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FILE: LIN 04 155 53581 Office: NEBRASKA SERVICE CENTER Date: JAN 20 2006

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.

for Michael T. Kelly
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 sustained. The petition will be approved.

The petitioner is a healthcare company that seeks to employ the beneficiary as a physician. 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 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 because less than 365 days had elapsed between when the petitioner filed the alien employment certification application (September 30, 2003) and the date the petition was filed (April 30, 2004), the beneficiary did not qualify for an extension of status.

On appeal, counsel submits a brief.

The beneficiary in the instant case has been the beneficiary of a series of approved H-1B petitions, valid from October 1, 1998 to September 30, 2004. In a letter dated April 19, 2004, the Missouri Department of Economic Development confirmed that the petitioner filed an alien labor certification application for the beneficiary on September 30, 2003. The record also reflects that the petition was filed on April 30, 2004. On appeal, counsel states that the director's decision was inconsistent with a Citizenship and Immigration Services' (CIS) opinion given during a Service Center Operations teleconference on July 27, 2004, which indicated that petitions similar to the instant matter should be approved.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21 removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030(A)(a) of the 21st Century DOJ Appropriations Authorization Act, § 106(a) of AC21 reads:

(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 the 21st Century DOJ Appropriations Authorization Act amended § 106(a) of AC21 to read:

(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.

CIS headquarters issued an operations memorandum on September 23, 2005, titled "Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year," which confirms counsel's interpretation of CIS's policy on this issue. The pertinent part of the memorandum revises section 33.3(g)(8) of the *Adjudicator's Field Manual (AFM)* to read as follows:

As discussed in section 31.2(d) of the *AFM*, assuming the alien is otherwise qualified for an extension of H-1B status, USCIS will grant an extension beyond the 6th year if the filing date of a pending or approved labor certification application or a pending or approved EB immigrant petition is 365 days or more prior to the requested employment start date on the H-1B petition. Such extension should be granted regardless of whether the H-1B extension application was filed prior to the passage of such period. However, if the alien would no longer be in H-1B status at the time that 365 days from the filing of the labor certification application or immigrant petition has run, then the extension of stay request cannot be granted. . . .

Accordingly, the appeal will be sustained, and the petition will be approved.

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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.