

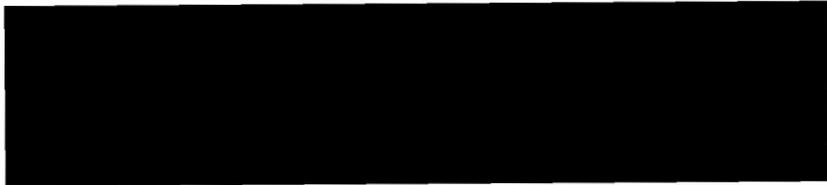
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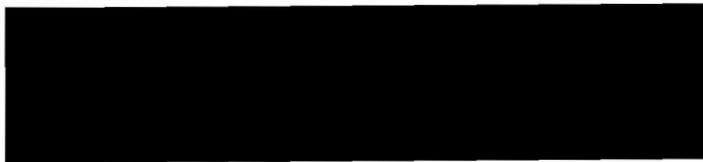


FILE: EAC 08 072 51306 Office: VERMONT SERVICE CENTER Date: SEP 30 200

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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner provides software development firm application solutions. It seeks to extend the employment of the beneficiary as a programmer analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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) the Form I-129 filed on January 11, 2008; (2) the director's March 27, 2008 request for further evidence (RFE); (3) copies of the initially submitted documents; (4) the director's April 17, 2008 denial decision; and (5) the Form I-290B and counsel's April 24, 2008 letter in support of the appeal. The AAO has considered the record in its entirety.

On April 17, 2008, the director denied the petition. The director determined that the beneficiary had held H-1B classification since February 17, 2001 and that the record did not include evidence allowing the beneficiary an extension of H-1B classification beyond the six-year limitation set out in the regulation at 8 C.F.R. § 214.2(h)(13)(iii). The director referenced the American Competitiveness in the Twenty-First Century Act (AC21), enacted October 17, 2000, and the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21), enacted on November 2, 2002 which provides exceptions to the six-year limitation in H-1B classification. The director determined that the document submitted by the petitioner initially to establish the beneficiary's eligibility for an exception to the six-year limitation could not be authenticated. The director noted that the petitioner had not submitted further evidence on this issue, but rather had submitted the same document in response to the director's request for further evidence. The director denied the petition for this reason.

The director also determined that the record did not contain evidence that the beneficiary had maintained valid nonimmigrant status beyond February 18, 2006 although the director's March 27, 2008 RFE had specifically requested this evidence. The director denied the petition for this additional reason.

On appeal, counsel for the petitioner provides photocopies of approval notices issued on the beneficiary's behalf establishing that the beneficiary maintained valid nonimmigrant status beyond February 18, 2006. The evidence submitted on appeal is sufficient to overcome the director's decision on this issue.

Also on appeal, counsel for the petitioner observes that the petitioner has been applying for an extension of visa beyond the February 18, 2006 date under an exception to the six-year limitation and "the beneficiary continued to stay and work here on legal status." Counsel notes that the beneficiary is working on a crucial project and that the denial of the H-1B extension is unreasonable and will cause irreparable loss and injury. Counsel does not submit further evidence to establish that the beneficiary is eligible to extend his stay beyond the six-year limitation.

The AAO finds that the prior approvals based on an exception to the six-year limitation are insufficient to establish eligibility under this petition. Prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner of beneficiary's qualifications. *See e.g. Texas A&M*

Univ. v. Upchurch, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). The AAO finds that if the records of the previously approved extension petitions contained the same evidence as submitted with this petition, CIS would have erred in approving the previously filed petition. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Counsel has not submitted additional evidence establishing that the beneficiary is eligible for an extension of H-1B classification beyond the six-year limitation. AC21 (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ21)) removed 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 DOJ21, section 106(a) of AC21 states the following:

(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 DOJ21 amended section 106(a) of AC21 to state the following:

(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 only information in the record demonstrating that the petitioner applied for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), is a photocopy of a form letter that does not identify the issuer indicating: "[w]e received the above Alien Employment Certification Application on 4/7/04. We are currently reviewing cases received 4/20/01." The underlined dates are handwritten in and as the document is a photocopy the dates are not subject to authentication. The photocopy also includes handwritten information regarding the date of the letter, the case number, the employer/petitioner, and the alien beneficiary. As this document does not include any information regarding who or how the letter was issued and is not an original, the AAO is unable to determine that the petitioner properly applied for a labor certification.

As the record does not contain substantive credible evidence that the petitioner applied for a labor certification, the petitioner has not established that the beneficiary is eligible for an extension of H-1B classification pursuant to AC21 as amended by DOJ21. The petitioner has not overcome the director's decision on this issue. For this reason, the petition will not be approved.

The burden of proof in this proceeding 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.