



U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 027 53249 Office: NEBRASKA SERVICE CENTER Date: **AUG 10 2005**

IN RE: Petitioner: [Redacted]
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:



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 Nebraska 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 an international luxury hotel, with 350 employees. It seeks to extend its employment of the beneficiary as an assistant controller under 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 beneficiary is not eligible for extension of H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). The director determined that, at the time of filing, the labor certification filed on behalf of the beneficiary had not been pending for at least 365 days.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director; and (4) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

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, 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 visa 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 section 11030(A)(a) of the 21st Century DOJ Appropriations Act, section 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 Act amended § 106(a) of AC-21 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.

On November 7, 2003, the petitioner filed the Form I-129 to extend the beneficiary's H-1B stay in the United States beyond the statutory six-year limit. The director denied the extension, noting that, on the date of filing, the labor certification application (ETA-750) filed by the petitioner with the Illinois Department of Employment Security had not been pending 365 or more days. The director's denial noted that the record contained a November 25, 2003 letter from the State of Illinois indicating its receipt of the petitioner's ETA-750 on January 7, 2003.

On appeal, counsel asserts that the language of AC21 does not require that the petitioner's labor certification have been pending at least 365 days on the date of filing. He contends that the language of AC21 provides for an extension of the maximum authorized period of stay if a labor certification application was filed by a petitioner prior to the end of the fifth year of H-1B classification and has been pending for at least 365 days on the date the six-year limit is reached. The AAO does not agree.

The regulations governing applications and petitions filed with Citizenship and Immigration Services (CIS) require that eligibility for an immigration benefit be established at the time of filing. As 8 C.F.R. § 103.2(b)(12) specifically provides:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

This regulation has general applicability to all applications and petitions before the CIS, as reflected in its case law. The principle is clear. A visa petition may not be approved at a later date based on a set of facts not present at the time of filing. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *see also Matter of Katigbak*, 14 I&N 45, 49 (Comm. 1971).

Congress is presumed to be familiar with existing law pertinent to the legislation it enacts. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979); *Valansi v. Ashcroft*, 278 F.3d 203, 212 (3rd Cir. 2002); *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 961 n. 3 (BIA 1995). If Congress had intended to make the general rule in 8 C.F.R. § 103.2(b)(12) inapplicable to petitions for extension of H-1B classification beyond the general six-year limitation, it would have done so clearly and unequivocally in AC21. It did not. Thus, 8 C.F.R. § 103.2(b)(12) applies to petitions for extension of H-1B status under AC21, as it does to all other petitions and applications before CIS.

In the instant case, the petitioner filed for an extension of the beneficiary's maximum authorized period of stay on November 7, 2003, less than 365 days after the January 7, 2003 filing of its labor certification with the Illinois Department of Employment Security. Therefore, on the date of filing, the beneficiary was not eligible for an exemption from the six-year limitation on his H-1B classification under AC21 section 106(a), and an extension of her H-1B status for a seventh year under AC21 section 106(b). Accordingly, the appeal will be dismissed.

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.