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FILE: EAC 04 125 50092 Office: VERMONT SERVICE CENTER Date: DEC 09 2005

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:

SELF-REPRESENTED

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, Director
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 computer consulting company that seeks to employ the beneficiary as a programmer-analyst. 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's RFE response and supporting documentation; (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.

According to the Form I-129, the beneficiary has been in the United States, in H-1B status, since May 3, 1998 (with two interruptions, each for a period of approximately one month). According to the petitioner, it filed an application for alien labor certification for the beneficiary on April 30, 2003.

The petitioner filed the instant petition on March 22, 2004, requesting that the beneficiary be granted an additional year of H-1B status, pursuant to the American Competitiveness in the Twenty-First Century Act (AC-21), as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21).

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.

The petition was denied on the basis that the petitioner had not submitted evidence requested in the director's June 30, 2004 request for evidence. Specifically, the director had requested that the petitioner submit one of the following items: (1) a document from the State Workforce Agency (SWA) notifying the employer, the employer's representative, the Department of Labor (DOL), or Citizenship and Immigration Services (CIS) that a Form ETA-750, filed on behalf of the beneficiary, had been pending for at least 365 days; (2) a document from one of the DOL's Employment and Training Administration's (ETA) regional offices notifying the employer, the employer's representative, or CIS that a Form ETA-750, filed on behalf of the beneficiary, had been pending for at least 365 days; or (3) a copy of an approved Form ETA-750.

However, the petitioner did not submit any of these items. Rather, it submitted copies of the unapproved ETA-750, a copy of a postal delivery notice, and a copy of the cover letter to the filing. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As the petitioner did not provide the evidence that the director requested in her request for evidence, the petitioner was properly denied.

On appeal, the petitioner submits the same documents it submitted in response to the request for evidence. Although the petitioner asserts that this submission includes "a copy of all requested documents," the

petitioner has still not addressed the concerns raised in the director's request for evidence. Specifically, the petitioner has still not submitted a letter from the SWA or ETA confirming that the petition has been pending for at least 365 days, or a copy of an approved ETA-750.

Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the petition may not be approved for an additional reason.

The instant petition was filed on March 22, 2004, with a start date of employment of March 17, 2004. According to the petitioner, the application for alien labor certification was filed on April 30, 2003. Therefore, the application for alien labor certification had not been pending at least 365 days on the date the H-1B petition was filed.

Section 106(a) of AC-21, as amended by section 11030(A)(a) of DOJ-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.

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).

Consequently, the regulation under which the petitioner seeks to qualify the beneficiary for a seventh year of H-1B status clearly requires that when the petition is filed, at least 365 days must have elapsed since the filing of the application for alien labor certification. Therefore, on March 17, 2004, the start of employment, or on March 22, 2004, the date this petition was filed, the beneficiary was ineligible to derive benefits from AC-21, as amended by DOJ-21. *See also* Memorandum from William R. Yates, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21)(Public Law 106-313)(May 12, 2005)*; Memorandum from William R. Yates, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273)(April 24, 2003)*.

A petitioner must wait 365 days after filing the application for alien labor certification before it is eligible to file for an seventh year of H-1B status under AC-21 (as amended by DOJ-21). Here, the petitioner did not do so. 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.