U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 03 168 50321 Office: TEXAS SERVICE CENTER Date: APR 20 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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, Director
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 provides engineering, procurement, and construction services. It seeks to employ the beneficiary as an PLC engineer. The petitioner, therefore, endeavors 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 because the petitioner sought to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. On appeal, counsel contends that the director erroneously denied the petition.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, 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.

The petitioner seeks the beneficiary's services as an PLC engineer, and wishes to continue the beneficiary's previously approved employment without change, and to extend or amend the stay of the beneficiary in the United States. The petitioner indicates on the petition that it seeks to extend the beneficiary's H-1B status to November 30, 2006.

The director denied the petition, finding that because the beneficiary had already been in the United States since August 25, 1997 in H-1B status, he had reached the maximum six-year period of stay in the United States on November 30, 2003. The director stated that the petitioner failed to establish that the beneficiary had an I-140 form or labor certification application (LCA) pending.

On appeal, counsel claims that the director erroneously denied the petition because the beneficiary qualifies for benefits under the American Competitiveness in the 21st Century Act (the AC21).

Upon review of the evidence in the record, the AAO finds that the beneficiary is not eligible to derive benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on May 29, 2003; (2) the January 5, 2004 letter from the U.S. Department of Labor (DOL), Employment and Training Administration, (ETA case number [redacted] indicating the petitioner's application for employment certification was filed with the Texas Workforce Commission (TWC) on January 22, 2003; (3) the September 19, 2003 letter from the TWC stating that the application for employment certification had been sent to the DOL; (4) the January 24, 2003 letter from the TWC stating that the alien labor certification application (ALC case number [redacted] had been received; (5) approval notices for H-4 and H-1B classifications; (6) an approved

application for labor certification filed on behalf of the beneficiary's spouse; (7) a receipt notice for the Form I-140 which had been submitted on behalf of the beneficiary's spouse; (8) the director's denial letter; (9) Form I-290B and supporting documentation; and (10) counsel's letter dated January 15, 2004. The AAO reviewed the record in its entirety before issuing its decision.

In order to extend or amend the beneficiary's stay in the United States to November 30, 2006 in the H-1B classification, the petitioner must prove that the beneficiary qualifies for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

Section 106(a) of the AC21 allows an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien was the beneficiary of a Form I-140 or an application for adjustment of status; and (2) 365 days or more had passed since the filing of the labor certification that is required for the alien to obtain status as an employment-based immigrant, or 365 days or more had passed since the filing of the Form I-140. Section 104(c) of the AC21 enables H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

On November 2, 2002, the 21st Century DOJ Appropriations Act was signed into law. It amended section 106(a) of the AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of the 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 labor certification 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 Form I-140. Section 106(b) of the AC21 allows for H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

Based on the evidence in the record, the beneficiary is not eligible for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act. The record reflects that the petitioner submitted, on the beneficiary's behalf, an application for labor certification (which has been pending since January 22, 2003). The present H-1B petition was filed on May 29, 2003. Because 365 days had not passed since the filing of the labor certification on January 22, 2003, and the filing of the H-1B petition on May 29, 2003, the beneficiary is not eligible for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

The application for labor certification and Form I-140, which had been submitted on behalf of the beneficiary's spouse, do not qualify the beneficiary for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is eligible to extend his stay in the H-1B classification beyond the six-year maximum period.

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.

Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). 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).

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