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FILE: WAC 08 006 50811 Office: CALIFORNIA SERVICE CENTER Date: **SEP 17 2009**

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)

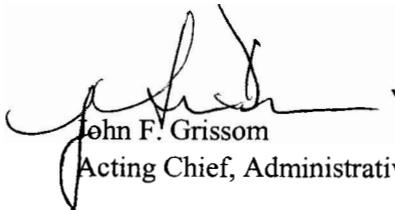
ON BEHALF OF PETITIONER:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting 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 systems 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 director denied the petition because the petitioner did not provide the requested verification letter from the Department of Labor (DOL) pertaining to the labor certification application. The director found that the petitioner is thus 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, the petitioner contends that it has no control over the unresponsiveness of the DOL and the petition therefore should be approved.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year.

The petitioner seeks the beneficiary's services as a systems analyst, and wishes to continue the beneficiary's previously approved employment without change, and to extend or amend the stay of the beneficiary in the United States. The petitioner indicates on the petition that it seeks to extend the beneficiary's H-1B status to October 1, 2011.

The director denied the petition because the beneficiary had already been employed in the United States since October 17, 2000 in H-1B status, and the requested extension of stay would place the beneficiary beyond the six-year limit. The director stated that the petitioner sought to qualify the beneficiary for benefits under the AC21 by submitting the October 24, 2006 labor certification receipt for [REDACTED] from the DOL. The director determined that, because the most recent action on the case reflects that the case has been closed, the beneficiary was not eligible for benefits under the AC21.

On appeal, the petitioner's VP/Technical Manager submits evidence to show that he is "in continuous pursuit with the [DOL] to complete the Labor certification process." The petitioner claims that the labor certification, originally filed on October 24, 2006, is still pending with the DOL.

Upon review of the evidence in the record, the AAO finds that the beneficiary is ineligible to derive benefits from the amendment to section 106(a) of the AC21 by the 21st Century DOJ Appropriations Act.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on October 1, 2007; (2) a letter dated May 17, 2006 from the Dallas Backlog Elimination Center at the Employment and Training Administration [REDACTED], reflecting an Acceptance for Processing date of January 31, 2003, and indicating that the petitioner's case had been closed due to an untimely or incomplete response; (3) a "Selection of Continuation Option Letter" addressed to the Dallas Backlog Elimination Center, signed by the petitioner on September 22, 2006, indicating that the petitioner wished to continue the processing of ETA [REDACTED]; (4) a letter dated October 24, 2006 from the Dallas Backlog Elimination Center in the Employment and Training Administration [REDACTED], indicating that the petitioner's case was received and currently awaiting further review by a Backlog Elimination Center analyst, and that the petitioner would receive a 45-Day Letter and a Selection of Continuation Option letter, if it had "not already received one"; (5) the director's November 23, 2007 request for additional evidence; (6) the petitioner's response to the director's request; (7) the director's denial letter; (8) Form I-290B and supporting documentation; and (9) the petitioner's brief. The AAO reviewed the record in its entirety before issuing its decision.

In order to extend or amend the beneficiary's stay in the United States in the H-1B classification, the petitioner must prove that the beneficiary qualifies for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

On November 2, 2002, the 21st Century DOJ Appropriations Act was signed into law. It amended section 106(a) of the AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of the 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 labor certification 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 Form I-140. Section 106(b) of the AC21 allows for H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

Based on the evidence in the record, the beneficiary does not qualify for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act. The record reflects that the alien labor certification [REDACTED] with the Acceptance for Processing date of January 31, 2003, was closed due to an untimely or incomplete response, and that on October 24, 2006, the labor certification [REDACTED] was received by the Dallas Backlog Elimination Center and awaiting further review. Thus, as noted by the director, the petitioner failed to provide recent evidence that reflects the current status of the case.¹ Accordingly,

¹ A recent check on August 14, 2009 of the DOL's Employment & Training Administration website at http://pds.pbis.doleta.gov/pbis_pds.cfm reflects that the labor certification [REDACTED] has been closed.

the beneficiary does not qualify for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act.

As related in the discussion above, the petitioner has not established that the beneficiary is eligible to extend his stay in the H-1B classification beyond the six-year maximum period.

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.