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**U.S. Citizenship  
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FILE: WAC 04 240 50352 Office: CALIFORNIA SERVICE CENTER Date: **MAR 27 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:

SELF-REPRESENTED

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, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides transportation services to the State of California. It desires to extend its authorization to employ the beneficiary temporarily in the United States as an associate information systems analyst, at an annual salary of \$57,108, for one year. The director determined that the beneficiary is ineligible for an extension of H-1B nonimmigrant status under the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ-21) and denied the petition.

On appeal, the petitioner states that it did not file a labor certification or an employment based immigrant visa petition on behalf of the beneficiary. The petitioner states that the beneficiary's mother filed a family-based petition on her behalf on December 20, 2000. The petitioner requests that an extension be granted for one additional year.

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), defines an H-1 (b) temporary worker as:

an alien . . . who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1). . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1). . . .

As a general rule, 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 (AC-21), as amended by DOJ-21, 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 pending due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the 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-21 amended section 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 record of proceeding before the AAO contains: (1) Form I-290B and supporting documentation; (2) the director's denial letter; (3) the director's request for additional evidence; (4) the petitioner's response to the director's request; and (5) Form I-129 and supporting documentation. The AAO reviewed the record in its entirety before issuing the decision.

The record reflects that the beneficiary has been in the United States continuously in H-1B status from October 1, 1997 through September 30, 2004. On August 31, 2004, the petitioner applied for an extension of H-1B status for the beneficiary beyond her six-year limit.

There are three ways in which a beneficiary may qualify to extend his or her employment beyond the sixth-year limit:

1. The beneficiary did not live continuously inside the United States and his or her employment in the United States was part-time, seasonal or intermittent or was for an aggregate of six months or less per year, *See* 8 C.F.R. § 214.2(h)(13)(v); or
2. The beneficiary has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year, *See* 8 C.F.R. § 214.2(h)(13)(iii)(A); or
3. The beneficiary is exempt from the sixth-year maximum limitation of authorized stay in H nonimmigrant status under, AC-21, as amended by DOJ-21.

In the director's request for evidence dated September 13, 2004, the petitioner was requested to submit documentary evidence to establish the beneficiary's eligibility for an extension beyond the six-year limit based on the aforementioned criteria. The petitioner's response dated September 15, 2004 states that the beneficiary has an approved immigrant petition through a relative, and that it did not file a petition for her permanent residence status. The petitioner also states that it has nothing else to supply in the form of evidence. The record reflects that the beneficiary has pending an approved Form I-130 petition under section 201(a)(1) of the Act, 8 U.S.C. § 1151(a)(1).

Upon review, the petitioner has not established that a labor certification or an employment-based immigrant visa petition has been filed on behalf of the beneficiary. The alien's approved family-based petition under sections 201(a)(1) and 203(a) of the Act, 8 U.S.C. § 1153(a), do not entitle her to an exemption from the sixth year limitation. Consequently, the beneficiary is not eligible for an extension of her H-1B nonimmigrant

classification.

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 not sustained that burden.

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