

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



*D2*

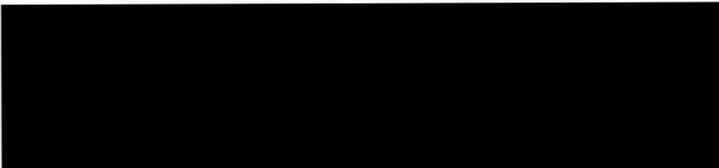
FILE: EAC 05 021 50055 Office: VERMONT SERVICE CENTER Date: **SEP 26 2006**

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 director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a computer software development and consulting company that seeks to employ the beneficiary as a computer systems 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 on the basis that the beneficiary was ineligible for extension of his H-1B nonimmigrant status because at the time of filing the Form I-129, Petition for a Nonimmigrant Worker (I-129 Petition) (on October 25, 2004), 365 days or more had not passed since the filing of the beneficiary's Labor Certification (November 13, 2003). The director also noted that the beneficiary did not have an approved Form I-140, Immigrant Petition for Alien Worker (I-140 Petition) pending.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides in pertinent part, that: "[t]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." The American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21<sup>st</sup> Century DOJ Appropriations Act), however, allows for an exception to the six-year limitation of authorized stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays.

Section 106(a) of AC21, as amended by § 11030(A)(a) of the 21<sup>st</sup> Century DOJ Appropriations Act, § 106(a) of AC21 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 106(b) of AC21, as amended by § 11030(A)(b) of the 21<sup>st</sup> Century DOJ Appropriations Act reads:

(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 regulation at 8 C.F.R. § 214.2(h)(14) further provides that, “[a] request for a petition extension may be filed only if the validity of the original petition has not expired.”

The director found that the beneficiary did not qualify for an extension of his H-1B status under § 106 of AC21 because, at the time of the I-129 petition filing, 365 days or more had not passed since the filing of the petitioner’s labor certification application. The director found further that the petitioner had failed to provide evidence establishing that the beneficiary had an approved I-140 petition, and that the beneficiary thus also did not qualify for an exception to the six-year stay time limit pursuant to section 104(c) of AC21.<sup>1</sup>

The record of proceeding before the AAO contains the Form I-129 petition and supporting documentation, the director’s denial letter, the Form I-290B Appeal to the AAO and a brief by counsel, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record reflects that the beneficiary first entered the United States in H-1B status on April 8, 1999, and that his six-year maximum period of stay expired on April 8, 2005. Thus, the petitioner must establish that a labor certification application was filed on the beneficiary’s behalf on or before April 7, 2004, 365 days prior to the expiration of the beneficiary’s maximum authorized period of stay in H-1B visa status.

Two recent U.S. Citizenship and Immigration Services (CIS) policy memoranda have clarified how CIS is to implement the provisions of AC21 and the 21<sup>st</sup> Century DOJ Appropriations Act. Both memoranda provide, in part, that an alien who is otherwise eligible for an H-1B extension does not need to first file an I-129 petition requesting an extension of time to allow the beneficiary to complete the six years, and then file an additional I-129 petition requesting an extension of time beyond the six years. *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*

---

<sup>1</sup> Section 104(c) of AC21 enables H-1B nonimmigrants with approved Form I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated.

*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 6<sup>th</sup> Year: Adjudicator's Field Manual Update AD05-15. HQPRD70/6.2.8 (September 23, 2005). The second memorandum states at page 5, that:*

Once [the requirements of Section 106(a) of AC21] 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.

It is noted that on appeal, counsel does not dispute the director's finding that the beneficiary does not qualify for an extension of his H-1B status under section 104(c) of AC21, and the AAO notes that the record contains no evidence to establish that the beneficiary has an approved I-140 petition. Counsel contends, however, that the beneficiary qualifies for an extension of his H-1B status pursuant to § 106(a) and (b) of AC21. Counsel asserts that two labor certification applications have been filed on the beneficiary's behalf. Counsel asserts that the first labor certification application was filed by Centerpoint Broadband Technologies Inc. (CBT) on February 5, 2002. The second labor certification was filed by Topspin Communications Inc., on November 13, 2003. Counsel asserts that the petitioner erroneously submitted the second, November 13, 2003, labor certification to CIS. On appeal, counsel submits evidence of the February 5, 2002, CBT labor certification application and requests that the petitioner's petition for a 7<sup>th</sup> year H-1B status extension be approved pursuant to section 106(a) of AC21.

The record reflects that at the time the petitioner filed the I-129 petition on the beneficiary's behalf (on October 25, 2004), the beneficiary's November 13, 2003, Topspin Communications Inc., and the February 2, 2002, CBT labor certification applications had been pending for more than 365 days prior to the expiration of the beneficiary's maximum period of authorized stay in H-1B visa status on April 8, 2005. Therefore, if either of these applications were still current, the beneficiary would meet the requirement of § 106(a) of AC21, that 365 days or more have passed since the filing of any application for labor certification.

The AAO finds that the petitioner has failed to establish that the beneficiary satisfies the requirements of § 106(a) of AC21 based on either the February 5, 2002, CBT labor certification application, or the November 13, 2003, Topspin Communications Inc. labor certification application. It is noted that on July 20, 2006, counsel submitted a letter to the AAO, and claimed that proof of the beneficiary's presently pending CBT labor certification was enclosed. **The AAO found no such proof, however.** Moreover, United States Department of Labor (DOL) records reflect that the November 13, 2003 labor certification application (case number 183854, California EDD) was administratively closed due to Topspin Communications Inc.'s failure

to respond to a Notice by DOL requesting corrections, supporting documents and a statement of the employer's desire to continue the application. DOL records reflect further that BCT withdrew the labor certification application (Case number 148340, California EDD) on March 2, 2006.

The AAO finds that the petitioner has failed to establish that either the November 13, 2003, BCT labor certification application or the February 5, 2002, CBT labor certification application is presently filed or pending with the Department of Labor. The AAO finds further that the evidence in the record fails to establish that the beneficiary otherwise meets the requirements for an extension of his H-1B status.

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. Accordingly, the appeal will be dismissed.

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