

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

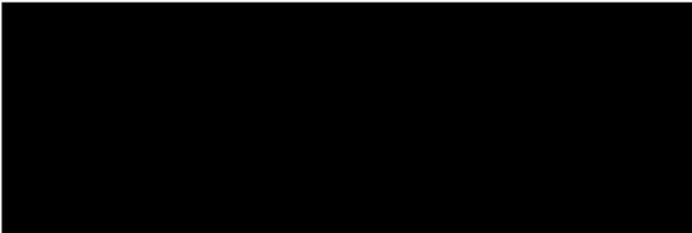
FILE: WAC 03 164 51523 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2006

IN RE: Petitioner:
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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 in the machine manufacturing industry and seeks to employ the beneficiary as a mechanical engineer – tooling engineer. 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).

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 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 May 23, 2004. This would constitute a seventh year of H-1B eligibility as the beneficiary had been working for the petitioner in approved status from May of 1997 until May 25, 2003.

The director denied the petition stating that 365 days had not passed between the filing of an applicable labor certification and the filing of the present petition. On appeal, counsel states that the director's decision is erroneous and that 365 days had passed between the filing of the applicable labor certification application and the present petition.

Upon review of the evidence in the record, the AAO finds that the beneficiary is not eligible to derive benefits from the amendment to section 106(a) of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (AC21) by the 21st Century DOJ Appropriations Act.

In order to extend or amend the beneficiary's stay in the United States to May 23, 2004 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.

Originally, 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. Section 104(c) of the AC21 enabled 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. As amended, 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 does not qualify for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act. The record reflects that 365 days or more has not passed since the filing of a labor certification required or used by the beneficiary to obtain status as an employment-based immigrant. The first labor certification filed on behalf of the beneficiary by [REDACTED] was accepted for processing by the U.S. Department of Labor on November 10, 1998. The Form I-129 petition from that employer requesting an extension of stay was filed on May 5, 2003. The petitioner filed an I-140 petition with the previously mentioned labor certification. That petition was denied on March 14, 2002. The petitioner then filed a second application for alien employment certification with a priority date of April 30, 2003, only five days before the filing of the present I-129 petition. At the time the present H-1B petition was filed, the petitioner did not have pending an I-140 petition based on a valid labor certification with a priority date that precedes the Form I-129 petition by more than 365 days. The only I-140 petition filed of record was denied by Citizenship and Immigration Services (CIS). Further, the labor certification filed by the petitioner on April 30, 2003, does not revive the prior labor certification upon which the denied I-140 petition was based. The petitioner has, therefore, failed to establish 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 not sustained that burden.

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