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U.S. Citizenship
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Services

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FILE: WAC 07 001 54209 Office: CALIFORNIA SERVICE CENTER Date: OCT 19 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:
[Redacted]

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be sustained. The petition will be approved.

The petitioner provides software development and consulting services. 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 director denied the petition because the beneficiary had remained in the United States in H-1B status for six years and the petitioner had not satisfied the requirements for an extension of stay under 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). The director determined that the underlying Form I-140 petition had been denied; thus the beneficiary is ineligible for an extension of the specialty occupation worker classification.

The Form I-129 in this matter was filed September 26, 2006 and requested that the beneficiary's H-1B employment be continued without change with the same employer. The record contains evidence that the beneficiary has been in H-1B classification since December 19, 1998; his most recent extension petition approval was valid from October 1, 2005 to September 30 2006. On appeal, the petitioner references an approved Form I-140 for the beneficiary.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years" and that an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year. AC-21 (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21)) 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 DOJ-21, section 106(a) of AC-21 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 DOJ-21 amended section 106(a) of AC-21 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 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.¹ See Memorandum from [REDACTED] 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). The regulations 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 petition in this matter was filed September 26, 2003, four days prior to the expiration of the beneficiary's H-1B status.

Upon review of CIS records, the AAO finds that a Form I-140 was filed February 23, 2006 (LIN 06 103 51659) based on a Form ETA 750, Labor Condition Application, filed December 9, 2003. The AAO notes this petition was denied on June 23, 2006. The petitioner immediately submitted a subsequent Form I-140

¹ The AAO acknowledges the petitioner's assertion that the failure to timely file an H-1B request for continuation of the beneficiary's employment was due to the ineffective assistance of counsel. However, 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). The record does not contain this information.

(LIN 06 228 52797) that was approved on July 25, 2007. Counsel asserts the Form I-140 was not denied but was withdrawn due to a typographical error.

The AAO finds counsel's assertion persuasive. The AAO notes the short period of time that lapsed between filing Form-140, LIN 06 103 51659, and Form I-140, LIN 06 228 52797, corroborating counsel's assertion that the initial Form I-140 petition had technical errors and had to be refiled. The subsequent Form I-140, LIN 06 228 52797, was approved based on the labor certification application originally filed December 9, 2003, over 365 days prior to the filing of the instant petition. Considering the beneficiary's continuous H-1B classification as well as the history of the Form ETA-750 and Form I-140 filings, the AAO finds that the withdrawal of Form-140, LIN 06 103 51659, should not negatively affect the continuing pendency of the Form ETA-750 and subsequently filed and approved Form I-140 filed on the beneficiary's behalf. Thus, the beneficiary is eligible for a one-year extension pursuant to Section 11030(A)(b) of DOJ-21 as it amended section 106(a) of AC-21, and the AAO will reverse the director's denial of the petition.

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.

ORDER: The appeal is sustained. The petition is approved