, 2005, and has been working as the petitioner's live-in child monitor pursuant to two previous H-2B petitions that were approved for the one-year periods November 22, 2004 to November 21, 2005 and November 22, 2005 to November 21, 2006. As noted above, the employment period specified in the present petition is November 22, 2006 to November 21, 2007.

On the Form I-129 the petitioner asserted an H-2B intermittent need, as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B)(4), which states:

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.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

The AAO notes that the petition is moot, as the period for which the alien worker was sought - November 22, 2006 to November 21, 2007 – has passed.

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

. . . .

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).

The Department of Labor (DOL) decided to not approve the petitioner's application for labor certification, based upon its determination that the request to continue the beneficiary's employment for an additional year indicates a permanent position.

Upon review of the record of proceedings as supplemented by affidavits, letters, and other documents submitted into the record as countervailing evidence after the DOL determination, the service center director determined that the petitioner had overcome the basis of the DOL decision to not approve the petitioner's application for labor certification, and that the petitioner had demonstrated that its need for the child monitor for an additional year qualifies as an H-2B temporary need. The AAO agrees.

The AAO does not concur with counsel's assertion that there "is no distinction between the facts of this case and [*Wilson v. Smith*, 587 F. Supp. 470 (D.C.D.C., 1984)]." The AAO does not agree with counsel's statement (at page 3 of his letter of May 31, 2007) to the effect that *Wilson v. Smith* held that a child care position will always qualify as an H-2B temporary position. Further, counsel's inclusion of other H-2B certifications and AAO decisions is not persuasive. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. Counsel's references to AAO non-precedent decisions have no persuasive impact. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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. 8 C.F.R. § 214.2(h)(6)(ii)(B). Based upon the totality of the particular evidence submitted as countervailing evidence in this proceeding – in particular the birth of the third child during the employment period specified on the Form I-129 (Petition for Nonimmigrant Worker) - the AAO finds that the petitioner has demonstrated sufficient circumstances for an extension of the beneficiary's H-2B status for the period requested in the petition. Further, the additional one-year period of H-2B employment does not violate the 3-year limitation on admission of an H-2B nonimmigrant at 8 C.F.R. § 214.2(h)(13)(iv). Accordingly, the AAO concurs with the director's conclusion that the petition merits approval for the period of employment specified on the Form I-129, that is, November 22, 2006 to November 21, 2007. The AAO finds no factual or legal impediment to approval of the petition except that it is now moot due to the passage of time. However, because it has become moot, it may not be approved at this time.

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 met that burden.

ORDER: The director's decision is affirmed although the petition is moot due to the passage of time.