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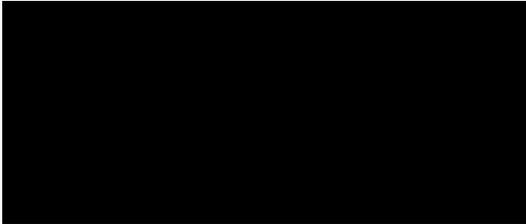
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 06 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 software development company that seeks to employ the beneficiary as a software developer. 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 software developer, 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 on the petition that it seeks to extend the beneficiary's H-1B status to November 15, 2004.

The director denied the petition, finding that because the beneficiary had already been employed in the United States since November 14, 1997 in H-1B status, he had reached the maximum six-year period of stay in the United States on November 14, 2003. The director stated that counsel sought to qualify the beneficiary for benefits under the American Competitiveness in the 21st Century Act (the AC21) by submitting two labor certification letters, case number 138434, from the Department of Labor (DOL). According to the director, because CIS records indicated the denial of Form I-485 and Form I-140 on August 29, 2003, the beneficiary was not eligible for benefits under the AC21.

On appeal, counsel claims that the director denied the petition because he erroneously believed that no alien labor certification was pending on behalf of the beneficiary. Counsel claims that the labor certification, originally filed on September 24, 2001, was still pending with the DOL. Counsel states that the Form I-140 had been filed on the beneficiary's behalf pursuant to the classification under section 203(b)(2) of the Act, as an alien of exceptional ability, with a request for waiver of the labor certification requirement in the national interest, and that CIS denied the petition on September 12, 2003. Counsel asserts that the Form I-140 was not filed pursuant to the labor certification filed on September 21, 2001, and thus that the denial of the Form I-140 had no effect on the pending labor certification.

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.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on November 14, 2003; (2) two letters from the California Employment Development Department (EDD)(Case number [REDACTED]), the first indicating the petitioner's application for employment certification was filed with a priority date of September 24, 2001; the second dated September 18, 2002, transmitting the petitioner's request for reduction in recruitment to the U.S. DOL; (3) the letter from the DOL dated July 8, 2003 remanding the case to the state EDD for supervised recruitment; (4) the denial letter from the California Service Center dated September 12, 2003 denying the Form I-140 petition; (5) the director's request for additional evidence; (6) the petitioner's response to the director's request; (7) the director's denial letter; (8) Form I-290B and supporting documentation; and (9) the petitioner's brief. The AAO reviewed the record in its entirety before issuing its decision.

In order to extend or amend the beneficiary's stay in the United States to November 15, 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 the Form I-140 was not submitted with an approved labor certification; it was submitted with a request that the requirement for a job offer and labor certification be waived in the national interest. Thus, the pending labor certification (case number [REDACTED] with the September 24, 2001 priority date did not pertain to the Form I-140 denied on September 12, 2003. The record reflects that the July 8, 2003 letter from the DOL indicated that it did not approve the petitioner's request for a reduction in recruitment (RIR), and that the application for labor certification was remanded to the EDD, the local labor office, for supervised recruitment, where it remains

pending. Accordingly, the beneficiary qualifies for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act, as the pending application for labor certification was filed at least 365 days before the filing of the petition.

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.