



U.S. Citizenship
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Services

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FILE: LIN 04 258 51252 Office: NEBRASKA SERVICE CENTER Date: DEC 22 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 service center director 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.

Pursuant to its desire to temporarily employ the beneficiary as a physician as a temporary worker in H-1B status, the petitioner filed a Form I-129 (Petition for Nonimmigrant Worker) to replace the beneficiary's prior H-1B employer, and to extend the beneficiary's stay in H-1B status. The prior employer, Veterans Affairs Medical Center (VAMC), filed the initial (approved) H-1B petition after the beneficiary obtained a waiver of the foreign residence requirement imposed by the beneficiary's previously obtained J visa. Under the waiver provisions, the beneficiary agreed to work for that health care facility for three years.

The director denied the petition on the ground that the beneficiary was not eligible to change employers because he had not yet completed his three-year contractual obligation to the prior employer, VAMC. The director also noted that there was no evidence of record to substantiate counsel's assertion, in response to the director's request for additional evidence (RFE), that the beneficiary had obtained a hardship waiver based upon his U.S. citizen child's medical condition.

The AAO determines that the evidence of record supports approval of the petition. The decisive factor is the existence of a second waiver not addressed by the director. As will be evident in the factual review below, at the time of the filing of the instant petition the beneficiary possessed a waiver, based on exceptional hardship that would befall his U.S. citizen son if he were required to reside in the beneficiary's home country, Pakistan.¹ This second waiver was granted after the previous waiver that was obtained prior to the beneficiary's going to work for VAMC. This hardship waiver overcomes the ineligibility that otherwise would have been operative because of the beneficiary's failure to complete his contractual obligation to VAMC.

The director's citations of authority for denying the instant petition include section 214(l)(1)(D)(2)(B) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1184(l)(1)(D)(2)(B). This provision concerns physician aliens who, like the beneficiary here, have obtained a change of status from the "J" nonimmigrant classification after receiving a waiver based on an agreement to serve a particular health facility or health care organization for three years. This section of the Act declares that any such person who has failed to fulfill the contractual obligation incurred under the waiver shall be ineligible "to apply for an immigrant visa, for permanent residence, or for any other change of nonimmigrant status." The section also states that the ineligibility will continue "until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least 2 years following departure from the United States." *See also* 8 C.F.R. § 212.7(a)(9)(iii) and (iv).

The present petition follows approval of an earlier H-1B petition that VAMC had filed in order to employ the beneficiary as a physician. Citizenship and Immigration Services (CIS) approved the petition for the period

¹ The AAO recognizes that counsel's RFE reply erroneously relied upon a non-existent waiver for medical reasons. However, the record of proceeding conclusively shows that a waiver for exceptional hardship had been granted in the interim between the grant of the waiver used by VAMC and the filing of the instant petition.

October 19, 2003 until October 18, 2006. On September 20, 2004, during the validity period of the approved VAMC petition, [REDACTED] filed the instant petition to become the beneficiary's new employer and to extend the beneficiary's stay in H-1B status.

Prior to the VAMC petition, the beneficiary was in J nonimmigrant status, under section 101(a)(15)(J) of the Act, as an alien receiving graduate medical education or training. Section 212(e)(iii) of the Act, 8 U.S.C. § 1182(e)(iii) states that, absent the grant of an appropriate waiver by CIS, those who come to the United States to receive graduate medical education or training in J status are not eligible to apply for an immigrant visa, permanent residence, or an H or L nonimmigrant visa "until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate period of at least two years following departure from the United States." The Secretary of the Department of Homeland Security may waive the two-year foreign residence requirement under certain conditions. Section 212(e) of the Act, 8 U.S.C. § 1182(e).

Before VAMC filed its petition, the beneficiary was granted a waiver pursuant to the regulation at 8 C.F.R. § 212.7(c)(9), which allows foreign medical graduates to apply for a waiver of the two-year residency requirement based on a request by a State Department of Public Health (or equivalent) if they meet the following conditions:

- (A) They were admitted to the United States under section 101(a)(15)(J) of the Act, or acquired nonimmigrant J nonimmigrant status before June 1, 2002, to pursue graduate medical education or training in the United States;
- (B) They have entered into a bona fide, full-time employment contract for 3 years to practice medicine at a health care facility located in an area or areas designated by the Secretary of Health and Human Services as having a shortage of healthcare professionals ("HHS-designated shortage area");
- (C) They agree to commence employment within 90 days of receipt of the waiver under this section and agree to practice medicine for 3 years at the facility named in the waiver application and only in HHS-designated shortage areas. . . .

The record indicates, and the petitioner does not dispute, that, as a condition of the waiver under 8 C.F.R. § 212.7(c)(9), the beneficiary entered into a contract to serve at VAMC for three years, and that the beneficiary had not fulfilled his three-year contractual commitment at the time [REDACTED] filed the instant petition.

In the interim between approval of the VAMC petition and [REDACTED] filing of the instant petition to replace VAMC as the beneficiary's employer, a second waiver was granted. The new waiver was granted for exceptional hardship under 8 C.F.R. § 212.7(c)(5), which states, in part:

An alien who is subject to the foreign residence requirement and who believes that compliance therewith would impose exceptional hardship upon his/her spouse or child who is a citizen of the United States or a lawful permanent resident alien, or that he or she cannot return to the country of his or her nationality or last residence because he or she will be

subject to persecution on account of race, religion, or political opinion, may apply for a waiver on Form I-612.

On appeal, counsel submits the following: (1) a Form I-290B; (2) a brief in the form of February 23, 2005 letter to the service center, styled "Motion to Reopen/Reconsider"; (3) a Form I-613 (Request for United States Agency Recommendation – Section 212(e) Waiver), which bears the U.S. Department of State's November 27, 2003 recommendation for approval of a waiver based on exceptional hardship, and which relates to the second waiver that CIS granted the beneficiary; (4) an affidavit from previous counsel that, in most pertinent part, notes that there are two waivers in this case: the agreement-to-serve-three-years waiver that accompanied the VAMC petition; and the more recently approved exceptional hardship waiver upon which the petitioner here relies; (5) a Form I-797 notice that CIS had received the beneficiary's application for an exceptional hardship waiver; (6) a Form I-797 notice that CIS has granted the exceptional hardship waiver as of November 19, 2003, which precedes the filing of the instant petition on September 20, 2004; and (7) a three-ring binder containing copies of the documents that former counsel had submitted in support of the beneficiary's application for the hardship waiver.

On the basis of the evidence on appeal and elsewhere in the record that the exceptional hardship waiver was in effect when the instant petition was filed, the AAO is persuaded by the argument of counsel and former counsel on appeal. CIS has approved a waiver subsequent to the one involving the agreement to work for VAMC. That waiver is valid on its face, was in existence at the time of the instant petition, and, therefore, overcomes the basis of ineligibility cited by the director.

The AAO notes that the Department of State recommended and CIS granted the second waiver in this case, notwithstanding the grant of an earlier waiver with a pendant contract that the statute and regulations require to be fulfilled. While the denial of waivers by CIS is within the AAO's purview when appealed, the propriety of CIS' having approved the second existing waiver is not before the AAO.

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 and the appeal shall accordingly be sustained.

ORDER: The appeal is sustained. The petition is approved.