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**U.S. Citizenship
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FILE: WAC 07 025 51606 Office: CALIFORNIA SERVICE CENTER Date: **APR 15 2008**

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Ra 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 for the period ending May 15, 2007. The petition will be approved permitting continued employment of the beneficiary until May 15, 2007.

The petitioner is a biotechnology company involved in medical research and the manufacture and marketing of medicines. It seeks to continue to employ the beneficiary as a principal scientist and to extend for a seventh year the beneficiary's 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. The director was correct in denying the beneficiary this exemption. As discussed below, however, the director erred in not approving the petition for the period that would extend the beneficiary up to his sixth year in H-1B status, in accordance with section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

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 continuation of previously approved employment, filed on November 3, 2006; (2) the notice of decision, dated February 27, 2007; and (3) the Form I-290B.

Part of the 21st Century DOJ Appropriations Authorization Act amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment-based immigrant; or (2) 365 days or more have passed since the filing of the employment-based immigrant petition (Form I-140).

The record indicates that the beneficiary resided in the United States with H-1B classification continuously from May 15, 2001 through January 20, 2007. The petitioner filed a labor certification application (Form ETA-9089, Application for Permanent Employment Certification) on behalf of the beneficiary, and that application was accepted for processing on May 8, 2006, followed by the filing of the instant petition (Form I-129) on November 3, 2006 to extend the beneficiary's H-1B status until May 15, 2008. Since 365 days had not passed between the filing of the Form ETA-9089 and the first day of intended employment noted in the extension of status petition (January 20, 2007), the beneficiary was not eligible for an exemption from the six-year limitation on his H-1B classification under AC21 section 106(a), and an extension of his H-1B status for a seventh year under AC21 section 106(b). In accordance with section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), limiting the authorized period of admission for an H-1B nonimmigrant to six years, the beneficiary's H-1B status may not be extended to May 15, 2008 as requested by the petitioner.

The record establishes, however, that the beneficiary was continuously approved for H-1B status from May 15, 2001 until January 20, 2007. The record further establishes that the proffered position qualifies as a specialty occupation, and that the beneficiary is qualified to perform the duties of the offered position. As noted above, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides in general that "[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years." Thus, the beneficiary is entitled to a continuation of his H-1B status until May 15, 2007, which will complete his 6th year of eligibility. The petition shall be approved until May 15, 2007.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden in so far as it has established that the beneficiary is entitled to a continuation of his H-1B status until May 15, 2007.

ORDER: The appeal is sustained for the period ending May 15, 2007. The petition is approved until May 15, 2007.