



U.S. Citizenship
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FILE: SRC 06 122 51939 Office: TEXAS SERVICE CENTER Date: **MAR 15 2007**

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:

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, Chief
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 dismissed and the petition will be denied.

The petitioner desires to extend its authorization to employ the beneficiary as an elder care giver pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for an indefinite period. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made prior to the filing date of the petition. The director also determined that the petitioner had not submitted documentation to show that the beneficiary previously held H-2B classification and denied the petition.

On appeal, the petitioner states that he needs a worker to care for his stroke-stricken spouse. The petitioner also states that the request for the certification has been ongoing for six months.

As discussed below, the AAO agrees with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record supports the director's decision to deny the petition. The AAO will dismiss this appeal.

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 regulation at 8 C.F.R. § 214.2(h)(6)(iii) states in pertinent part:

(C) 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). . . .

The regulations stipulate that an H-2B petition for temporary employment in the United States 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. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on March 21, 2006 without a temporary labor certification, or notice detailing the reasons why such certification could not be made. On May 19, 2006, the director requested the petitioner to submit a certified temporary labor certification issued by the Department of Labor (Form ETA 750) prior to the petition's filing, the petitioner's tax identification number and annual income, a copy of the beneficiary's passport and proof of the beneficiary's H-2B classification.

In response to the director's request for evidence, the petitioner submitted a copy of Form I-129 reflecting his social security number and annual income and a copy of the biography page of the beneficiary's passport. The

petitioner failed to provide a certified temporary labor certification issued prior to the filing of the petition on March 21, 2006. Absent such temporary labor certification, the petition can not be approved.

Further, the petition was filed to continue the beneficiary's previously approved employment as an H-2B nonimmigrant worker. However, the petitioner did not provide evidence of the beneficiary's current H-2B nonimmigrant classification.

Beyond the decision of the director, the petitioner has not established the temporary nature of the employment. 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 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 instant petition does not indicate the type of employment need but it does indicate that the temporary need is unpredictable. The petition indicates that the dates of intended employment are from March 15, 2006 until the death of [REDACTED]. The record does not contain any medical evidence from a physician indicating the life expectancy of this person. Therefore, the petitioner has not established a temporary need for the beneficiary's services.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ The petition indicates that the beneficiary will be responsible for the care of [REDACTED] who is said to be the petitioner's spouse.