U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 040 50098 Office: CALIFORNIA SERVICE CENTER Date: JUL 11 2005

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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 sustained. The petition will be approved.

The petitioner is a medical supply and billing company that seeks to employ the beneficiary as a director of advertising and promotions. 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 because the petitioner sought to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. On appeal, counsel contends that the director erroneously denied the petition.

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. In accordance with the regulation at 8 C.F.R. § 214.2(h)(13)(ii)(B), when an alien has spent the maximum allowable period of stay in the United States, a new petition may not be approved, with certain exceptions.

The petitioner seeks the beneficiary's services as a director of advertising and promotions. The petitioner wishes to continue the beneficiary's previously approved employment without change, and to extend the stay of the beneficiary in the United States. The petitioner did not indicate on the petition the period of time that it seeks to extend the beneficiary's H-1B status.

The director denied the petition, finding that the beneficiary had already been employed in the United States since November 26, 1996 in H-1B status, and that she had reached the maximum six-year period of stay in the United States on November 25, 2002. The director found no evidence that would allow the beneficiary to remain in H-1B status beyond this date.

On appeal, counsel asserts that the beneficiary has an approved labor certification that was filed more than 365 days prior to the filing of the immediate petition, and that the labor certification approval notice was attached to the immediate petition along with counsel's letter dated October 27, 2003. Counsel asserts that the beneficiary filed the I-140 petition (now pending adjudication) under the Legal Immigration Family Equity Act (LIFE Act) [sic] more than 365 days prior to the filing of the petition. According to counsel, the beneficiary is exempt from 8 C.F.R. § 214.2(h)(13)(iii) based on the above reasons.

Upon review of the evidence in the record, the AAO finds that the beneficiary is eligible for approval of an H-1B petition in accordance with section 106(a) of the American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21), as amended by section 106(a) of the Twenty-first Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act).

The record of proceeding before the AAO contains: (1) the Form I-129 filed on November 15, 2002; (2) the May 9, 2003 letter from the U.S. Department of Labor (DOL), Employment and Training Administration, indicating that the Form ETA 750, submitted by the petitioner on behalf of the beneficiary, was certified by the DOL; (3) the approved Form ETA 750; (4) the Form I-140 receipt notice (WAC-04-022-50883 – with the receipt date of October 30, 2003) indicating it had been filed on the beneficiary's behalf pursuant to the classification under section 203(b)(3)(A)(i) or (ii) of the Act, as a skilled worker or professional; (5) two letters from the California Employment Development Department (EDD)(Case number [redacted] the first indicating the petitioner's application for employment certification was filed with a priority date of March 1, 2000; the second dated October 30, 2000, transmitting the petitioner's application to the U.S. DOL; (6) a letter dated October 27, 2003 from counsel; (7) the director's request for additional evidence; (8) the petitioner's response to the director's request; (9) the director's denial letter; and (10) Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

In order to extend or amend the beneficiary's stay in the United States in the H-1B classification, the petitioner must demonstrate that the beneficiary qualifies for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act. In addition, an 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, with certain exceptions. 8 C.F.R. § 214.1(c)(4).

Section 106(a) of the AC21 allows an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien is the beneficiary of a Form I-140 or an application for adjustment of status; and (2) 365 days or more have 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 have 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 21st 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.

Based on the evidence in the record, the beneficiary qualifies for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act. The record reflects that the letter from EDD, (case number [redacted] has a priority date of March 1, 2000, and the May 9, 2003 letter from the EDD indicated that the DOL approved Form ETA 750 (case number [redacted] on May 9, 2003. Thus, the labor certification, which the DOL eventually approved, had been pending for more than 365 days when this Form I-129 petition was filed on November 15, 2002. The record contains the receipt notice of the Form I-140, filed on October 30, 2003, on the beneficiary's behalf pursuant to the classification under section 203(b)(3)(A)(i) or (ii) of the Act,

as a skilled worker or professional. Accordingly, the beneficiary qualifies for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

As related in the discussion above, the petitioner has established that the beneficiary is eligible to extend her stay in the H-1B classification beyond the six-year maximum period, and the petition may not be denied pursuant to 8 C.F.R. § 214.2(h)(13)(ii)(B).

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.