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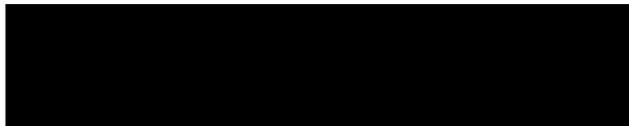
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FILE: WAC 03 166 54372 Office: CALIFORNIA SERVICE CENTER Date: **NOV 10 2005**

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 materials 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. 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 trading company. It seeks to employ the beneficiary as a business analyst and extend for a seventh 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 did not qualify for an exemption from the normal six-year limit on H-1B status.

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 21st 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 for a seventh year extension; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and an appeal brief.

The record shows that the beneficiary resided in the United States with H-1B classification for nearly six years – from July 21, 1997 to May 15, 2003. On May 16, 2003, the instant petition was filed to extend the beneficiary's H-1B status for an additional year – until May 15, 2004. The director denied the petition on the ground that the beneficiary does not qualify for an exemption from the normal six-year limit on H-1B status. In his decision the director recited provisions of the amended American Competitiveness in the Twenty-First Century Act ("AC21"), which 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 recounted the request for evidence (Form I-797) which had been sent to the petitioner advising as to the types of documentation needed to establish the beneficiary's eligibility for a one-year extension under AC21. The director discussed in detail the evidentiary shortcomings of the documentation submitted by the petitioner in response to Form I-797, which attempted to show that the petitioner had filed a labor certification application on behalf of the beneficiary more than 365 days prior to the filing of the instant petition, and found that the documentation failed to establish that an application for labor certification had been filed on behalf of the beneficiary. The director concluded that the record did not establish the beneficiary's eligibility for an extension of his H-1B classification under AC21.

On appeal counsel submits a brief which refers to the same documentation that was previously submitted by the petitioner and discussed by the director in his decision. The brief does not address the substance of the director's decision or the grounds for denial. Nor is it accompanied by any additional documentation from the Georgia Department of Labor demonstrating that a labor certification application was filed on behalf of the beneficiary and pending for 365 days or more on the date the instant H-1B extension petition was filed, as required to establish the beneficiary's eligibility for an extension of stay under AC21.¹

As discussed in the director's decision, the petitioner asserts that a labor certification application (Form ETA 750) was filed on behalf of the beneficiary more than 365 days before the filing of the instant petition and is still pending, thereby making the beneficiary eligible under AC21 for an extension of stay

¹ The AAO notes that counsel's appeal brief was not timely filed. In the appeal (Form I-290B), filed November 8, 2004, counsel indicated that a brief and/or evidence would be submitted within 30 days. No such materials were submitted during that time period. By letter dated December 6, 2004, received by the AAO on December 14, 2004, counsel requested an additional 30 days to file a brief and/or evidence in support of the appeal. No such materials were received during that time period. On October 26, 2005 the AAO telefaxed a letter to counsel requesting information as to whether a brief and/or evidence had been submitted, copies of any such materials along with evidence of the date of their original filing, or an acknowledgement that no brief or evidence had previously been submitted in support of the appeal. Counsel responded by telefax on October 31 and November 1, 2005, submitting an appeal brief and additional documentation, but without any evidence that such materials had been submitted within the time period indicated on Form I-290B (30 days) and the extension request letter (an additional 30 days). Nor does counsel claim to have filed the materials within that 60-day time period.

beyond the six-year maximum period for H-1B nonimmigrants. As evidence of such a filing the record includes a photocopied envelope from the Georgia Department of Labor, Alien Certification Section, postmarked November 16, 2001, addressed to Ms. [REDACTED] (petitioner's counsel); together with a photocopied one-page document, dated November 9, 2001, stating that an Alien Employment Certification Application had been received on April 30, 2001, and identifying the case number as 014555, the employer as Sphinx Gifts, and the alien as the instant beneficiary, Mohammed Budhwani. The one-page document bears no letterhead showing that it came from the Georgia Department of Labor, or any other government office. Nor is the document signed or stamped by any government official.

Based on the evidence of record, which the petitioner has not supplemented on appeal, the AAO agrees with the director that the petitioner has not established that a labor certification application was filed on behalf of the beneficiary 365 days or more prior to the filing of the instant H-1B extension petition on May 16, 2003, and was still pending on that date. Accordingly, the beneficiary is not eligible under AC21 for an extension of stay in H-1B status beyond the maximum six-year limit.

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.