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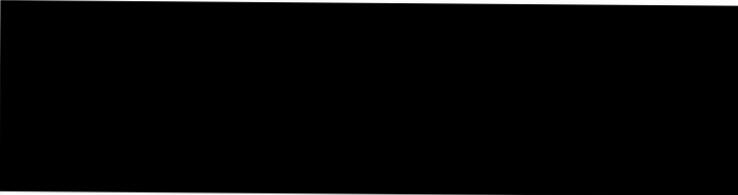


FILE: LIN 05 026 51841 Office: NEBRASKA SERVICE CENTER Date: OCT 05 2006

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:



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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 software consulting firm that seeks to extend its employment of the beneficiary as a systems analyst 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 he determined that the Labor Condition Application (LCA) supporting it was not certified for the period of time that coincided with the beneficiary's seventh year in the United States and because the beneficiary's H-1B status had expired nearly eight months prior to the filing of the instant petition.

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, with counsel's brief, and new and previously-submitted documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner filed the instant petition on November 4, 2004, requesting that the beneficiary be granted an additional four months in 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 period of employment requested in the petition was October 4, 2004 to March 14, 2005.

The record reflects that the beneficiary was admitted to the United States in H-1B status on March 14, 1998 and there is no evidence that he departed the United States for any period of time since that date. As 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," the beneficiary reached the end of his maximum period of H-1B admission on March 14, 2004. However, AC-21 removes 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 amended by section 11030(A)(a) of DOJ-21, section 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 § 106(b) 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.

Citizenship and Immigration Services (CIS) has issued guidance indicating that extensions of H-1B status should be granted beyond the sixth year if a pending or approved labor certification application had been filed at least 365 days prior to the requested employment start date on the H-1B petition and the beneficiary would still be in H-1B status 365 days from that filing. *See* Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year*, HQPRD 70/6.2.8 (September 23, 2005).

In his denial, the director found, in part, that the beneficiary's H-1B status could not be extended because the LCA supporting the petition was not certified for a time period covering the beneficiary's seventh year in the United States, i.e., March 15, 2004 to March 15, 2005. On appeal, counsel submits an LCA for a systems analyst position, certified prior to the date of filing, for the time period beginning September 4, 2003 and ending on September 4, 2006. A letter from the petitioner indicates that the LCA was previously used for a systems analyst who left its employment in October 2003. The petitioner states that it now wishes to use the LCA in support of its continued employment of the beneficiary.

The AAO will not, however, accept the LCA originally submitted in support of the H-1B petition filed for a prior systems analyst. When petitions have been approved for the total number of workers specified in the labor condition application, substitution of aliens against previously approved openings shall not be made. A new LCA shall be required. 8 C.F.R. § 214.2(h)(4)(i)(B)(4). As the LCA submitted on appeal indicates that it was certified in relation to the employment of a single systems analyst, it may not be used in support of the instant petition. Accordingly, the petitioner has not submitted an LCA in the occupational specialty in which the beneficiary would be employed, as required by the regulation at 8 C.F.R. § 214.2(4)(i)(B)(1).

The director also denied the petition because the beneficiary's H-1B status had expired prior to the filing of the Form I-129 extension request, noting that "an extension of stay may not be approved for an applicant who has failed to maintain the previously accorded status or where such status expired before the application or petition was filed." He did not find the record to demonstrate that the delay in filing was the result of extraordinary circumstances beyond the control of the petitioner, the basis on which CIS may excuse such a delay. *See* 8 C.F.R. § 214.1(c)(4). On appeal, counsel acknowledges that the beneficiary's H-1B status had expired at the time of filing, but asks that CIS, in light of the errors made by the petitioner's previous counsel, use its discretion to approve the instant petition *nunc pro tunc*.

Pursuant to 8 C.F.R. § 214.1(c)(5), there is no appeal from a denial of an application for an extension of stay filed on Form I-129. However, the AAO will consider counsel's assertions regarding the errors made by the petitioner's prior counsel as they relate to the extension of the beneficiary's H-1B status. Even though requests to extend an H-1B petition and an alien's stay are combined on the Form I-129, CIS is required to make a separate determination on each. *See* 8 C.F.R. § 214.2(h)(15)(i).

Pursuant to 8 C.F.R. § 214.2(h)(14), a request for a petition extension may be filed only if the validity of the original petition has not expired. In the instant case, the previously approved H-1B petition expired prior to the filing of the extension petition. While the AAO notes counsel's assertions that the untimely filing of the petition was the result of errors made by prior counsel, an appeal or motion based upon a claim of ineffective assistance of counsel requires 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; that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond; and that the appeal or motion reflect whether a complaint has been filed with the 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). As the record does not provide such evidence, the AAO will not consider whether the extension petition should be considered as timely filed.

The AAO now turns to the issue of whether the evidence of record establishes that the labor certification application filed by the petitioner on the beneficiary's behalf had been pending 365 days on the start date of the beneficiary's employment and that the beneficiary would have been in H-1B status 365 days after the filing of the labor certification, as required by CIS policy for the approval of AC-21 extensions.

In the instant case, the start date listed on the Form I-129 is October 4, 2004, which is more than 365 days subsequent to the August 15, 2003 filing of the labor certification application benefiting the beneficiary. However, because the beneficiary's sixth year in H-1B status expired on March 14, 2004, the start date of his employment for the purposes of an extension under the provisions of AC-21 is the date on which he would have begun working under a seventh year extension of status – March 15, 2004. As a result, the labor certification benefiting the beneficiary would not have been pending for 365 or more days on the start date of his employment. Moreover, as the beneficiary's sixth year of H-1B status terminated on

March 14, 2004, the record does not establish that he would have been in H-1B status 365 days after the filing of the labor certification application. Accordingly, the record fails to demonstrate that the beneficiary is eligible for an extension of his H-1B status under sections 106(a) and (b) of AC-21, as amended by sections 11030(A)(a) and (b) of DOJ-21.

For the reasons previously discussed, the record does not establish that the petitioner has complied with Form I-129 filing requirements regarding the submission of an LCA or that the beneficiary is eligible for an extension of his H-1B status for a seventh year. Therefore, the AAO will 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.