U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

JUN 22 2005

FILE: EAC 03 061 54045 Office: VERMONT SERVICE CENTER Date:

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 service center director 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 specializes in the recruitment of information technology professionals. It seeks to employ the beneficiary as a programmer analyst. The petitioner 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 beneficiary had allowed his authorized period of stay to expire before filing the instant petition and, therefore, is ineligible for the benefits provided for in sections 104(c) or 106 of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (21st Century DOJ Appropriations Authorization Act),

On appeal, counsel states, in part, that the beneficiary's H-1B status expired on September 18, 2002, and, therefore, he did not violate his status when he departed the United States on September 17, 2002, after six years of H-1B status. Counsel further states that there is no requirement under the 21st Century DOJ Appropriations Act that states that the beneficiary must have been maintaining valid H-1B status at the time of filing in order to qualify for the exception.

Section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. As the above statute indicates, the beneficiary must be eligible to adjust status except for the per-country limitations. (Emphasis added.)

Under section 106(a) of AC21, an H-1B nonimmigrant may obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien is the beneficiary of an employment-based immigrant petition or an application for adjustment of status; and (2) 365 days or more have passed since the filing of the labor certification application (Form ETA 750) that is required for the alien to obtain status as an employment-based immigrant, or 365 days or more have passed since the filing of the employment-based petition (Form I-140).

Part of the 21st Century DOJ Appropriations Authorization Act amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of 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 application for labor certification (Form ETA 750) 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 employment-based immigrant petition (Form I-140).

Here, the petitioner submitted evidence that the petitioner filed a labor certification application Form ETA 750 on the beneficiary's behalf on July 5, 2001.

The petitioner filed the I-129 petition on December 19, 2002, a date subsequent to the enactment of the 21st Century DOJ Appropriations Act on November 2, 2002. Accordingly, the pending labor certification application 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 an extension of stay are met. Although there is no appeal from the denial of an application for extension of stay, 8 C.F.R. § 214.1(c)(5), and CIS generally rejects all appeals from the denial of an extension of stay, the regulation at 8 C.F.R. § 214.2(h)(13)(ii)(B) prohibits approval of a Form I-129 petition filed on behalf of an H-1B or L-1 nonimmigrant worker who has met the maximum allowable period of authorized stay. Thus, the AAO must in this case consider whether the alien was in status or in an authorized period of stay in order to determine whether the petition was properly denied.

Pursuant to 8 C.F.R. § 214.1(c)(4), 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, with certain exceptions. In this case, the beneficiary had reached the maximum allowable period of time in H-1B status before the instant petition/application for extension of stay was filed. The petitioner has not demonstrated that the failure to timely file the application for extension of stay meets the requirements for any of the exceptions.

In this case, the beneficiary's authorized period of stay expired on September 18, 2002; however, the petition seeking a one-year extension was not filed until December 19, 2002. In addition, counsel submits evidence that the beneficiary departed the United States on September 17, 2002. CIS may not extend the beneficiary's status if he is no longer in status. Accordingly, the beneficiary has reached the 6-year maximum allowable period of stay as an H-1B nonimmigrant, the petition was filed after the alien's status expired, and therefore the alien is not eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4) and section 106(a) of AC21. In accordance with the regulation at 8 C.F.R. § 214.2(h)(13)(ii)(B), the petition may not be approved.

Beyond the director's decision, it does not appear that the proffered position is a specialty occupation. In this case, although the record contains a description of the beneficiary's proposed duties from the petitioner, there is no comprehensive description of the proposed duties from an authorized representative of the petitioner's client where the beneficiary will ultimately perform the proposed duties. Without such description, the petitioner has not demonstrated that the proffered position meets the statutory definition of a specialty occupation. The petitioner bears the burden of establishing that the beneficiary will be coming to the United States to perform services in a specialty occupation. Absent a comprehensive description of the beneficiary's proposed duties, as described above, the petitioner has not persuasively demonstrated that a specialty occupation exists for the beneficiary, or that it has complied with the terms of the labor condition application. For this additional reason, the petition may not be approved.

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.