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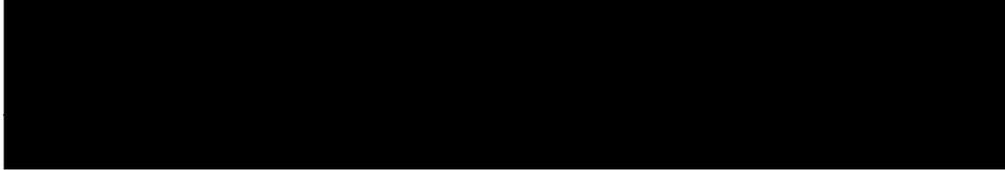
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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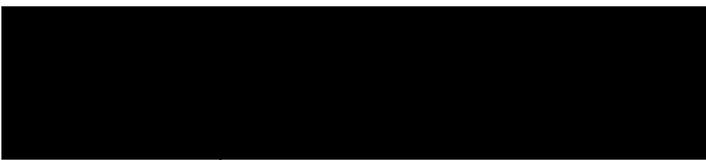


FILE: LIN 05 253 50614 Office: NEBRASKA SERVICE CENTER Date: DEC 05 2007

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and he dismissed a subsequent motion to reopen that was generated by an untimely appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a manufacturer and designer of medical diagnostics systems, and it seeks to employ the beneficiary as a software 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 on finding that the petition was filed after the beneficiary's H-1B status had expired, and that the beneficiary's loss of status rendered him ineligible for coverage under sections 104(c) or 106 of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (DOJ 21). On appeal, counsel contends that the petition should have been treated as timely filed.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." However, section 106(a) of AC21, as amended, removed the six-year limitation on the authorized duration of stay in H-1B visa status once 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien.

As amended by § 11030A(a) of DOJ21, § 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 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] 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.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

As found by the director, the beneficiary has been employed in the United States in H-1B status since October 1997. It is undisputed that, if the present petition was filed while the beneficiary was still in H-1B status, the beneficiary would qualify for a one-year extension of stay in H-1B status under AC21.

The director found that the service center was correct in rejecting the petition when first filed (for failure to submit the appropriate fee). The director further determined that the petitioner's attempt - by re-filing with an explanatory note - to correct its clerical error that led to the rejection was ineffective because needlessly delayed for approximately eight weeks. On appeal, counsel contests the director's analysis and contends that the petition should be treated as timely filed.

Upon consideration of the record of proceedings, the AAO finds the following facts of record critical to the outcome of this appeal. By the mistaken checkmark at the "no" at box 4 of Part B (Fee Exemption and/or Determination section) of its Data Collection Supplement, when initially filed the petitioner's Form I-129 mistakenly indicated that the petition's fee exceeded the amount submitted with the petition (which was \$185). However, on the date the petition was initially filed, CIS-issued documents that were submitted with the petition established that the entry at box 4 was mistaken, and that the \$185 fee submitted with the petition was the correct fee.¹ On these facts, which were considered in the full context of this particular record of proceeding, the AAO finds that the petitioner had submitted the correct fee when it initially filed the petition. Therefore, the rejection sanction for submission of an incorrect fee, at 8 C.F.R. § 103.2(a)(7)(i), does not apply. The petition was initially filed with correct fee.

For the reasons discussed above, the appeal will be sustained, and the petition will be approved. Since the petition was filed before the alien's status expired, he is eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4) and sections 106(a) and (b) of AC21, as amended by DOJ21.

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.

¹ The director's decision acknowledges that, due to the number of this petitioner's extension petitions previously approved for this beneficiary, \$185 was the correct fee at the time that the petition was initially filed.

ORDER: The appeal is sustained. The petition is approved.