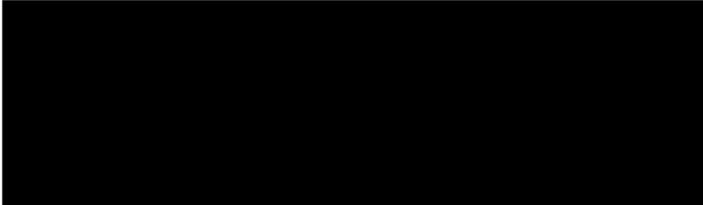


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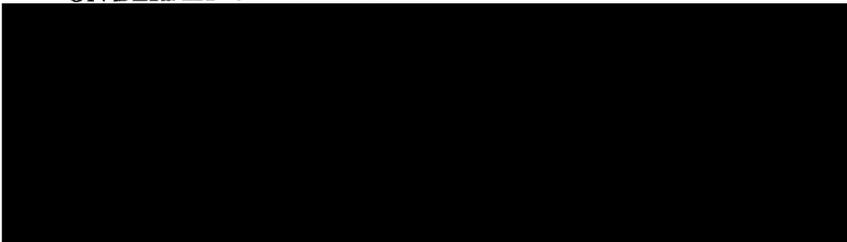
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FILE: WAC 06 040 53020 Office: CALIFORNIA SERVICE CENTER Date: **NOV 14 2007**

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, Chief  
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 is a software development business that seeks to extend its authorization to employ the beneficiary as a software engineer. The director denied the petition because the beneficiary had allowed his authorized period of stay to expire before filing the instant petition. The director found that the petitioner is, therefore, 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) (DOJ 21).

On appeal, counsel states, in part, as follows:

[The] [p]etitioner demonstrated all the required elements [to be granted an exception pursuant to 8 C.F.R. § 214.1(c)(4)]. The extraordinary circumstances include the fact that the prior extension to recapture days outside the United States was still pending, and expected to produce an extension of [the beneficiary's] H-1B to November 19, 2006, at the time the labor certification was filed on November 18, 2005. Had [the] petitioner known that the Service Center would extend the H-1B for 376 days instead of 381, it would have filed the labor certification application before November 14, 2005. The petitioner and beneficiary had no way of knowing that the Service would, in fact, allow the recapture of only 376 days instead of 381 so that the H-1B would expire on November 14, 2006.

Although the Decision recognizes [the] petitioner's request that the Service exercise its discretion to overlook the 4-day delay in filing the extension application, it gives no discussion or analysis to show that the request was considered at all or any discretion considered. Instead, the Decision seems to be based on the erroneous notion that the extension [cannot] be granted because the petitioner had been physically in the US in H-1B status for six years.

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 as [an H-1B] nonimmigrant may not exceed 6 years." However, section 106(a) of AC21, as amended, removed the six-year limitation on the authorized duration of stay in H-1B visa status once 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien.

As amended by § 11030A(a) of DOJ21, § 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 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] 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.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

As found by the director, the beneficiary has been employed in the United States in H-1B status since November 3, 1998, and the maximum period of the beneficiary's authorized stay expired on November 14, 2005.

The first issue in this matter is whether the petitioner's ETA 750 had been pending 365 days or more prior to the date the petition was filed. The petitioner submitted evidence that it filed a labor certification application Form ETA 750 on the beneficiary's behalf on November 18, 2004, 365 days prior to the filing of the present petition. The petitioner filed the Form I-129 petition on November 18, 2005, a date subsequent to the enactment of DOJ21. Accordingly, the pending labor certification application filed 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 extension of stay and H-1B classification are met.

The beneficiary's authorized period of stay expired on November 14, 2005; however, the petition seeking an additional one-year period of authorized employment was not filed until November 18, 2005. Counsel asserts that the petitioner demonstrated all the required elements to be granted an exception for the beneficiary's

failure to maintain his nonimmigrant H-1B status. Counsel explains that had the petitioner known that the director would extend the H-1B for only 376 days instead of the requested 381, it would have filed the labor certification application before November 14, 2005.

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. CIS may not extend the beneficiary's status if he is no longer in status. 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. The record of proceeding does not contain a copy of the visa petition that counsel claims was approved for only 376 days instead of the requested 381 days, or any evidence that the director's decision to grant only 376 days of the requested 381 days was erroneous. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, a visa petition may not be approved at a later date based on a set of facts not present at the time of filing. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); see also *Matter of Katigbak*, 14 I&N 45, 49 (Comm. 1971).

The AAO further notes that a request for an H-1B petition extension may be filed only if the validity of the original petition has not expired. 8 C.F.R. § 214.2(h)(14). As the validity of the previous petition expired on November 14, 2005, four days prior to the filing of the current petition, the petition extension may not be approved.

As discussed above, 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. 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, the petition was filed after the validity of the previous petition had expired, and therefore the alien is not eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4), 8 C.F.R. § 214.2(h)(14) 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.

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.