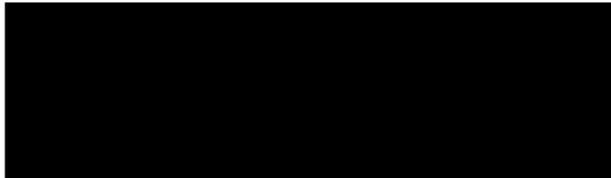


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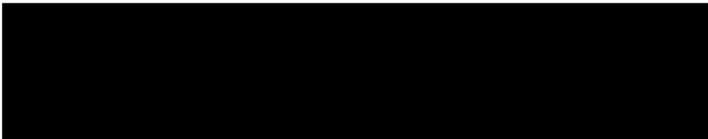
DZ

FILE: LIN 06 009 51901 Office: NEBRASKA SERVICE CENTER Date: MAR 01 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, in part. The petition will be approved for 60 days.

The petitioner is a computer solutions provider. It seeks to employ the beneficiary as a software engineer/applications and endeavors to extend the stay 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 denied the petition stating that the beneficiary had exhausted the six-year time limit available for H-1B classification. On appeal, the petitioner states that a labor certification filed by [REDACTED] was accepted for processing on March 3, 2003, and has been pending more than 365 days preceding the filing of the present Form I-129 petition and the beneficiary is therefore entitled to an extension of his status 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) (21st Century DOJ Appropriations Authorization Act).

Section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. As the above statute indicates, the beneficiary must be eligible to adjust status except for the per-country limitations.

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 21st Century DOJ Appropriations Authorization Act amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment-based immigrant; or (2) 365 days or more have passed since the filing of the employment-based immigrant petition (Form I-140).

The petitioner states on appeal that the beneficiary has not spent the allowable six-year period in the United States in H-1B visa status, as his employer, Venture Softnet, Inc. terminated the beneficiary's employment on December 6, 2004. The record reflects that the beneficiary first entered the United States on February 5, 1999, and remained continuously in the United States in H-1B status through the termination of his employment on December 6, 2004. Thus, at the time of filing the present petition, 60 days remained on the beneficiary's six-year maximum period of stay.

The petitioner is not, however, eligible for a one-year extension of stay under AC21. CIS records reflect that an immigrant petition for alien worker (Form I-140) was filed on the beneficiary's behalf concurrently with the beneficiary's application to adjust status to permanent resident (Form I-485) in September, 2004. Both the Form I-140 and Form I-485 were denied in September, 2005. AC21 provides that an alien on whose behalf a labor certification application has been filed for at least 365 days may be granted a one-year extension of H-1B visa status until such time as a final decision is made to deny the I-140 immigrant petition and/or to approve or deny the I-485 application to adjust status. As both the petition and the application upon which the AC21 extension claim is based were denied in September, 2005 prior to the time the petitioner filed the present petition in October, 2005, the petitioner is not entitled to a one-year extension of the beneficiary's status under AC21.

The AAO notes that the record reflects that the beneficiary worked in the United States in 2005 for Cybersoft and did not spend a full year outside the United States. Thus, he is not entitled to readmission in H-1B visa classification beyond the time remaining on his original six-year maximum, or 60 days. *See* 8 C.F.R. § 14.2(h)(13)(iii)(A).

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 with respect to the request for an extension of stay under AC21.

FURTHER ORDER: The petition is approved for 60 days.