

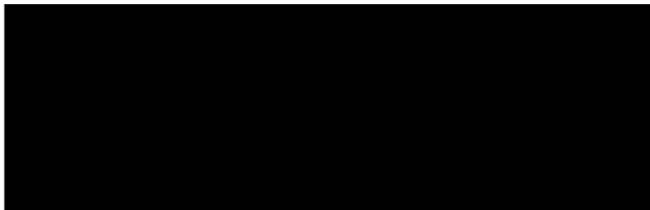
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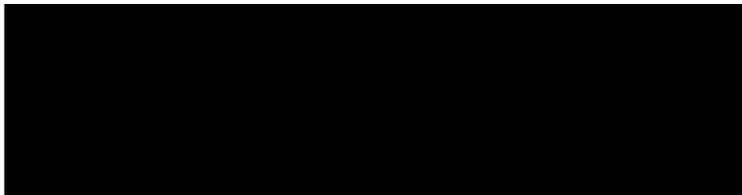
FILE: EAC 03 139 54109 Office: VERMONT SERVICE CENTER Date: MAR 03 2006

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.

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 is a hotel operator and seeks to employ the beneficiary as a controller. 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 controller, 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 that it seeks to extend the beneficiary's H-1B status to April 1, 2004.

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

In order to extend or amend the beneficiary's stay in the United States to April 1, 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.

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 365 days or more has passed since the filing of a labor certification required or used by the beneficiary to obtain status as an employment-based immigrant. The labor certification filed on behalf of the beneficiary by the petitioner was **accepted for processing by the U.S. Department of Labor on April 13, 1998. That certification was** subsequently used by the petitioner when it converted its petition to an RIR (reduction in recruitment) case. Upon conversion, the Department of Labor for the State of New York noted a new filing date of June 25, 2002 for the RIR conversion. As previously noted, however, the labor certification was in fact filed by the petitioner on April 13, 1998. The Form I-129 petition from that employer requesting an extension of stay was filed on April 1, 2003. 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.