U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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[redacted]

FILE: EAC 03 266 50728 Office: VERMONT SERVICE CENTER Date: MAR 22 2006

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.

for Michael T. Kelly
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 is a luxury hotel that seeks to employ the beneficiary as a benefits manager. 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 asserts 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 benefits manager, 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 from November 29, 2003 to November 29, 2004.

The director denied the petition, finding that because the beneficiary had already been employed in the United States since December 17, 1997 in H-1B and/or L-1 status, she had reached the maximum six-year period of stay in the United States. The director stated that counsel sought to qualify the beneficiary for benefits under the American Competitiveness in the 21st Century Act (the AC21) by stating that there is a pending motion to reconsider or to reopen regarding the November 15, 2001 denial of the beneficiary's Form I-140. According to the director, a denial is considered a final decision regardless of a pending appeal or motion to reopen. The director concluded that since the beneficiary did not have a pending Form I-140, the beneficiary was ineligible for an extension of stay beyond six years under the provisions of section 106(a) of the AC21 or the 21st Century DOJ Appropriations Act.

On appeal, counsel states that on October 1, 2002, a timely motion to reconsider or reopen the denial of the beneficiary's Form I-140 was filed and is currently pending. Counsel asserts that regulatory language and CIS memoranda support the beneficiary's entitlement to a seventh year extension based on the pending motion to reconsider or to reopen. Counsel references the regulation at 8 C.F.R. § 214.2(k)(11)(vi), the regulation at 8 C.F.R. § 274a.12(c)(9), the Child Status Protection Act (CSPA), and the CIS memorandum from William Yates, Acting Associate Director for Operations, dated April 24, 2003 in support of his claim.

Upon review of the evidence in the record, the AAO finds that the beneficiary is not eligible to derive benefits under the provisions of section 106(a) of the AC21 or the amendment to section 106(a) of the AC21 by the 21st Century DOJ Appropriations Act.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on September 29, 2003; (2) the filing receipt (with the notice date of December 19, 2000) for the Form I-140 (EAC-01-062-54318) that was filed on behalf of the beneficiary; (3) the director's January 29, 2002 letter denying the Form I-140; (4) the director's July 9, 2004 letter denying the I-129 filed on September 29, 2003; (5) the Form I-290B (receipt number EAC 03-005-53019) appealing the denial of the Form I-140 and the Internet printout relating to this; and (6) the Form I-290B appealing the denial for the H-1B petition and supporting documentation.

To extend or amend the beneficiary's stay in the United States to November 29, 2004 in the H-1B classification, the petitioner needed to prove that the beneficiary qualifies for benefits under section 106(a) of the AC21 or under the 21st Century DOJ Appropriations Act.

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, the AC21, as amended by the 21st Century DOJ Appropriations Act, 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 Act, § 106(a) of the 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 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.

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.

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.

The memorandum entitled "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 (AC21) (Public Law 106-313)," signed by William Yates, CIS Associate Director for Operations, on May 12, 2005, is relevant here. In the memorandum Mr. Yates states that "there are cases where an alien, who has been granted an H-1B extension beyond the 6th year, will nonetheless only be allowed to remain for the 6-year maximum period of stay." Mr. Yates further states:

> As addressed in the April 24, 2003 guidance memorandum, USCIS is required to grant the extension of stay request made under section 106(a) of AC21, in one-year increments, until such time as a final decision has been made to:
>
> A. Deny the application for labor certification, or, if the labor certification is approved, to deny the EB immigrant petition that was filed pursuant to the approved labor certification;
>
> B. Deny the EB immigrant petition, or
>
> C. Grant or deny the alien's application for an immigrant visa or for adjustment of status.
>
> If at any time before or after the filing of the single (combined) extension request a final decision is made on the above-stated grounds, the beneficiary of the extension request will not be entitled to an extension beyond the time remaining on his or her 6-year maximum stay unless another basis for exceeding the maximum applies.

The memorandum conveys that a timely and non-frivolous I-140 appeal pending at the AAO will allow an alien to request an H-1B extension beyond the 6-year limit, and that this is:

> Subject to regulatory modification, as long as a decision may be reversed on direct appeal or certification to the Administrative Appeals Office (AAO), USCIS will not consider that decision final for this purpose.

Based on the memorandum's information, a timely and non-frivolous I-140 appeal pending at the AAO will allow an alien to request an H-1B extension beyond the 6-year limit.

Counsel states that a timely motion to reconsider or reopen the denial of the Form I-140 was filed and is currently pending. CIS records reflect that the petitioner appealed the denial of the Form I-140 petition (receipt number EAC 02 122 52508) and that the appeal was dismissed on September 4, 2002. The petitioner filed a subsequent motion to reopen and reconsider the AAO's dismissal of the appeal, which was also dismissed by the AAO on July 13, 2005. No subsequent motion was filed, and the Form I-140 petition is denied. As there is no longer a pending Form I-140 petition, the beneficiary fails to qualify for benefits under section 106(a) or 106(b) of the AC21 as amended by the 21st Century DOJ Appropriations Act.

As related in the discussion above, the petitioner has not established that the beneficiary is eligible to extend her 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 not sustained that burden.

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