U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 25 2005

IN RE: Petitioner: [redacted]
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:

[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 develops and sells medical devices. It seeks to employ the beneficiary as a senior systems 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 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.

The petitioner seeks the beneficiary's services as a senior systems analyst, and wishes to continue the beneficiary's previously approved employment without change, and to extend or amend the stay of the beneficiary in the United States. The petitioner indicates on the petition that it seeks to extend the beneficiary's H-1B status to April 27, 2005.

The director denied the petition, finding that because the beneficiary had already been employed in the United States since April 26, 1998 in H-1B status, he had reached the maximum six-year period of stay in the United States on April 26, 2004. The director did not discuss whether the beneficiary qualified for benefits under the American Competitiveness in the 21st Century Act (the AC21).

On appeal, counsel claims that the director erroneously denied the petition because the beneficiary qualifies for benefits under the Act.

Upon review of the evidence in the record, the AAO finds that the beneficiary is eligible to derive benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on December 19, 2003; (2) the letter from the California Employment Development Department (EDD)(Case number 130860) indicating the petitioner's application for employment certification was filed with a priority date of June 21, 2001; (3) the application for employment certification with the priority date of June 21, 2001 and the certification date of [redacted]; (4) the receipt and approval notices issued for the Form I-140; (5) the director's denial letter; (6) Form I-290B and supporting documentation; and (7) counsel's letter dated January 12, 2004. 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 to April 27, 2005 in the H-1B classification, the petitioner must prove that the beneficiary qualifies for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

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 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 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(b) 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 petitioner has been issued, on the beneficiary's behalf, a certified application for employment certification (which had been pending for over 365 days) and an approved Form I-140. Accordingly, based on this evidence, 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 his stay in the H-1B classification beyond the six-year maximum period.

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.