



U.S. Citizenship
and Immigration
Services

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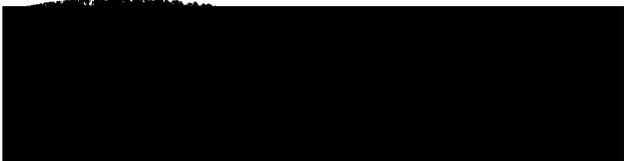
FILE: EAC 03 085 52069 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will approved.

The petitioner is a private tennis club that employs the petitioner as a tennis program manager and wishes to extend her H-1B status for a seventh year of eligibility, pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition for the seventh year extension and stated that the beneficiary had reached her maximum period of time as an H-1B prior to the filing of the instant petition. On appeal, counsel states that the beneficiary was in legal H-1B status at the time the petition was filed, and submits new documentation.

In general, section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4) provides that: “[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years.” However, the amended American Competitiveness in the Twenty-First Century Act (AC21) removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030A(a) of the 21st Century Department of Justice (DOJ) Appropriations Act, § 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).

(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

Section 11030A(b) of the 21st Century DOJ Appropriations Act amended § 106(a) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation for the seventh year extension filed January 22, 2003; (2) the director's request for additional evidence, dated April 25, 2003; (4) counsel's letter responding to the director's request, dated May 5, 2003; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition, finding that the beneficiary had reached her maximum allowable period of stay in H-1B status on September 30, 2002. Citing 8 C.F.R. § 214.2(h)(13)(iii), the director stated that the petition may not be approved, since the beneficiary had exceeded her authorized period of stay when the Form I-129 petition for the seventh year extension was filed on January 22, 2003. Although the director denied the petition by citing to 8 C.F.R. § 214.2(h)(13)(iii), this provision is a limitation on admission and does not set forth a ground for denying the petition. The director would have more appropriately denied the petition under 8 C.F.R. § 214.2(h)(13)(i)(B) which provides, in relevant part: "When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) may not be approved. . . ." The AAO finds that the director denied the petition under this regulation despite the director not citing the correct provision of law.

On appeal, counsel states that the beneficiary was in status at the time the petition was filed, due to a pending petition for an extension of status that was subsequently approved. The petitioner submitted sufficient evidence to establish this claim. Counsel further claims that the beneficiary began her H-1B period of stay on January 23, 1997, and that the beneficiary's six full years in H-1B status ended on January 23, 2003. Counsel submits a copy of a Form I-797 approval notice indicating that the beneficiary was initially granted H-1B visa status with a validity period from January 23, 1997 until November 24, 1999. The petitioner previously submitted a copy of an I-797 approval notice indicating that the beneficiary was granted additional H-1B visa status with a validity period from January 17, 2000 to September 30, 2002. Nevertheless, counsel does not provide evidence to account for the beneficiary's full six years of authorized period of stay as an H-1B. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). However, it is noted that counsel's assertions apply the most restrictive possible accounting of the beneficiary's period of stay, counting six years from the beneficiary's initial approval.

In order to be eligible for the seventh-year extension, the petitioner must establish that the beneficiary has either a Form ETA-750 or a Form I-140 which has been pending for 365 days or more at the time of filing the petition. Policy guidance issued by CIS on April 24, 2003 lists the documentation needed to establish that an application for labor certification filed on behalf of the H-1B beneficiary has been pending 365 days or more, as the following:

A document from a State Workforce Agency (SWA) notifying the employer, the employer's representative, the Department of Labor, or the [CIS] that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more; or

A document from one of the Department of Labor's Employment and Training Administration (ETA) regional offices notifying the employer, the employer's representative, or the [CIS] that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more.

The memorandum requires that "[t]he above documents must include the name of the petitioning employer, the date that the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the pending Form ETA-750." Memorandum from [REDACTED] Acting Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD 03-09*. HQBCIS 70/6.2.8-P (April 24, 2003), page seven.

Contained in the record is a copy of a letter from the Department of Labor's ETA Philadelphia regional office with the required identifying information. The letter indicates that the beneficiary had an ETA-750 filed on her behalf as of January 23, 2002, exactly 365 days prior to the filing of the instant petition. Thus, the beneficiary is eligible to apply for the seventh-year extension.

As noted above, the petitioner proved that the beneficiary was in legal status at the time of filing the instant petition. Because the beneficiary had not reached "the maximum allowable period of stay in the United States" due to the exception provided by AC21, the director incorrectly denied the petition pursuant to 8 C.F.R. § 214.2(h)(13)(i)(B). For this reason, the decision of the director will be withdrawn.

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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved.