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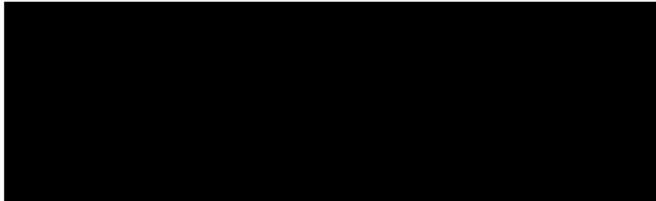
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FILE: WAC 07 059 52197 Office: CALIFORNIA SERVICE CENTER Date **AUG 04 2008**

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 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 services business that seeks to extend beyond the six-year limitation the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 determined that the beneficiary was not entitled to be employed for an additional year under the provisions of the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (21st Century DOJ Appropriations Authorization Act) because the Form I-140, Immigrant Petition for Alien Worker, filed on his behalf was denied.

On appeal, counsel states, in part:

The AC21 regulations provide that there shall be an exemption from the six-year maximum limitation when either:

- (1) 365 days or more have passed since the filing of any application for labor certification, or
- (2) 365 days or more have passed since the filing of an employment-based immigrant petition.

Under this first provision, the beneficiary . . . would appear to still be exempt from the six-year limitation, since he does have still [sic] a valid labor certification which was filed more than 365 days ago (at time of filing the I-129). In addition, a second I-140 was filed on behalf of [the beneficiary] on March 15, 2007, more than two weeks prior to the denial of his I-129. . . .

We note that the beneficiary has already been exempted from the six-year maximum limitation as he has already been granted a 7th and 8th year extension of H-1B based upon the same ETA-750 labor certification application. Therefore, he has previously been found to have been exempt.

The beneficiary in the instant case has been the beneficiary of a series of approved H-1B petitions, valid from December 30, 1997 to October 1, 1998; from March 1, 1998 to March 1, 2001; from October 1, 1998 to October 1, 2001; from October 2, 2001 to December 24, 2003; from December 25, 2003 to December 24, 2004; from December 25, 2004 to December 24, 2005; and from December 25, 2005 to December 24, 2006. The instant petition was filed on December 20, 2006, with the dates of intended employment from December 25, 2006 to December 24, 2007. The petitioner also filed an I-140 petition on behalf of the beneficiary on September 8, 2006, which was denied on December 20, 2006. On appeal, counsel submits evidence that a second I-140 was filed on behalf of the beneficiary on March 15, 2007. Counsel asserts, in part: "[T]he currently pending I-140, in addition to the previous argument regarding the labor certification application pending for more than 365 days, makes the beneficiary eligible for a further extension of his H-1B status."

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, AC21 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 21st Century DOJ Appropriations Authorization Act, § 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 11030(A)(b) of the 21st Century DOJ Appropriations Authorization Act amended § 106(a) of AC21 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.

In this matter, the beneficiary has been employed in the United States in H-1B status since December 30, 1997, and the maximum period of the beneficiary's authorized stay expired on December 29, 2003. The beneficiary was twice exempted from the six-year maximum limitation and was granted two extensions

through December 24, 2006. The record reflects that the current Form-129 petition was filed on December 20, 2006, and was denied on March 30, 2007. Citizenship and Immigration Services (CIS) records reflect that the petitioner filed a second Form I-140 based on the same labor certification on March 15, 2007. CIS denied the second Form I-140 on February 21, 2008, and the petitioner filed an appeal of that decision, which is pending.

The first issue in this matter is whether the petitioner's ETA 750 had been pending 365 days or more prior to the date the petition was filed. The petitioner submitted evidence that it filed a labor certification application Form ETA 750 on the beneficiary's behalf on October 1, 2002, more than 365 days prior to the filing of the present petition. The petitioner filed the Form I-129 petition on December 20, 2006, a date subsequent to the enactment of [REDACTED]. Accordingly, the pending labor certification application filed on the beneficiary's behalf can be the basis for extending his authorized period of stay in the United States in H-1B status beyond the maximum six-year limit as long as all other requirements for extension of stay and H-1B classification are met.

The beneficiary's authorized period of stay expired on December 24, 2006, and the I-140 petition filed on behalf of the beneficiary was denied on December 20, 2006. That decision was not appealed and became final as of December 20, 2006. The beneficiary therefore is not eligible for an exemption from the six-year limitation on his H-1B classification under AC21 section 106(a), and an extension of his H-1B status for an additional year under AC21 section 106(b).

AC21 clearly provides that the one-year extension of stay may only be granted until such time as the Form I-140 petition filed on behalf of the beneficiary pursuant to the approved labor certification is denied. As the Form I-140 petition was denied on the same date that the current petition was filed, there was no valid pending labor certification or petition as of that date. Counsel asserts on appeal that the second Form I-140 petition was filed on behalf of the beneficiary more than two weeks prior to the denial of the instant petition, and therefore the instant petition should be approved. The petitioner, however, must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Counsel additionally asserts that the beneficiary has already been exempted from the six-year maximum limitation as he has already been granted a 7th and 8th year extension of H-1B based upon the same ETA-750 labor certification application, is also noted. However, the AAO finds that the limitations contained in section 106(b) must be read together with section 106(a) of AC21, which was designed to prevent those people already here for six years in H-1B status from having to leave the United States due to delays in the processing of their labor certification applications or immigrant petitions. In this case, as the petitioner's I-140 petition filed on November 15, 2006 on behalf of the beneficiary was denied on December 20, 2006, the beneficiary is not eligible for an exemption from the six-year limitation on his H-1B classification under AC21 section 106(a), and an extension of his H-1B status for an additional year under AC21 section 106(b). In accordance with section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), limiting the authorized period of admission for an H-1B nonimmigrant to six years, the extension petition must be denied. Accordingly, the appeal will be dismissed, and the petition will be denied.

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.