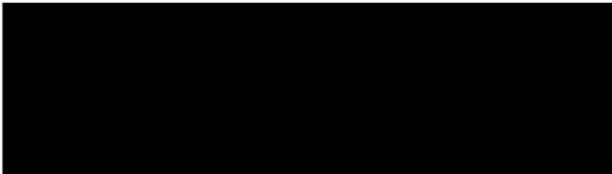


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prevent clearly unwarranted
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**U.S. Citizenship
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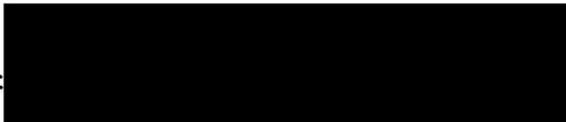
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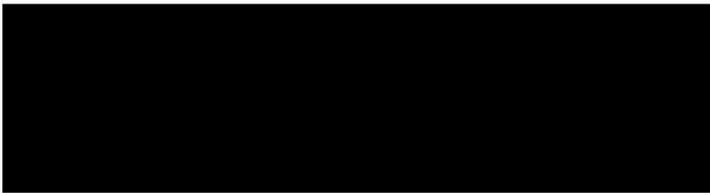
FILE: EAC 03 207 50750 Office: VERMONT SERVICE CENTER Date: **MAY 26 2006**

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.

for Michael F. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner, a firm engaged in the business of gemstone and jewelry trading, seeks to extend the employment of the beneficiary as a market research analyst. The petitioner endeavors to continue the classification of 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 after determining that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21) because the evidence of filing a labor certification application - a postal receipt and unendorsed labor certification application Form ETA 750 - was insufficient to demonstrate that the petitioner had filed a labor certification application under Section 104(c) of AC21 as claimed. Additionally, the director found that petitioner did not provide sufficient documentation to demonstrate that the beneficiary is eligible to recapture time outside the United States from November 1, 2002 through May 10, 2003 so that it would be deducted from the beneficiary's time in H-1B status in the United States.

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 Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ Authorization 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 DOJ Authorization Act, § 106(a) of AC-21, which was signed into law on November 2, 2002, 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 DOJ Authorization 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.

The director requested evidence that the beneficiary was eligible for extension of his H-1B status under the exemption that the beneficiary has not continuously resided in the United States for the 6 year time period. In response, counsel explained the beneficiary had not exceeded the six-year limit and had filed within the expiration of the sixth year limit. The petitioner stated that the beneficiary had filed a labor certification application and it had been pending more that 365 days before the instant petition was filed. The petitioner submitted a copy of the pending labor certification application and postal receipt.

The director denied the H-1B 7th year extension petition because the evidence of the pending labor certification application, the postal receipt, was insufficient. Based on the record at the time of adjudication, the director correctly denied the 7th year extension. On September 14, 2004, the petitioner filed a motion to reopen or reconsider. The director found that the motion did not provide new facts to be proved or reasons for reconsideration and denied the motion.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director request; (4) the director's denial letter; (5) the petitioner's motion to reopen or reconsider; (6) the director's denial of the motion; and (7) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal, counsel contends that the beneficiary is qualified for an extension beyond his six-year limit under AC21 § 106(a) as amended, because he has a pending immigrant employment-based labor certification application that was pending for more than 365 days before the instant petition was filed. On appeal, counsel resubmits a copy of a letter from the Alien Employment Certification Office in New York, dated November 27, 2001 and addressed to the beneficiary's previous counsel. The letter consists of the instructions for recruitment for the labor certification application filed on behalf of the beneficiary. The date on this correspondence, November 27, 2001, precedes the filing date of the instant petition, July 7, 2003; therefore, the labor certification application filed on behalf of the beneficiary was pending for more than 365 days before the H-1B extension petition was filed.

The beneficiary is eligible for a 7th year extension of status. The beneficiary meets the requirement that (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) 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 an employment-based immigrant petition (Form I-140). See Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by American Competitiveness in the Twenty First Century Act of 2000*

(AC21)(Public Law 106-313). HQPRD 70/6.2.8-P (May 12, 2005). Accordingly, the petitioner has prevailed on appeal.

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. Accordingly, the appeal will be sustained and the petition will be approved.

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