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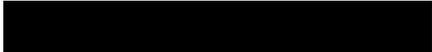
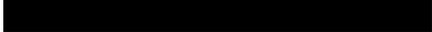
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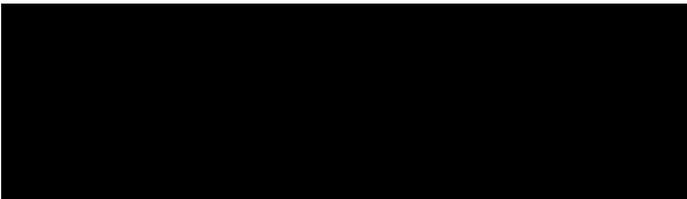


FILE: LIN 04 182 50220 Office: NEBRASKA SERVICE CENTER Date: **AUG 29 2006**

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 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 an urban public education system. It seeks to continue employing the beneficiary as a speech language pathologist. 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 speech language pathologist, and wishes to continue the beneficiary's previously approved employment without change, and to extend 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 from August 22, 2004 to August 21, 2005.

The director denied the petition, finding that because the beneficiary had already been employed in the United States for over seven years, she had reached the maximum six-year period of stay in the United States. The director stated that counsel sought to qualify the beneficiary for benefits under the American Competitiveness in the 21<sup>st</sup> Century Act (AC21) by submitting a letter acknowledging receipt of an application, filed July 25, 2001, for alien employment certification, case number 214946, from the State of Michigan Department of Career Development. The director further noted that the petitioner failed to provide evidence as to the status of the labor certification application filed on July 25, 2001. As such, the director determined that the beneficiary was not eligible for benefits under AC21.

On appeal, counsel asserts that the petitioner met its burden of proof by establishing that a labor certification application was filed on July 25, 2001. According to counsel, the petitioner is not required to establish the status of the labor certification application.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on June 8, 2004; (2) a letter from the Michigan Department of Career Development, dated August 17, 2001; (3) the director's first denial letter; (4) the petitioner's Motion to Reopen; (5) the director's second decision, dated March 1, 2005; and (6) Form I-290B and accompanying brief.

As amended by § 11030(A)(a) of the DOJ Authorization Act, § 106(a) of AC-21 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 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.

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 AC21 by the 21<sup>st</sup> Century DOJ Appropriations Act.

Recent Citizenship and Immigration Services (CIS) policy memoranda have clarified how CIS is to implement the provisions of AC-21. In accordance with these policy memoranda, the most recent of which was published on December 27, 2005, the AAO determines that the beneficiary is eligible for an exemption from the six-year limitation on her H-1B classification under section 106(a) of AC-21, and for an extension of her H-1B status for an eighth year under section 106(b) of AC-21.

The December 27, 2005 memorandum provides, in part, that the director should not deny a request for an H-1B extension beyond the six-year limit when the Labor Certification Application has been filed over 365 days ago, but the I-140/I-485 has not been filed. Memorandum from Michael Aytes, Acting Director of Domestic Operations, *Interim Guidance for Processing I-140 Employment-based Immigrant Petitions and*

*I-485 & H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), HQPRD 70/6.2.8-P (December 27, 2005).*

The record reflects that the alien labor certification application was filed on July 25, 2001, and that no I-485 or I-485 has been filed. United States Department of Labor records reflect that the application remains pending at the Dallas Backlog Elimination Center with a priority date of July 25, 2001, and has not been withdrawn or denied. Thus, in accordance with AC-21 and CIS policy memoranda, the extension should be granted.

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.