

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW, Rm. A3042
Washington, DC 20529



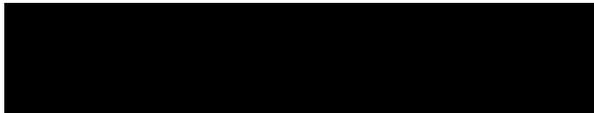
U.S. Citizenship
and Immigration
Services

DA



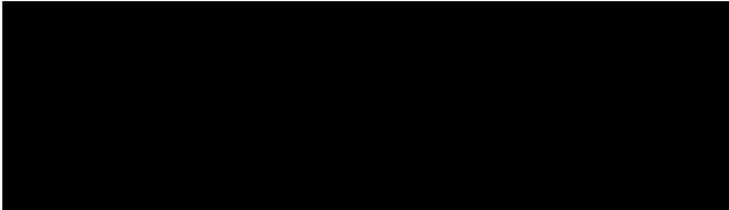
FILE: EAC 05 048 53049 Office: VERMONT SERVICE CENTER Date: DEC 23 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner is a visual communication organization that seeks to extend the employment of the beneficiary as a programmer analyst. The petitioner 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 after determining that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the 21st Century Department of Justice Appropriations Authorization Act (AC21) because the evidence of filing a labor certification application, a postal receipt, was insufficient to demonstrate that the petitioner had filed a labor certification under Section 104(c) of AC21 as claimed.

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] shall not exceed 6 years.” However, the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act), removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030(A)(a) of the DOJ Authorization Act, § 106(a) of AC-21 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 11030(A)(b) of the DOJ Authorization Act amended § 106(a) of AC-21 to read:

(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 director requested evidence that the beneficiary was eligible for extension of his H-1B status under AC21. In response, the petitioner explained the beneficiary had not exceeded the six-year limit and had filed within the expiration of the sixth year limit. The petitioner stated that the beneficiary had filed a labor certification application and it had been pending more than 365 days before the instant petition was filed. The petitioner submitted a copy of the pending labor certification application and postal receipt.

The director denied the H-1B 7th year extension petition because the evidence of the pending labor certification application, the postal receipt, was insufficient. Based on the record at the time of adjudication, the director correctly denied the 7th year extension.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal, counsel contends that the beneficiary is qualified for an extension beyond his six-year limit under AC21 § 106(a) as it was originally enacted, because he has a pending labor certification application that was pending for more than 365 days before the instant petition was filed. Counsel explains that due to the significant changes to the U.S. Department of Labor's (DOL) processing of Labor Certification Applications, the above referenced pending labor certification application has been turned over to the DOL's Philadelphia Backlog Processing Center which had not yet opened at the time the petition was adjudicated. Counsel submits copies of correspondence with the DOL requesting the required documentation.

The AAO notes that while the appeal was pending, counsel submitted additional documentation. Counsel submitted a copy of letter from the Department of Labor indicating that the beneficiary filed a labor certification application and that it was accepted for processing on June 20, 2003. The instant petition was filed on December 9, 2004; therefore, the labor certification application filed on behalf of the beneficiary was pending for more than 365 days before the H-1B extension petition was filed.

The beneficiary is eligible for a 7th year extension of status. The beneficiary meets the requirement that 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) 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 employment based immigrant petition (Form I-140). *See* 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 American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313). HQPRD 70/6.2.8-P (May 12, 2005). Accordingly, the AAO shall withdraw the director's denial of the petition.

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. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.