



U.S. Citizenship
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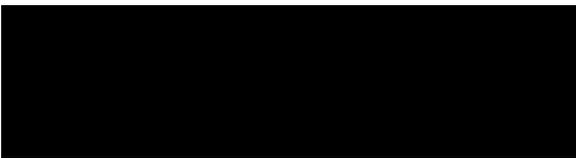


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: SEP 09 2005

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:



PUBLIC COPY

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.

In order to continue employing the beneficiary as a design engineer, the petitioner, a corporation that provides automotive engineering services, endeavors to continue classification of the beneficiary for an eighth year as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21) because an application for permanent labor certification was neither pending nor approved at the time that the petition was filed. In pertinent part, the director stated:

On March 17, 2005, [Citizenship and Immigration Services] sent the petitioner a request for additional evidence [RFE] that the application for alien employment certification was still pending or had been approved.

On March 28, 2005, the petitioner returned the [RFE] cover letter and stated that the labor certification application was returned by the Michigan Department of Career Development on May 23, 2002. The Department of Career Development denied the application based upon inadequate recruitment, and as such no application for labor certification is currently pending for the petitioner's business.

It is noted from the record that the beneficiary has been in the United States under Section 101(a)(15)(H) or (L) of the Act for over 7 years. Since the beneficiary has remained in the United States in H or L status for over six years and the petitioner has not satisfied the requirements for an extension of stay under AC21, no further extensions of the petition may be granted.

The crux of the appeal, as stated at section 3 of the timely filed I-290B (Notice of Appeal) is that the director misinterpreted the information presented in the RFE reply, in that both the wording of the petitioner's RFE response letter and its attached documents regarding the labor certification application process indicated that the labor certification application had not been denied, but rather was still pending. As the evidence of record substantiates counsel's assertion, the grounds for the denial have been overcome, and the appeal will be sustained.

In general, section 214(g)(4) of the INA, 8 U.S.C. §1184(g)(4), provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21, as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act), removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays.

As amended by § 11030(A)(a) of the 21st Century DOJ Appropriations Act, section 106(a) of AC21 reads:

(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 the 21st Century DOJ Appropriations Act amended section 106(a) of AC21 to read:

(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 decisive RFE document is the January 5, 2005 letter from the Michigan Department of Labor and Economic Growth (DL&EG) that directed the petitioner to engage in recruitment efforts and return the documentation of those efforts by May 17, 2005. The letter clearly indicates that processing of the labor certification application will continue upon timely receipt of the requested recruitment documentation. Counsel's March 24, 2005 letter of reply that forwarded this Michigan DL&EG letter indicated that the labor certification application had not been denied but was pending further DL&EG action commensurate with its March 17, 2005 Request for Evidence. It is also noted that the director erroneously read the May 23, 2002 letter from the Michigan Department of Career Development as a denial of the petitioner's labor certification application, when actually this letter indicated that the application would be processed "under the regular permanent process in the order in which it was initially received." The record reflects that there had been a denial of a reduction in recruitment request made by the petitioner, and that the DL&EG advised the petitioner that it would have to proceed with the traditional recruitment. The denial of reduction in recruitment was not a denial of the labor certification application.

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.