

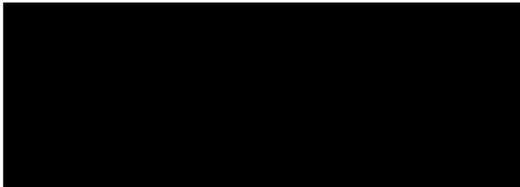
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**U.S. Citizenship
and Immigration
Services**

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FILE: EAC 05 115 52849 Office: VERMONT SERVICE CENTER

Date: AUG 06 2007

IN RE: Petitioner:
Beneficiary:



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 
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 petroleum research analysis company that seeks to employ the beneficiary as a database programmer. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a 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; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

According to the H Classification Supplement to the Form I-129, the beneficiary was in the United States, in H-1B status, from May 10, 1999 through the time the instant petition was received at the service center on March 16, 2005. The beneficiary's current nonimmigrant status expired April 15, 2005.

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, the American Competitiveness in the Twenty-First Century Act (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 the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21) broadened the class of H-1B nonimmigrants able to avail themselves of this provision.¹

The petitioner did not indicate the legal basis for its request for additional time for the beneficiary in its initial submission. In his March 21, 2005 request for additional evidence, the director requested evidence from the petitioner to establish eligibility for such additional time under AC-21 as amended by DOJ-21.

In his May 19, 2005 response to the director's request, counsel submitted another copy of the certified labor condition application and another copy of the petitioner's February 3, 2005 letter of support. In his letter, counsel stated that "there is already documentation in the file indicating the need for additional year by the employer."

Finding insufficient evidence that the beneficiary qualified for an additional seventh year of H-1B classification, the director denied the petition.

¹ See also Memorandum from William R. Yates, Acting Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD03-09*. HQBCIS 70/6.2.8-P (April 24, 2003); Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *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: Adjudicator's Field Manual Update AD05-15*. HQPRD70/6.2.8 (September 23, 2005).

On appeal, counsel states the following:

This application for extension was filed on the basis that the alien was the only individual able to complete a major project and which is strategically important to United States interest in the energy field.² The loss of the alien to the project could set things back by more than six months. In this period of rising energy costs, a six month delay in a project which can assist in the expansion of the availability of oil projects, is great but difficult to calculate.

The request for extension is based on these extra-ordinary circumstances and not based on a pending labor certification or I-140.

The extension falls under 8CFR 214.2 (b)(ii)(9) [sic]. Extraordinary extensions have been granted on appeal in **Matter of Cornell University 19 I & N 650 (1987)** and **Matter of Safetran 20 I & N 40 (1929)** [sic] in similar circumstances [emphasis in original].

The AAO disagrees with counsel's analysis. First, the AAO notes that the regulation cited by counsel, 8 C.F.R. § 214.2(b)(ii)(9), does not exist. Moreover, the AAO notes that subsection (b) of 8 C.F.R. § 214.2 addresses visitor visas, specifically: visitors for business or pleasure; visitors under the visa waiver program; the admission of aliens pursuant to the North American Free Trade Agreement; and construction workers.

The AAO also notes that the two cases cited by counsel involved determinations on an issue no longer relevant to immigration law—whether a petitioner can, through the discretion of the legacy Immigration and Naturalization Service, obtain a sixth year of H-1B status for an employee in excess of the normal five-year limitation on H-1B status. Today, any petitioner may file for and obtain a sixth year of H-1B status for its H-1B employees. Also, the AAO notes that in *Matter of Safetran*, 20 I&N Dec. 49 (BIA 1989),³ the BIA did not approve the petition, as claimed by counsel. Rather, it denied the petition.

In both *Safetran* and *Matter of Cornell University*, 19 I&N 650 (BIA 1987), the BIA was analyzing the regulation at 8 C.F.R. § 214.2(h)(11)(ii) as it existed at the time those decisions were issued. According to the BIA, at that time 8 C.F.R. § 214.2(h)(11)(ii) stated that the total period of approval in H-1B classification, including the initial approval, could not exceed five years, except in extraordinary circumstances. That regulation, however, does not stand for the same proposition today. Today, 8 C.F.R. § 214.2(h)(11)(ii) addresses the automatic revocation of previously approved petitions, which is not at issue in this case.

Counsel and the petitioner have failed to demonstrate any basis under which the beneficiary is eligible for any additional authorized stay in H-1B status. Accordingly, the beneficiary is ineligible under section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), as he has exhausted his six-year limitation on the authorized period of stay in H-1B status.

² No documentary evidence beyond the two-paragraph letter submitted at the time of the initial filing, and resubmitted in response to the director's request for evidence, has been submitted to support this assertion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

³ The case cited by counsel, *Matter of Safetran*, 20 I & N 40 (1929), does not exist. The AAO assumes that counsel is referring to *Matter of Safetran*, 20 I&N Dec. 49 (BIA 1989) and will proceed accordingly.

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.