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FILE: EAC 05 020 52657 Office: VERMONT SERVICE CENTER Date: DEC 22 2005

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*fa* *Michael T. Kelly*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software consulting company. It seeks to employ the beneficiary as a programmer analyst and extend for one year his classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 on the ground that the beneficiary, who had already spent six years in the United States in H-1B status, did not qualify for an exemption from the statutory six-year limit.

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] may not exceed 6 years.” However, the amended American Competitiveness in the Twenty-First Century Act (“AC21”) removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by section 11030(A)(a) and (b) of the 21<sup>st</sup> Century Department of Justice Appropriations Act, reads as follows:

(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.

(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.

The record of proceeding before the AAO includes (1) Form I-129 and supporting documentation; (2) the director's decision; and (3) Form I-290B, an appeal brief, and supporting materials.

The director denied the petition on two grounds: (1) that the petitioner's application for labor certification (Form ETA 750) was not filed with the Department of Labor 365 days or more before the filing of the instant petition, and (2) that the beneficiary was not maintaining a valid nonimmigrant status at the time the instant petition was filed. The record showed that a Form ETA 750 was filed on April 19, 2004, just over six months before the filing of the instant H-1B extension petition on October 28, 2004, and that the beneficiary's H-1B status expired on August 23, 2004, more than two months before the filing of the instant H-1B extension petition. The director also referred to internal records of Citizenship and Immigration Services (CIS) indicating that the beneficiary first entered the United States on May 1, 1997, the petitioner's statement that the beneficiary had completed six years in H-1B status, and the lack of evidence as to when that status began, and declared that the beneficiary may have completed six years in H-1B status as early as April 30, 2003.

On appeal the petitioner acknowledges that the beneficiary had completed not just six, but seven years in H-1B status when his latest one-year extension expired on August 25 (actually August 23), 2004. The petitioner asserts that a labor certification application was pending with the Department of Labor (DOL) for more than 365 days at the time the instant petition was filed on October 28, 2004. In support of this assertion the petitioner submits a copy of a letter to CIS from one of the beneficiary's previous U.S. employers, [REDACTED] dated April 28, 2003, stating that it was applying for a one-year extension of the beneficiary's H-1B status under the provisions of AC21 and that a labor certification application on behalf of the beneficiary "has been pending for at least 365 days," having been filed with the Michigan Department of Labor on August 23, 2002. The petitioner also refers to another H-1B petition filed on behalf of the beneficiary on May 19, 2004 by yet another U.S. company, [REDACTED] for whom the beneficiary, according to his curriculum vitae, began working in May 2004.

The foregoing documentation does not establish the beneficiary's eligibility under AC21 for a further one-year extension of stay in H-1B status. The H-1B petition filed by [REDACTED] is a different proceeding from the instant petition, and thus irrelevant in the AAO's disposition of the instant appeal. As for the letter from [REDACTED] it contains an internal inconsistency since it was dated April 28, 2003 and refers to a labor certification application filed on August 23, 2002 – just eight months earlier – as pending for at least 365 days. The AAO notes that the petitioner neglected to submit a copy of the labor certification, or other evidence of its existence and date of filing. In order to establish that a labor certification application has been pending for 365 days or more, the petitioner must submit either a document from the state agency that accepted the filing or from a DOL regional office. *See Memorandum from William R. Yates, Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273), HQBCIS 70/6.2.8-P (April 24, 2003).* It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Id.* The AAO determines that

the letter from [REDACTED] standing alone, is not persuasive evidence that a labor certification application was filed on behalf of the beneficiary 365 days or more before the filing of the instant H-1B extension petition in October 2004, and was still pending on that date.

The AAO also notes that the beneficiary is not qualified for another one-year extension under AC21 because he was not in valid H-1B status at the time the extension petition was filed. The regulation at 8 C.F.R. § 214.2(h)(14) provides that “[a] request for petition extension may be filed only if the validity of the original petition has not expired.” *See also Memorandum from William R. Yates*, cited above. As previously discussed, the instant extension petition was filed on October 28, 2004, more than two months after the beneficiary’s previous H-1B extension petition expired on August 23, 2004.

Based on the foregoing analysis, the AAO determines that the beneficiary is not eligible under AC21 for a further one-year extension of stay in H-1B status.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director’s decision denying the petition.

**ORDER:** The appeal is dismissed. The petition is denied.