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U.S. Citizenship
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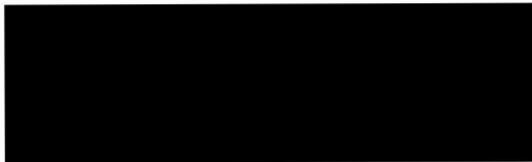


FILE: LIN 05 116 51924 Office: NEBRASKA SERVICE CENTER Date: JAN 03 2007

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:



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 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 a commercial calibration and calibration management firm that seeks to continue its employment of the beneficiary as an accounting director. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant status 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (4) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner does not dispute the director's finding that the petitioner seeks to extend the beneficiary's total stay in the United States beyond six years. The petitioner filed the instant petition on March 9, 2005 and requested that the beneficiary be granted three additional years in H-1B status.

The director denied the petition, finding the beneficiary ineligible for additional time in H-1B status under the American Competitiveness in the Twenty-First Century Act (AC-21), as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21).¹

As a general rule, 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." However, AC-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.

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states the following:

¹ The AAO notes that the petitioner did not raise the issue of AC-21 and DOJ-21 in the petition.

- (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 appeal, counsel contends that the beneficiary qualifies for an additional year of H-1B status. Counsel contends that the beneficiary is entitled to an additional year in H-1B status because an application for labor certification was filed on behalf of the beneficiary's wife, which entitled her to additional time in H-1B status. Counsel contends that since the beneficiary's wife is entitled to additional time in H-1B status, the beneficiary is also entitled to such an extension.

Counsel submits a copy of a letter from the State Of Washington Employment Security Department, dated December 31, 2001, which states that the an application for labor certification was filed on behalf of the beneficiary's wife on December 24, 2001.² Counsel also submits evidence regarding the beneficiary's wife's current nonimmigrant status, as well as evidence regarding the validity of their marriage.

The AAO disagrees with counsel's analysis. Section 106(a)(1), the section of AC-21 at issue here, exempts from the six-year limitation aliens on whose behalf "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))" has been pending for 365 days.

The AAO notes that the record does not reflect the filing of any application for labor certification on behalf of the beneficiary, so no certification required or used by the beneficiary to obtain status under section 203(b) of the Act (8 U.S.C. § 1153(b)) has been pending for at least 365 days. Neither AC-21 nor DOJ-21 provide for the granting of additional time in H-1B status for the spouses of aliens entitled to benefits under those statutes. The beneficiary is, therefore, ineligible for additional time in H-1B status.

Accordingly, the AAO finds that the petitioner has not overcome 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 not sustained that burden.

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

² Counsel does not indicate whether any action has been taken on this application since that time.