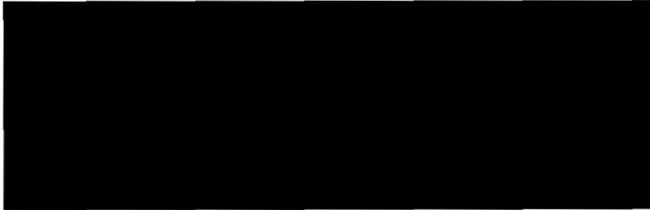


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FILE: LIN 04 233 50155 Office: NEBRASKA SERVICE CENTER

Date: JUL 12 2006

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, Chief
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 an IT development and consulting firm that seeks to extend the employment of the beneficiary as a computer programmer and to continue his 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 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 January 17, 1999. The petitioner filed an application for alien labor certification (ETA 750) for the beneficiary on October 21, 2003.

The petitioner filed the instant petition on August 16, 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 August 2, 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 in 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(b) 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 these two policy memoranda, the AAO has determined 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 seventh 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 second memorandum, at page 5, states, in part, the following:

Once [the requirements of Section 106(a) of AC-21] have been met, the alien may be granted an extension beyond the 6-year maximum on or prior to the date the alien reaches the 6-year maximum. Such extensions may only be granted in one-year increments, but may be requested on a single (combined) extension request for any remaining time left in the initial 6-year period. Requiring the filing of two extension petitions merely increases petitioner and CIS workloads, and has no basis in statute.

The date of the filing of the application for alien labor certification, October 21, 2003 is less than 365 days prior to the August 2, 2004 requested employment start date specified on the Form I-129. This would appear to preclude the beneficiary from a seventh year of H-1B status, as, at first glance, the application for alien labor certification appears to not have been filed more than 365 days prior to the petition's requested employment start date. However, the AAO has reviewed the record and determined that the alien's maximum period of stay in H-1B status expires on January 16, 2005, which is more than 365 days after the filing date of the Form ETA-750. Thus, the beneficiary will begin working under the seventh year extension of status under AC-21 on January 17, 2005. That date is more than 365 days after the application for alien labor certification was filed. Under the CIS guidance quoted above, the petitioner may combine the extension request to complete the alien's six year maximum and to extend for a seventh year under AC-21 on one Form I-129 petition. Thus, the beneficiary is eligible for a seventh year of H-1B status, and the AAO will 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.

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