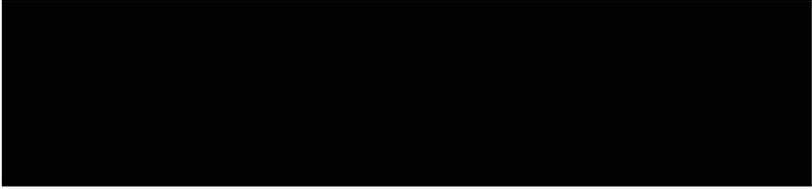


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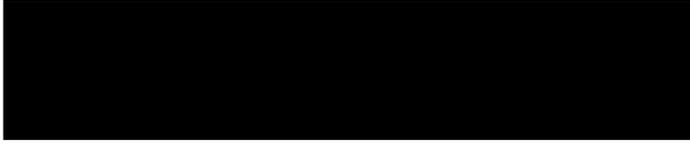
D4

FILE: EAC 05 053 53353 Office: VERMONT SERVICE CENTER Date: MAY 29 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:



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.

for Michael T. Kelly
Robert P. Wiemann, Chief
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 appeal will be dismissed. The petition will be denied although the matter is moot due to the passage of time.

The petitioner operates a computer consultant business. It desires to employ the beneficiary as a PGT software analyst and consultant 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 one and one-half years. 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 established a temporary need for the beneficiary's services and denied the petition.

On appeal, counsel for the petitioner states that he will submit evidence of the filing of the labor certification and adjustment of the beneficiary's stay to one year for a one-time occurrence. Counsel also states that he needs 120 days to submit a brief and/or evidence to the AAO. To date, no such brief and/or evidence have been submitted to the AAO. Therefore, the record is considered complete.

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 December 13, 2004 without a temporary labor certification that had been certified by the DOL, or notice detailing the reasons why such certification could not be made. The Application for Alien Employment Certification (Form ETA 750) that is contained in the record of proceeding has not been certified by the DOL. The petitioner has failed to provide a certified temporary labor

certification issued prior to the filing of the petition on December 13, 2004. Absent such temporary labor certification, the petition cannot be approved.

Further, 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 indicates that the employment is a one-time occurrence and that the temporary need is unpredictable.

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)(I).

The petition, Form I-129, indicates that the petitioner currently employs 85 people. The petition also indicates that the dates of intended employment are from January 2005 until July 2006. The petitioner states that the beneficiary is the only person in Puerto Rico that has specialized knowledge and expertise in the PGT software. The uncertified copy of the Form ETA 750 contained in the record of proceeding indicates that the job duties are to install and test PGT software and to train future specialists on the PGT project. Therefore, the petitioner has not established that it will not need workers to perform the services or labor in the future. Also, the petitioner has not shown that the need is for a temporary event of short duration particularly when the services are needed for one and one-half years. Accordingly, the petitioner has not established that its need for the beneficiary's services is temporary.

It is noted that the petitioner requested the beneficiary's services from January 2005 until July 2006. Therefore, the period of requested employment has passed.

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. The petition is denied although the matter is moot due to the passage of time.