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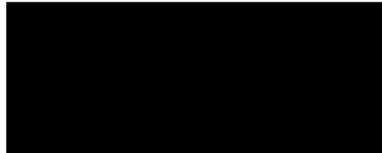
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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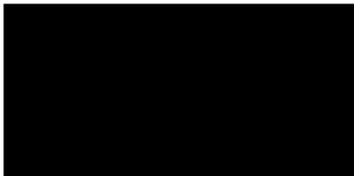
FILE: SRC 06 121 50420 Office: TEXAS SERVICE CENTER Date: **SEP 14 2007**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 designs and manufactures advanced wafer production devices, equipment, and machinery. It seeks to extend the employment of the beneficiary as a software engineer. 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).

The director denied the petition because the beneficiary had remained in the United States in H-1B status for six years and the petitioner had not satisfied the requirements for an extension of stay under the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (21st Century DOJ Appropriations Authorization Act). The director determined that because the petitioner did not file for an extension for the beneficiary while the beneficiary was still in valid H-1B status, the beneficiary was not eligible for approval under AC21 and the 21st Century DOJ Appropriations Authorization Act.

The director also determined that the petitioner's request for an extension of the beneficiary's stay could not be approved because the beneficiary had failed to maintain the previously accorded status or the status had expired before the instant petition had been filed and the petitioner had not provided evidence that the failure to timely file the petition was inadvertent. The director further determined that a gap of two weeks existed between the beneficiary's authorized periods of employment as set out in the Labor Condition Applications (LCA) contained in the record and that for this additional reason the director could not grant an extension of stay.

The Form I-129 in this matter was filed March 8, 2006 and requested that the beneficiary's H-1B employment be continued without change with the same employer. The record contains evidence that the beneficiary had H-1B classification from February 15, 2000 to February 10, 2002; from August 1, 2000 to July 1, 2003; and from July 2, 2003 to February 15, 2006. On appeal, the petitioner references an approved Form I-140 for the beneficiary.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years" and that 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. AC-21 (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21)) removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays and DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

(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 DOJ-21 amended section 106(a) of AC-21 to state the following:

(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 request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the Form I-129 is filed.¹ See Memorandum from William R. Yates, Acting Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations*

¹ The AAO acknowledges the petitioner's assertion that the failure to timely fail an H-1B request for continuation of the beneficiary's employment was due to the ineffective assistance of counsel. However, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record does not contain this information.

*Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD03-09. HQBCIS 70/6.2.8-P (April 24, 2003). The regulations state: "A request for a petition extension may be filed *only if the validity of the original petition has not expired.*" 8 C.F.R. § 214.2(h)(14) (Emphasis added). The petition in this matter was filed three weeks following the expiration of the original petition. The regulations do not allow for an extension of status when the beneficiary is no longer in the original H-1B status. The petitioner in this matter has not provided any evidence that the beneficiary was eligible to recapture any time spent outside the United States to extend the validity of the H-1B classification. The petitioner has not provided evidence that the beneficiary satisfied the requirements for an extension of status under AC21.*

The AAO also notes that "[a]n extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed." 8 C.F.R. § 214.1(c)(4). The AAO acknowledges there are exceptions to this rule, including discretion exercised by Citizenship and Immigration Services (CIS) in a situation where the delay to timely file was due to extraordinary circumstances beyond the control of the applicant or petitioner. The director in this matter found that the petitioner had not demonstrated that the delay requesting an extension of stay was due to extraordinary circumstances. The petitioner submitted additional evidence on appeal regarding the extraordinary circumstances of the delay, information that has not been reviewed by the director. However, as the petition for a continuation of the beneficiary's employment in a specialty occupation (classification in H-1B status) will not be approved as the request for the petition extension was not filed before the validity of the original petition had expired, the AAO finds it unnecessary to reach the discussion regarding the petitioner's request for the beneficiary's extension of stay. Likewise, the AAO will not discuss the petitioner's submission of an LCA which fails to cover the two-week gap of the beneficiary's authorized employment.

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