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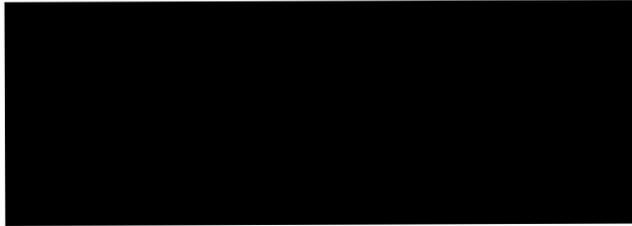
U.S. Department of Homeland Security
20 Massachusetts Avenue, NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: LIN 05 140 52201 Office: NEBRASKA SERVICE CENTER Date: JAN 18 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
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 an information technology staffing firm that seeks to employ the beneficiary as a programmer/analyst. The petitioner seeks to extend for a seventh year 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 record of proceeding before the AAO includes (1) Form I-129 and supporting documentation for a seventh year extension, filed on April 6, 2005; (2) the director's request for evidence (RFE); (3) counsel's response to the director's RFE; (4) the director's decision; and (5) Form I-290B and counsel's appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the ground that the beneficiary did not qualify for an exemption from the normal six-year limit on 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] may not exceed 6 years." However, the amended American Competitiveness in the Twenty-First Century Act (AC21) removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21 as amended by section 11030(A)(a) and (b) of the 21st Century Department of Justice Appropriations Act (hereinafter, AC21 as amended), reads as follows:

- (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.
- (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.

On March 24, 2003, the petitioner filed an application for alien employment certification with the U.S. Department of Labor. The record reflects that the beneficiary has been in the United States, in H-1B status, since February 26, 1998. The petitioner filed the instant petition on April 6, 2005, through prior counsel, requesting that the beneficiary be granted an additional year of H-1B status pursuant to AC21 as amended. The requested start date of employment in the petition was February 26, 2005. According to the record of proceeding, the beneficiary was in valid H-1B status until December 16, 2003. The instant petition did not include evidence that the beneficiary was in valid H-1B status when the Form I-129 was filed.

The director issued an RFE that stated that CIS records indicated that the beneficiary was not eligible for an extension, and that the documentation submitted with the petition did not indicate otherwise. In response to the RFE, counsel explained that prior counsel was incompetent, requested that the director exercise his discretion pursuant to 8 C. F. R. § 214.1(c)(4)(i), and submitted a copy of a complaint "to be filed by [the beneficiary] with the State of Michigan Attorney Grievance Commission." The record of proceeding contains no evidence that this complaint was ever filed by the beneficiary.

The director denied the petition on finding that the beneficiary had remained in the United States in H-1B status for longer than six years and the petitioner had not satisfied the requirements for an extension of stay under AC21 as amended. The director determined that because the petitioner did not file for an extension for the beneficiary while the beneficiary was still in valid H-1B status, the beneficiary was not eligible for approval under AC21 as amended. As discussed below, the AAO finds that the director's decision to deny the present petition is correct. Accordingly, the appeal will be dismissed and the petition will be denied.

On appeal, counsel again states that prior counsel provided ineffective assistance and requests the exercise of discretion pursuant to 8 C. F. R. § 214.1(c)(4)(i) due to extraordinary circumstances. The AAO notes that prior counsel's bar license was revoked on November 22, 2006. However, counsel has not fulfilled the requirements for proving ineffective assistance of counsel. 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). Accordingly, the petitioner has not provided sufficient documentation for a request that Citizenship and Immigration Services (CIS) provide discretionary relief on the basis of ineffective assistance of counsel.

If the alien is not otherwise eligible for an extension of H-1B status, CIS will not approve a request for extension of H-1B status. The request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the Form I-129 is filed. See Memorandum from William R. Yates, Acting Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD03-09*. HQBCIS 70/6.2.8-P (April 24, 2003). "An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed." 8 C.F.R. § 214.1(c)(4). There are exceptions to this rule, but none of them apply to the instant petition. The regulations also state, "A request for a petition extension may be filed *only if the validity of the original petition has not expired.*" 8 C.F.R. § 214.2(h)(14) (Emphasis added). The evidence of record establishes that the present petition was filed more than one year following the expiration of the last previously approved H-1B petition.

In her appeal brief, counsel states that she had to "piece together [the beneficiary's] H-1B history from the portions he was able to salvage from former counsel's office before it was re-possessioned." Counsel asserts that the beneficiary was in valid H-1B status until February 26, 2005 due to the approval of a Form I-129 petition with the receipt number of LIN-04-002-51830. Counsel bases the assertion upon (1) a copy of what appears to be a CIS standard form notifying former counsel of the receipt of an I-129 filed by the present petitioner for the present beneficiary; (2) the receipt number on that notice, which is LIN-04-002-51830; and (3) copies of CIS case-status printouts showing that the petition with the I-129 petition number in question, LIN-04-002-51830, was approved on December 16, 2003.

Counsel does not present a notice of approval for the petition with receipt number LIN-04-002-51830; and the case-status printouts do not reference the identity of either the petitioner or the beneficiary. Moreover, the information on the copy of the CIS receipt notice does not match CIS records. The AAO checked CIS electronic files for receipt number LIN-04-002-51830, and it also retrieved the actual physical file bearing that receipt number. The electronic records and the file itself reveal that the petition with receipt number LIN-04-002-51830 was filed by a different petitioner than here and on behalf of a different beneficiary than the person named in the present petition. Thus, the copy of the receipt notice submitted by counsel has no weight. The evidence of record establishes that the beneficiary was in valid H-1B status only until December 16, 2003.

The petitioner has not provided evidence that establishes the beneficiary's eligibility at the time filing in accordance with 8 C.F.R. § 214.1(c)(4). Therefore, the beneficiary was not eligible for an exemption from the six-year limitation on her H-1B classification under AC21 section 106(a) at the time that her extension petition was filed. In accordance with 8 C.F.R. § 214.2(h)(14), limiting petition extensions to those filed within the validity of the original petition, the extension petition is denied.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.