

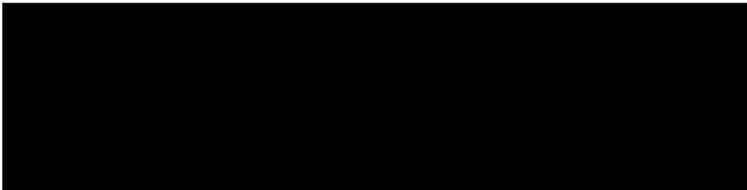
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U.S. Department of Homeland Security  
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U.S. Citizenship  
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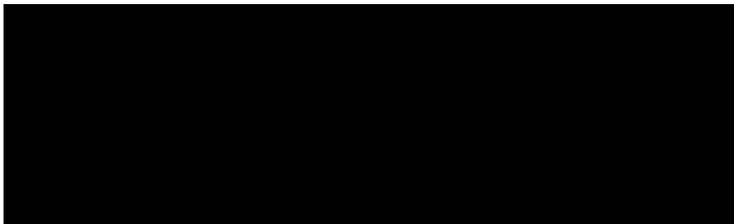
FILE: WAC 06 279 50042 Office: CALIFORNIA SERVICE CENTER Date: JAN 03 2008

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

*Robert P. Wiemann*  
for Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a software development and project management company that employs the beneficiary as a programmer/analyst. The petitioner seeks to extend for a seventh year the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-IB 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 record of proceeding before the AAO includes (1) Form I-129 and supporting documentation for a seventh year extension, filed on September 19, 2006; (2) the notice of decision, dated January 5, 2007; and (3) Form I-290B and counsel's appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

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-IB status.

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-IB 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-IB 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-IB nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by section 11030(A)(a) and (b) of the 21<sup>st</sup> Century Department of Justice Appropriations Act (DOJ-21), 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-IB 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 reflects that the beneficiary has been in the United States, in H-1B status, since October 3, 2000. The petitioner filed the instant petition on September 19, 2006, requesting that the beneficiary be granted an additional year of H-1B status pursuant to AC-21 (as amended by DOJ-21). The requested start date of employment in the petition was October 3, 2006. The instant petition includes a statement from counsel explaining that the labor certification application was lost by the Department of Labor; and counsel submitted into the record copies of a Federal Express mailing label and invoice as proof that the application for labor certification was delivered to the Department of Labor on August 5, 2004, more than 365 days before the instant petition was filed. The director denied the petition stating that:

In the present case, the record does not indicate that an Application for alien Employment Certification (Form ETA 750) was filed on behalf of the beneficiary. As such, exemption under AC21 as modified by the DOJ Act does not apply to the beneficiary. Consequently, the beneficiary's stay is limited to a six-year period.

On appeal, counsel claims that the director did not consider the evidence submitted. Counsel submits a letter to the Department of Labor, dated June 1, 2006, inquiring about the status of the application for labor certification, to which the letter referred to as mailed to the Department of Labor on August 2, 2004. In his brief, counsel states that, in response to the June 2006 letter, the petitioner was notified that there is no labor certification file on record for the beneficiary and "was invited to submit evidence of the filing, supporting documents, and newly signed [Form] ETA 750 Parts A and B. Petitioner, through counsel, submitted this request on October 2, 2006. This request is still pending."

The AAO finds persuasive the totality of the evidence submitted in support of counsel's assertion that the application for labor certification was filed with the Department of Labor in August 2004. The date of the filing of the application for alien labor certification, August 5, 2004, is more than 365 days prior to the September 19, 2006 filing of the Form I-129. Therefore, the petitioner may extend the beneficiary's stay in H-1B status beyond the 6<sup>th</sup> year despite not having filed a Form I-140 petition. Thus, 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.