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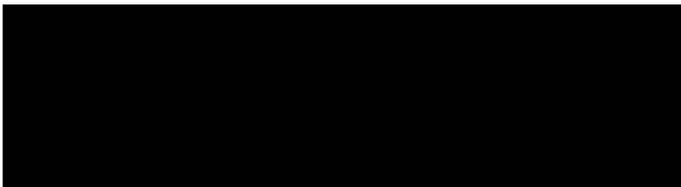
FILE: WAC 04 254 52868 Office: CALIFORNIA SERVICE CENTER Date: MAY 26 2006

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 service center director denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a wireless engineering consulting firm that seeks to extend the employment of the beneficiary as a research field engineer. The petitioner 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 after determining that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the 21st Century Department of Justice Appropriations Authorization Act (AC21) because the petitioner did not establish that 365 days or more had passed since the filing of the labor certification application. The director noted that the beneficiary had been maintaining an H nonimmigrant status for six years in the United States, and is ineligible for an extension of classification under section 101(a)(15)(H)(i)(b) of the Act.

In general, section 214(g)(4) of the Act, 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, 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), 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, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

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 the DOJ Authorization Act amended § 106(a) of AC-21 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 petitioner submitted the Form I-129 on September 17, 2004 and requested that the beneficiary's status be extended from October 1, 2004 until September 30, 2005 under AC21. The petitioner submitted Form I-129 and indicated that the beneficiary had been in the United States in H-1B status since October 1, 1998. The petitioner submitted an acknowledgment letter from the Employment Development Department of the State of California confirming that the petitioner filed a labor certification application for the beneficiary on November 13, 2003.

The director denied the H-1B 7th year extension petition because the evidence of record indicated that the petitioner did not establish that 365 days or more had passed since the filing of the labor certification application, and therefore the beneficiary was ineligible to extend status under the provisions of AC21.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal, counsel contends that the petitioner and beneficiary made a good faith effort in filing the labor certification timely. Counsel asserts that it was the petitioner's former counsel who failed to act and respond to the petitioner's inquiries and that former counsel did not file the labor certification until November 2003. Counsel contends that the instant petition is a case that falls within the exceptions outlined by 8 C.F.R. § 214.1(c)(4) and that the untimely filing was due to extraordinary circumstances.

Although counsel asserts that the untimely filing was due to extraordinary circumstances, the record contains no evidence of such circumstances and counsel's assertions are vague and unsupported. The record contains no evidence that the delay was due to extraordinary circumstances beyond the control of the applicant or the petitioner. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The beneficiary is not eligible for a 7th year extension of status. The petitioner fails to meet the eligibility requirements of AC21 in that the Form ETA-750 had not been pending 365 days prior to the filing date of the petition or the start date of employment.

Accordingly, the AAO shall not disturb the director's denial of the petition.

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.