

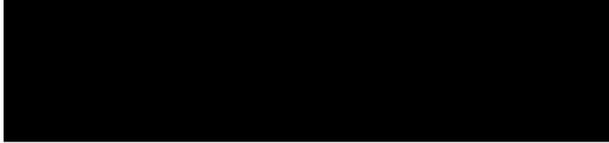


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN-02-056-53732 Office: Nebraska Service Center

Date: MAR 15 2003

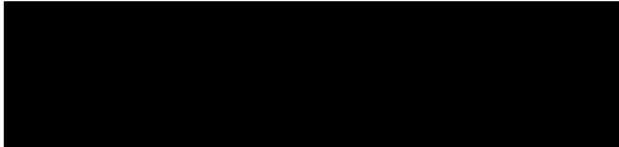
IN RE: Petitioner:
Beneficiary:



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)

PUBLIC COPY

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting business with 17 employees and a gross annual income of \$850,000. It seeks to employ the beneficiary as a systems analyst for a period of one year. The director determined the petitioner had not established that the beneficiary was eligible for any further extensions of his H-1B status.

On appeal, counsel submits a brief.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the record shows that the beneficiary has been present in the United States in H-1B nonimmigrant status from January 12, 1996 to January 12, 2002. The director further found that the beneficiary had not been physically present outside the United States for the immediate prior year, and therefore may not seek a change of status or be readmitted to the United States under section 101(a)(15)(H) of the Act. The director additionally found that the petitioner had not established that its Form I-140, Immigrant Petition for Alien Worker, or its ETA 750, Application for Alien Employment Certification, had been pending for at least 365 days, pursuant to Section 106 of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21).

On appeal, counsel states, in part, that the beneficiary made two trips outside the United States for an aggregate of 103 days, and

that both trips were interruptive of his H-1B stay in the United States. Counsel further states that because of such absences, the beneficiary is eligible for an extension until April 25, 2002. Counsel additionally states that pursuant to FAM 41.53 N11, which allows a beneficiary to enter the United States ten days prior to and ten days beyond the validity dates of the approved period on the petition, the beneficiary was in status for at least ten days beyond January 12, 2002, and, therefore, is eligible for extension benefits under Section 106 of AC21.

In a Bureau memorandum entitled "Limitations on Admission of H and L Nonimmigrants," dated March 9, 1994, it states, in part, as follows:

It is of the opinion of this office that time spent out of the United States during the validity period of a petition must be counted toward the alien's maximum period of stay in the United States, provided that the time spent outside of the United States was not interruptive of the alien's employment in the United States. Periods of time spent outside of the United States which are considered to be a normal part of a work year, such as vacations, holidays, and weekends, do not interrupt the alien's employment in the United States since the alien is expected to be able to take time off during the work year. Likewise, short work details to other countries for the United States employer do not interrupt the alien's employment in the United States since travel is common in many industries. (Emphasis added.)

The record contains a document entitled "Summary of the dates being outside the US...", which states, in part, as follows:

1. Vacation to INDIA: Left USA on July 5, 1997. Returned to USA on September 18, 1997
2. Vacation to INDIA: Left USA on October 14, 2001. Returned to USA on November 11, 2001

Counsel's statements on appeal are not persuasive. Information in the record indicates that the beneficiary has been in the United States in H-1B nonimmigrant status since January 12, 1996, and that his absences from the United States were for vacation purposes, and, therefore, not considered interruptive of such employment. As such, the record shows that the beneficiary has now spent the maximum allowable period of stay in the U.S. in an H classification, and, therefore, is ineligible for any further extensions. For this reason, the petition may not be approved.

Section 104(c) of the AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust because of per-country limits to be eligible to extend their nonimmigrant status until their application for adjustment of status has been adjudicated. The record, however, contains no evidence that at the time of the filing of the present petition, the petitioner had an approved I-140 petition on behalf of the beneficiary.

Section 106 of the AC21 permits H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6-year maximum period, when:

(a) the H-1B nonimmigrant is the beneficiary of an employment based (EB) immigrant petition or an application for adjustment of status; and

(b) 365 days or more have passed since the filing of a labor certification application, Form ETA 750, that is required for the alien to obtain status as an EB immigrant, or 365 days or more have passed since the filing of the EB immigrant petition.

Although the record contains evidence indicating that the priority date of the beneficiary's Application for Alien Employment Certification is January 16, 2001, the record contains no evidence of an approved employment-based (EB) immigrant petition or an application for adjustment of status on behalf of the beneficiary. Furthermore, the record does not demonstrate that at the time of the filing of the instant petition for an extension of the beneficiary's nonimmigrant H-1B status on December 7, 2001, either 365 days or more had passed since the filing of the labor certification application, Form ETA 750 (on January 16, 2001), or since the filing of the EB immigrant petition (on January 15, 2002). For this additional reason, the petition may not be approved.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.