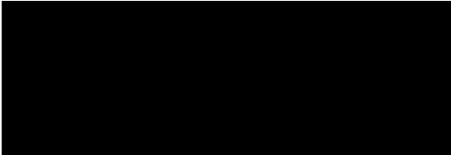


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FILE: WAC 05 020 50542 Office: CALIFORNIA SERVICE CENTER Date:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be sustained. The petition will be approved.

The petitioner designs custom homes. It seeks to employ the beneficiary as an architectural designer 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 record of proceeding before the AAO contains: (1) the October 28, 2004 Form I-129 and supporting documentation; (2) the director's January 24, 2005 request for further evidence (RFE); (3) the petitioner's April 14, 2005 response to the RFE; (4) the director's August 2, 2005 RFE; (5) the petitioner's October 11, 2005 response to the RFE; (6) the director's November 17, 2005 denial decision; and (7) the Form I-290B and the petitioner's plea for leniency in interpreting the regulations. The AAO reviewed the record in its entirety before issuing its decision.

Citizenship and Immigration Services' (CIS) records reflect that the beneficiary first arrived in the United States in B-2 status and changed status to H-4 status beginning on December 1, 1998. On March 27, 2000 the beneficiary changed her status to H-1B. The beneficiary has continuously resided in the United States in H-1B status through the filing date of the instant petition. The record contains a letter from the California Employment Development Department (EDD) dated February 6, 2004 sent to the petitioner's prior counsel indicating that the California EDD had received the application for alien employment certification. On October 28, 2004 the petitioner filed the petition that is the subject of this appeal.

On November 17, 2005, the director indicated that the only issue to be determined is whether the petitioner had established that the beneficiary is entitled to a seventh-year H-1B extension.

The director noted the applicable law at section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), that provides: "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." The director also noted pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A) that:

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

The director also addressed the exemption to the six-year H-1B limitation created by the American Competitiveness in the Twenty-First Century Act (AC-21) (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21)) and the November 2, 2002 amendment by Section 11030A of Public Law 107-273, 21st Century Department of Justice Appropriations Authorization Act, (DOJ Act) amendment that states:

(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 11030(A)(b) of DOJ-21 amended section 106(a) of AC-21 to state the following:

(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 director determined that the beneficiary began her "H" status on December 1, 1998 and that her period of authorized admission as an "H" nonimmigrant had expired November 30, 2004. The director noted that 365 days had not passed since the Form ETA 750 had been filed February 6, 2004; thus the AC21 exemption as modified by the DOJ Act did not apply to the beneficiary.

A recent CIS policy memoranda has clarified that time spent as an H-4 dependent does not count against the maximum allowable periods of stay available to principals in H-1B status. See Memorandum from Michael Aytes, Associate Director, Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent for the United States for Over One Year*. HQPRD 70/6.2.8 (December 5, 2006). The memorandum, at page 2, states, in part, the following:

USCIS, therefore, is now clarifying that any time spent in H-4 status will not count against the six-year maximum period of admission application to H-1B aliens. Thus, an alien who

was previously an H-4 dependent and subsequently becomes an H-1B principal will be entitled to the maximum period of stay applicable to the classification.

The AAO notes that the statute and relevant regulation limit the time a person may spend in the United States in H-1B status and does not put a maximum limit on the amount of time an alien may spend in H-4 visa status. See section 214(g)(4) of the Act, 8 USC § 1184(g)(4); 8 C.F.R. § 214.2(h)(13)(iii)(A). The spouse and unmarried minor children of an H-1B principal are subject to the same period of admission and limitation as the principal. 8 C.F.R. § 214.2(h)(9)(iv). Under the authority cited above, the AAO finds that the beneficiary's maximum period of admission in H-1B visa status expired on March 26, 2006.

Two prior CIS policy memoranda also clarified how CIS is to implement certain provisions of AC-21 and DOJ-21. In accordance with these two policy memoranda, the AAO has determined that the beneficiary is eligible for an exemption from the six-year limitation on her H-1B classification under section 106(a) of AC-21, and for an extension of her H-1B status for a seventh year under section 106(b) of AC-21.

Both memoranda provide, in part, that an alien who is otherwise eligible for an H-1B extension does not need to first file a form I-129 requesting an extension of time to allow the beneficiary to complete the six years, and then file an additional Form I-129 requesting an extension of time beyond the six years. Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21)(Public Law 106-313)* HQPRD70/6.2.8-P (May 12, 2005); Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year: Adjudicator's Field Manual Update AD05-15*. HQPRD70/6.2.8 (September 23, 2005). The second memorandum, at page 5, states, in part, the following:

Once [the requirements of Section 106(a) of AC-21] have been met, the alien may be granted an extension beyond the 6-year maximum on or prior to the date the alien reaches the 6-year maximum. Such extensions may only be granted in one-year increments, but may be requested on a single (combined) extension request for any remaining time left in the initial 6-year period. Requiring the filing of two extension petitions merely increases petitioner and CIS workloads, and has no basis in statute.

The date of the filing of the application for alien labor certification, October 21, 2004, is less than 365 days prior to the November 2, 2004 requested employment start date specified on the Form I-129. This would appear to preclude the beneficiary from a seventh year of H-1B status, as, at first glance, the application for alien labor certification appears to not have been filed more than 365 days prior to the petition's requested employment start date. However, the AAO has reviewed the record and determined that the alien's maximum period of stay in H-1B status expired on March 26, 2006, which is more than 365 days after the filing date of the Form ETA-750. Thus, the beneficiary will begin working under the seventh year extension of status

under AC-21 on March 27, 2006. That date is more than 365 days after the application for alien labor certification was filed. Under the CIS guidance quoted above, the petitioner may combine the extension request to complete the alien's six year maximum and to extend for a seventh year under AC-21 on one Form I-129 petition. Thus, the beneficiary is eligible for a seventh year of H-1B status, and the AAO will reverse the director's denial of the petition.

The burden of proof in this proceeding 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.