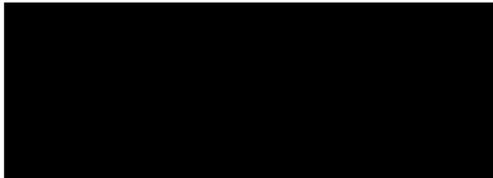


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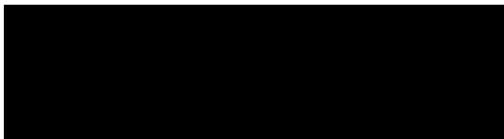
FILE: LIN 06 119 50306 Office: NEBRASKA SERVICE CENTER Date: OCT 04 2007

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, Nebraska Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

The petitioner provides software systems for the debt collection industry. It seeks to employ the beneficiary as a software developer. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On September 8, 2006, the director denied the petition determining that a request for an extension of H-1B status must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor (DOL) and that the petitioner must have a labor condition application (LCA) on file valid for the period of time requested for employment. The director further determined that the petitioner had not satisfied the requirements for an extension of stay pursuant to the American Competitiveness in the Twenty-First Century Act (AC-21) (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21)).

The record of proceeding before the AAO contains: (1) the Form I-129 filed March 13, 2006 requesting continuation of previously approved employment without change with the same employer; (2) the director's June 12, 2006 request for evidence (RFE); (3) counsel's July 19, 2006 response to the RFE and a Form ETA 9035E LCA certified July 19, 2006 for employment beginning July 19, 2006 and ending July 16, 2008; (4) the director's September 8, 2006 denial decision; and (5) the Form I-290B and brief in support of the appeal. The AAO has considered the record in its entirety before issuing its decision.

The AAO observes that the petitioner has provided evidence to establish eligibility for an additional seventh year of H-1B classification pursuant to AC21 as amended by DOJ-21. The record reflects that the beneficiary has been in the United States, in H-1B status, since April 19, 2000 and the alien's maximum period of stay in H-1B status ended April 19, 2006. Thus, the beneficiary would have begun working under the seventh year extension of status under AC-21 on April 20, 2006. That date is more than 365 days after the application for alien labor certification (Form 750) was filed on April 2, 2004. The petitioner filed a Form 750 application for alien labor certification for the beneficiary with a priority date of July 14, 2004; the record before the AAO shows the application was still pending as of May 4, 2005. Thus, on this issue, it appears the beneficiary would have been eligible for a seventh year extension pursuant to AC 21.

However, as the petitioner filed the instant petition on March 13, 2006, requesting continuation of previously approved employment without change with the same employer and did not submit or have a Form ETA 9035E Labor Condition Application (LCA) at that time, the petitioner did not establish filing eligibility. The petitioner's Form ETA 9035E, LCA certified on July 19, 2006 that included a requested start date of employment July 19, 2006 and an ending date of July 16, 2008 does not demonstrate filing eligibility when the petition was filed March 13, 2006.

The AAO observes, general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

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

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). When the petition is for an extension of stay, it must be accompanied by either a new or a photocopy of the prior certification from the DOL that the petitioner continues to have on file a labor condition application valid for the requested period of employment. 8 C.F.R. § 214.2(h)(15)(ii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of the LCA with the DOL when submitting the Form I-129.

In the instant matter, the petitioner filed the Form I-129 with CIS on March 13, 2006. In response to the director's request for evidence of LCA certification, the petitioner provided a copy of the LCA, DOL-certified on July 19, 2006, approximately 90 days after the petitioner filed the Form I-129. Thus, the record does not show that, at the time of filing, the petitioner had obtained a certified LCA in the occupational specialty and complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) and 8 C.F.R. § 214.2(h)(15)(ii)(B)(1).

On appeal, counsel asserts there is no requirement that the Form ETA 9035 be dated prior to the termination of the preceding visa. The AAO disagrees. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Thus, although the beneficiary would be eligible for a seventh year of H-1B status, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The beneficiary is ineligible for

classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in this proceeding 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