

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

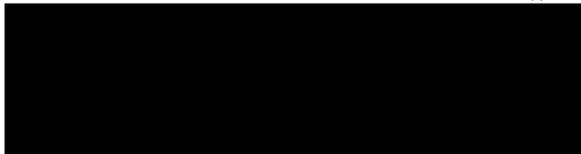
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D1



FILE: WAC 06 271 51467 Office: CALIFORNIA SERVICE CENTER Date: DEC 26 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.

A handwritten signature in cursive script that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 trading and consulting company that seeks to employ the beneficiary as a systems analyst. The petitioner, therefore, seeks to extend for a seventh year the beneficiary's classification 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) counsel's response to the RFE; (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.

The record reflects that the beneficiary has been in the United States, in H-1B status, since April 15, 1999. The petitioner filed a Form ETA 750 application for alien labor certification for the beneficiary on March 5, 2001, which was certified on February 28, 2002. The previous extension petition was approved on behalf of the beneficiary from September 28, 2005 – September 27, 2006 (SRC-05-127-52075).¹

The petitioner filed the instant petition on September 5, 2006, 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)). The requested start date of employment in the petition was September 28, 2006.

The director denied the petition, stating that

The Form ETA 750 had not been pending for at least 365 days or more prior to the alien's requested start date of the request for extension because it was certified on February 28, 2002. The petitioner did not provide evidence that the employment-based immigrant petition has been filed and pending for at least 365 days or more prior to the alien's requested start date of the request for extension.

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.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

¹ As the beneficiary's six-year stay tolled on April 14, 2005, it appears that the current petition may be the third petition filed under the provisions of AC-21. The preceding petition to the most recently approved petition was approved from September 28, 2004 – September 27, 2005 (SRC-04-250-51591).

(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 DOJ-21 amended section 106(a) of AC-21 to state the following:

(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.

Two recent Citizenship and Immigration Services (CIS) policy memoranda have clarified how CIS is to implement these provisions of AC-21 and DOJ-21. In accordance with the law and these two policy memoranda, the AAO determines that the beneficiary is eligible for an exemption from the six-year limitation on her H-1B classification under section 106(a) of AC-21, and for an extension of her H-1B status for a ninth year under section 106(b) of AC-21.

Both memoranda provide, in part, that an alien who is otherwise eligible for an H-1B extension does not need to first file a form I-129 requesting an extension of time to allow the beneficiary to complete the six years, and then file an additional Form I-129 requesting an extension of time beyond the six years. Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *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) HQPRD70/6.2.8-P (May 12, 2005); 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). The first memorandum, at page 9, states, in part, the following: "Until further guidance is published, a request for an H-1B extension beyond the 6-year limit should not be denied on the sole basis that an I-140 petition has not yet been filed."

The date of the filing of the application for alien labor certification, March 5, 2001, is more than 365 days prior to the September 28, 2006 requested employment start date specified on the Form I-129. Under the CIS guidance quoted above, the petitioner may extend the beneficiary's stay in H-1B status beyond the 6th year despite not having filed a Form I-140 petition. Thus, the beneficiary is eligible for a ninth year of H-1B status, and the AAO will reverse the director's denial of the petition.²

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.

² The beneficiary will complete her eighth year in H-1B status on April 14, 2006 and will begin her ninth year on April 15, 2006.