

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D4

JUN 22 2005



FILE: EAC 03 014 53282 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, because the evidence indicates that the petition should have been granted. The petition will be denied as moot, because the period of employment for which the petition was filed has elapsed. The appeal will be dismissed.

The petitioner filed this H-2B petition for her parents in order to employ the beneficiary as their live-in caregiver for the one-year period October 15, 2002 to October 14, 2003.¹ 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." 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).

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. DOL stated that the job duties are "part of the normal and continuing operation of [the petitioner's] household and are, therefore, permanent and ongoing in nature," and that the petitioner failed to provide information about who is going to undertake the duties after the period specified for employment of the beneficiary.

The director denied the petition on the basis that the petitioner had not "overcome the assertion by [DOL] that the job is not temporary."

On appeal, counsel contends that the evidence of record establishes that the position is temporary in nature. Counsel also contests what he understood to be another basis cited by the director for denial, namely, that the

¹ The AAO has noted the fact that one of the parents, Mrs. Sinclair, died prior to the director's decision.

petitioner had not timely submitted the DOL determination on the petitioner's application for temporary labor certification, as required by the regulations at 8 C.F.R. §§ 214.2(h)(6)(iii)(C) and (E), and 8 C.F.R. § 214.2(h)(6)(iv)(A).

At the outset, the AAO finds that, although the director's decision could have been more precisely worded, it denied the petition only on the basis that the petitioner had not established that the proffered position was temporary. The AAO also finds that there was no basis for denying the petition for failure to submit a timely DOL determination, as the record establishes that the DOL determination, made on October 1, 2002, predated the filing of the petition October 17, 2002.

The AAO concurs with counsel's contention that the director erred in finding that the countervailing evidence submitted by the petitioner "does not overcome the assertion [sic] by the [DOL] that the job is not temporary."

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

TEMPORARY – Care of an elderly couple with complex medical conditions. Provide care and guidance as necessary in daily routine. Assist the wife into and out of bed and wheelchair to lavatory and up and downstairs; bathe and dress her, clean her, change diapers, etc.

In her letter of December 16, 2002, [REDACTED] related that her mother has died, but that her father will continue to require a person to provide live-in care because he is 86 years old, "has a slow heart and high blood pressure," and needs someone "early in the morning, when [he] wakes up to assist him in getting dressed and to provide care and guidance as necessary in his daily routine." The daughter also states:

I reasonably anticipate requiring the services of the Beneficiary for a period of less than a year until October 14, 2003 [the ending date of the period of requested employment]. I intend to work part-time and from home so that I could [take] care of my father when necessary, and subsequently the services of a caregiver will no longer be required.

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).

DOL correctly identified the temporary labor condition application as being for a one-time occurrence. In the aforementioned letter of December 16, 2002, however, Mr. Sinclair's daughter stated: "This is also to advise you that the nature of the need for the Beneficiary's services is Intermittent." This statement conforms with Section 2 of the petitioner's Form I-129 Supplement H, which describes the proposed employment as intermittent and the temporary need as unpredictable.

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, with the addition of the aforementioned letter from the [REDACTED] the totality of evidence establishes that the need 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, a 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. Specifically, the evidence of record establishes that the need for a live-in caretaker would not extend beyond the one-year period ending October 14, 2003, by which time the petitioner anticipates being able to assume her father's care.

As just discussed, the petition should have been approved. However, the regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) provides that, if a petition is approved after the date the petitioner indicated that the services would begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner. As the end-date of the period for which the alien's services were specified in the petition has passed, approval of the petition at this time would be inconsistent with the regulation, and it would have no practical effect. Therefore, the petition will be denied as moot.

ORDER: The director's decision of May 9, 2003 is withdrawn. The petition is denied, because the matter is moot due to the passage of time.