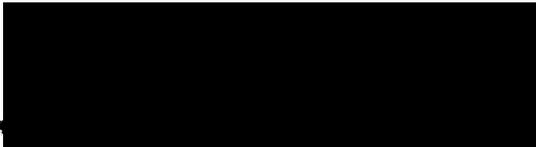


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U.S. Citizenship
and Immigration
Services

D2



FILE: EAC 04 113 50474 Office: VERMONT SERVICE CENTER Date: NOV 15 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:
[Redacted]

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 denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a drug development company that seeks to employ the beneficiary as a human resources/general affairs coordinator. 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record reflects that the beneficiary has been in the United States, in H-1B status, since April 27, 1998. The petitioner filed an application for alien labor certification for the beneficiary on April 21, 2003. The petitioner filed the instant petition on March 5, 2004, requesting that the beneficiary be granted an additional year of H-1B status 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 director denied the petition, holding that since 365 days had not elapsed between the filing of the application for alien labor certification and the filing of the instant petition, the beneficiary did not meet the requirements set forth at AC-21 (as amended by DOJ-21) and therefore did not qualify for a seventh year of H-1B status.

On appeal, counsel contends that the director erred in denying the petition, and that the beneficiary in fact qualifies for a seventh year of H-1B status. Counsel also contends that the director's decision was "idiotic," that she "completely misunderstood the requirements," and that she "misapplied the law and applicable regulations in the most base and egregious manner, contrary to normal processing." Counsel also states that the denial constituted a due process violation. In a separate letter submitted with the appellate brief, counsel states that the director's reasoning was "so wrong that it would be criminal if it wasn't so pathetic," says that CIS is "hereby forewarned" that it will be exposed to "ridicule and censure," says that he has called for an inquiry "to determine whether other similarly situated petitioners have also been victimized," and that it appears as though the director "might not be qualified to comprehend the text of the attached motion."

As a general rule, 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." However, AC-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 noted previously, the instant petition was filed on March 5, 2004. In her denial, the director properly determined that at that time, 365 days had not elapsed since the filing of the application for alien labor certification on April 21, 2003. Counsel asserts that because the application for alien labor certification would have been pending for longer than 365 days on April 26, 2004, the date on which the beneficiary exhausted her six-year period of H-1B status, the petition should be approved. Counsel asserts that the date the extension was filed is irrelevant.

Section 106(a) of AC-21, as amended by section 11030(A)(a) of DOJ-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.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). 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).

Consequently, the regulation under which the petitioner seeks to qualify the beneficiary for a seventh year of H-1B status clearly requires that when the petition is filed, at least 365 days must have elapsed since the filing of the application for alien labor certification. Therefore, on March 4, 2004, the date this petition was filed, the beneficiary was ineligible to derive benefits from AC-21, as amended by DOJ-21, and the petition was properly denied. Neither the statute nor the regulations support counsel's interpretation of the law. *See also* Memorandum from William R. Yates, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21)(Public Law 106-313)(May 12, 2005)*; Memorandum from William R. Yates, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273)(April 24, 2003)*.

As the petition was properly denied, counsel's statements regarding the director's logic and reasoning are without merit and will not be addressed. As for the assertion that the director's denial constituted a due process violation, counsel has demonstrated no error by the director in conducting her review of the petition, nor any resultant prejudice that would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). As discussed previously, the petitioner is required to wait 365 days after filing the application for alien labor certification before it is eligible to file for an seventh year of H-1B status under AC-21 (as amended by DOJ-21), and the denial was the proper result under the regulation.

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.