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**U.S. Citizenship
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Services**

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FILE: EAC 04 112 52197 Office: VERMONT SERVICE CENTER Date: **JUN 07 2006**

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director 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 an IT consulting provider that seeks to extend the employment of the beneficiary as a senior java developer. The petitioner, therefore, 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) 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 March 28, 1998. The petitioner filed an application for alien labor certification for the beneficiary on March 23, 2003.

The petitioner filed the instant petition on March 1, 2004, 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 March 28, 2004.

The director denied the petition, holding that since 365 days had not elapsed between the filing of the application for alien labor certification and the filing of the instant petition, the beneficiary did not meet the requirements set forth at AC-21 (as amended by DOJ-21) and therefore did not qualify for a seventh year of H-1B status.

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:

(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.

In accordance with CIS policy memoranda issued by William R. Yates, Associate Director of Domestic Operations, on May 12, 2005 entitled *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 (AC21) (Public Law 106-313)* and on September 23, 2005 – entitled *Interim Guidance Regarding the Impact of the Department of Labor (DOL)'s 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* – the AAO determines that the beneficiary is eligible for an exemption from the six-year limitation on his H-1B classification under AC21, section 106(a), and to an extension of his H-1B status for a seventh year under AC21, section 106(b), because the petitioner filed a labor certification application more than 365 days before the starting date of the employment period sought in the extension petition.

The date of the filing of the application for alien labor certification, March 23, 2003, is more than 365 days prior to the March 28, 2004 requested employment start date specified on the Form I-129. The AAO reviewed the beneficiary's initial I-94 card which established that the beneficiary entered the United States in H-1B status on March 28, 1998. The AAO has reviewed the record and determined the beneficiary will begin working under the seventh year extension of status under AC-21 on March 28, 2004. That date is more than 365 days after the application for alien labor certification was filed. Under the CIS guidance quoted above, the beneficiary is eligible for a seventh year of H-1B status, and the AAO will reverse 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.

ORDER: The appeal is sustained. The petition is approved.