

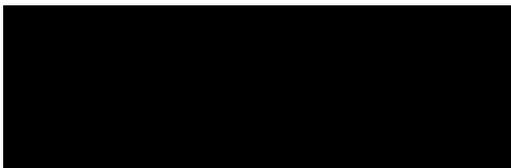


U.S. Citizenship  
and Immigration  
Services

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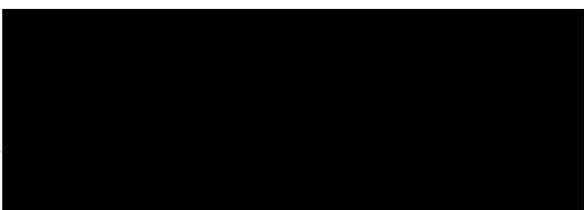
FILE: WAC 04 172 50782 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2006

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 director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides wholesale and retail perfumes and cosmetics. It seeks to employ the beneficiary as a contract analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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 on the ground that the petitioner filed the H-1B petition seeking to extend the beneficiary's H-1B nonimmigrant status under section 106(a) of the American Competitiveness in the 21<sup>st</sup> Century Act (the AC21), after the beneficiary's nonimmigrant status expired on March 8, 2004.

The director denied the petition because the beneficiary had remained in the United States in H-1B status for over six years and the petitioner had not satisfied the requirements for an extension of stay under the "American Competitiveness in the Twenty-First Century Act," (AC21) and the Twenty-First Century Department of Justice Appropriations Authorization Act" (21<sup>st</sup> Century DOJ Appropriations Authorization Act). The director determined that because the petitioner did not file for an extension for the beneficiary while the beneficiary was still in valid H-1B status, the beneficiary was not eligible for approval under AC21 and the 21<sup>st</sup> Century DOJ Appropriations Authorization Act.

On appeal, counsel submits in the record a letter from both the petitioner and from the beneficiary's physical therapist. The petitioner's September 20, 2004 letter states that the filing of the H-1B petition on May 28, 2004, two months after the expiration of the beneficiary's H-1B status, was beyond the control of the beneficiary. The August 18, 2004 letter from the physical therapist indicates that the beneficiary had undergone physical therapy treatment from February 26, 2004 to April 21, 2004; and that the beneficiary was unable to travel due to migraines and anxiety disorder.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the director's denial letter; and (4) Form I-290B and additional evidence. The AAO reviewed the record in its entirety before issuing its decision.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101 (a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year.

Section 106(a) of the AC21 allowed an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien was the beneficiary of a Form I-140 or an application for adjustment of status; and (2) 365 days or more had passed since the filing of the labor certification that is required for the alien to obtain status as an employment-based immigrant, or 365 days or more had passed

since the filing of the Form I-140. Section 104(c) of the AC21 enables H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

On November 2, 2002, the 21<sup>st</sup> Century DOJ Appropriations Act was signed into law. It amended section 106(a) of the AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of the AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any labor certification that is required or used by the alien to obtain status as an employment-based immigrant; or (2) 365 days or more have passed since the filing of the Form I-140. Section 106 of the AC21 allows for H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

The previous approval notice (WAC-03-176-54124) in the record reflects that the H-1B status granted to the beneficiary expired on March 8, 2004. The petitioner filed the instant petition on May 28, 2004, 2 ½ months after the expiration of the beneficiary's status.

The regulation at 8 C.F.R. § 214.1(c)(4), which relates to extensions of stay and timely filing and maintenance of status, conveys that "[a]n extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed." There is an exception to this rule. It is as follows:

Failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
- (ii) The alien has not otherwise violated his or her nonimmigrant status;
- (iii) The alien remains a bona fide nonimmigrant; and
- (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

The regulations also state, "A request for a petition extension may be filed *only if the validity of the original petition has not expired.*" 8 C.F.R. § 214.2(h)(14) (Emphasis added). The petition was filed in this case two months following the expiration of the beneficiary's H-1B status.

In a June 21, 2001 memorandum CIS has clarified that the request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the Form I-129 is filed. See Memorandum from William R. Yates, 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 AD03-09*. HQBCIS 70/6.2.8-P (April 24, 2003).

To show that the filing of the H-1B petition after the expiration of the beneficiary's H-1B status was due to extraordinary circumstances beyond the control of the petitioner, counsel submits letters from the petitioner and the beneficiary's physical therapist. These letters are not persuasive and are inconsistent with the petitioner's May 26, 2004 letter. In the May 26, 2004 letter that accompanied the H-1B petition, the petitioner stated that the H-1B petition was filed following the expiration of the beneficiary's H-1B status because the petitioner and the beneficiary "did not realize that an extension could be filed" and that the "failure to submit the application in a timely manner is unintentional and under the circumstance[s] beyond the petitioners [sic] control"; and the petitioner sought relief under 8 C.F.R. § 214.1(c)(4). Thus, the May 26, 2004 letter conveyed that the petition was filed after the expiration of the beneficiary's H-1B status because the petitioner did not know that an extension could have been filed. The letter did not indicate that the petition was filed after the expiration of the beneficiary's status because of the beneficiary's undergoing of physical therapy.<sup>1</sup> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No independent evidence explains or reconciles the inconsistencies in the record.

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 not sustained that burden.

**ORDER:** The appeal is dismissed. The petition is denied.

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<sup>1</sup> The petitioner does not explain how the beneficiary's physical therapy treatment hindered the petitioner from filing an H-1B petition prior to the expiration of the beneficiary's H-1B status. The beneficiary is not a party to the proceedings. 8 C.F.R. §103.2(a)(2).