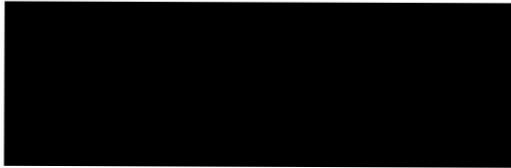




U.S. Citizenship
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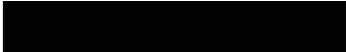
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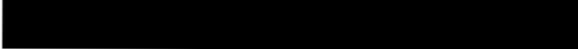
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FILE: WAC 07 083 52733 Office: CALIFORNIA SERVICE CENTER Date: **JUL 24 2008**



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 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 sustained. The petition will be approved.

The petitioner is an architecture firm that seeks to extend beyond the six-year limitation the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 determined that the beneficiary was not entitled to be employed for an additional year under the provisions of the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (21st Century DOJ Appropriations Authorization Act) because the I-140 filed on his behalf was denied.

On appeal, counsel states, in part:

[W]e filed a new I-140 petition, SRC-07-108-53847, on February 20, 2007. . . . [T]he first I-140 petition (SRC-07-022-51770) was denied for lack of some supporting documents. Because we failed to submit some of the required documentation with the first I-140 petition, we decided to file a complete, new I-140 petition rather than appeal the February 1, 2007 denial.

The second I-140 petition, SRC-07-108-53847, is currently pending at the Texas Service Center. . . .

Subsequent to filing the appeal, counsel submitted a letter dated April 28, 2008, indicating that the beneficiary had departed the United States and was granted a new H-1B visa at the U.S. Consulate in London, valid from October 31, 2007 to October 30, 2010. Counsel submitted a copy of the beneficiary's I-94, Departure Record, reflecting that the beneficiary had re-entered the United States on October 31, 2007 and was granted H-1B classification through November 9, 2010. Counsel also submitted a copy of the I-140 approval notice with a priority date of March 25, 2005.

A review of Citizenship and Immigration Services (CIS) records indicates that the beneficiary in the instant case was the beneficiary of a series of approved H-1B petitions, valid from December 13, 2000 to May 1, 2002; from May 2, 2002 to May 1, 2005; from May 2, 2005 to February 11, 2007; and from August 8, 2005 to February 11, 2007. The instant petition was filed on January 26, 2007, with the dates of intended employment from February 12, 2007 to February 11, 2010. The petitioner also filed an I-140 petition on behalf of the beneficiary on October 30, 2006, which was denied on February 1, 2007. A second I-140 was filed on behalf of the beneficiary on February 20, 2007, which was approved on August 28, 2007.

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, 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 § 11030(A)(a) of the 21st Century DOJ Appropriations Authorization 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 11030(A)(b) of the 21st Century DOJ Appropriations Authorization 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.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A):

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.

As found by the director, the beneficiary has been employed in the United States in H-1B status since February 11, 2001. The maximum period of the beneficiary's authorized stay expired on February 10, 2007.

The first issue in this matter is whether the petitioner's ETA 750 had been pending 365 days or more prior to the date the petition was filed. The petitioner submitted evidence that it filed a labor certification application Form ETA 750 on the beneficiary's behalf on March 25, 2005, more than 365 days prior to the filing of the present petition. The petitioner filed the Form I-129 petition on January 26, 2007, a date subsequent to the enactment of DOJ21. Accordingly, the pending labor certification application filed on the beneficiary's behalf can be the basis for extending his authorized period of stay in the United States in H-1B status beyond the maximum six-year limit as long as all other requirements for extension of stay and H-1B classification are met.

On appeal, counsel states that the beneficiary is eligible for a seventh-year extension, as a second I-140 petition with the same March 25, 2005 priority date was filed while the first I-140 petition was pending.¹ The petitioner submitted sufficient evidence to establish this claim. Thus, the petitioner has demonstrated that the beneficiary was in legal status at the time of filing the instant petition and the beneficiary is eligible for a seventh year of H-1B status. 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.

As discussed above, counsel submitted a copy of the beneficiary’s I-94, Departure Record, reflecting that the beneficiary had re-entered the United States on October 31, 2007 and was granted H-1B classification through November 9, 2010. Because the record contains no evidence that the beneficiary resided and was physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year, in accordance with 8 C.F.R. § 214.2(h)(13)(iii)(A), the instant petition will be approved for only a one-year period from February 12, 2007 to February 11, 2008.

It is also noted that it appears that the Western Adjudications Center (WAC) may have erroneously approved the I-129 petition Receipt #WAC-08-006-52224 for the entire three-year period, and that the petition may be subject to revocation on notice, pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

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 for a one-year period from February 12, 2007 to February 11, 2008.

¹ The AAO bases this determination on the first and the second Form I-140 petition filings, both based upon the same labor certification with a priority date of March 25, 2005. The initially filed Form I-140 was denied on February 1, 2007, and became final upon the lapse of the appeal period on March 6, 2007. The second Form I-140 based upon the same labor certification was filed on February 20, 2007.