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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services



DZ

FILE: EAC 05 099 50124 Office: VERMONT SERVICE CENTER Date: DEC 15 2006

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:



IDENTIC 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, 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 dismissed. The petition will be denied.

The petitioner is a computer software development and consulting company that seeks to continue the beneficiary's employment as a programmer analyst, and 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 found that the beneficiary was not eligible for a seventh year extension of his H-1B nonimmigrant status, because 365 or more days did not pass between the time that the petitioner filed a labor certification application on the beneficiary's behalf, and the time that the petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129) on the beneficiary's behalf. The director also found that the beneficiary was out of status when the Form I-129 petition was accepted for filing. The director found that the beneficiary was not otherwise qualified for extension of his H-1B nonimmigrant visa, and the Form I-129 was denied accordingly.

The petitioner, through counsel, concedes that the beneficiary is not eligible for a seventh year extension of his H-1B status because the Form I-129 petition was filed prematurely. Counsel requests, however, that U.S. Citizenship and Immigration Services (CIS) nevertheless approve the present Form I-129 petition because the beneficiary would be detrimentally affected by the petitioner's error, and because the petitioner was unaware of Form I-129 filing rules, and was not represented by counsel at the time the Form I-129 was filed.

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

Section 106(a) of AC21:

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 106(b) of AC21

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 record of proceeding before the AAO contains: the Form I-129 petition and supporting documentation; the director's denial letter; the Form I-290B, Appeal to the AAO, and a brief by counsel. The AAO reviewed the record in its entirety before issuing its decision.

The record reflects that the beneficiary first entered the United States in H-1B status on April 29, 1999, and that the beneficiary's six-year maximum period of stay expired on April 28, 2005. The record contains a copy of a letter from the Connecticut Department of Labor indicating that a labor certification application was filed on the beneficiary's behalf on March 18, 2004. The record reflects that the present Form I-129 was filed less than 365 days later, on February 15, 2005.

The beneficiary's most recent H-1B status expired on February 7, 2005. The memorandum entitled, *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 (AC21)(Public Law 106-313*, by William R. Yates, Associate Director for Operations (May 12, 2005), indicates that it is not necessary for an alien who would otherwise be eligible for an H-1B extension, to first file a Form I-129 requesting an extension of time to allow the beneficiary to complete or nearly complete the initial six years, and then file an additional Form I-129 requesting an extension of time beyond the six years. The guidance states that once the threshold requirements of AC21 have been met:

[T]he alien may be granted an extension beyond the 6-year maximum on or prior to the date the alien reaches the 6-year maximum. Such extensions may only be granted in one-year increments, but may be requested on a single (combined) extension request for any remaining

time left in the initial 6-year period. Requiring the filing of two extensions petitions merely increases petitioner and CIS workloads, and has no basis in statute. In no case, however, may the total period of time granted on an extension exceed a cumulative total of 3 years. 8 C.F.R. 214.2(h)(15)(ii)(B)(1).

In the present matter, the beneficiary's six-year maximum did not expire until April 28, 2005, more than a year after the labor certification application was filed (on March 18, 2004). Under the cited guidance, the petitioner need not file two petitions in order to obtain the extension - one to complete the six years, from February 7, 2005 to April 28, 2005, and a second to obtain the one-year extension from April 28, 2005 to April 28, 2006. The Form I-129 petition may not be approved, however, as the validity of the previous petition had expired at the time of filing the instant petition. The present Form I-129 petition was accepted for filing on February 15, 2005, one week after the validity of the previous petition expired.¹ The regulation at 8 C.F.R. § 214.2(h)(14) provides in general that, with respect to H-1B workers, "[a] request for a petition extension may be filed only if the validity of the original petition has not expired."

An April 24, 2003, memorandum by William R. Yates, Acting Associate Director for Operations, CIS, entitled, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273)*, provides further on page two that:

The request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the petition (Form I-129) is filed with BCIS [CIS]. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded [H-1B] status, or where such status expired before the application or petition was filed.

As the beneficiary was not in status, and the previous petition's validity had expired prior to the filing of the instant Form I-129 petition, an extension under AC21 may not be granted.

Based on the foregoing analysis, the AAO finds that the beneficiary is not eligible under AC21 for a one-year extension of stay in H-1B status.

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 appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.

¹ The beneficiary does not seek to recapture time spent outside of the United States.