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FILE: EAC 03-082-53257 Office: VERMONT SERVICE CENTER

Date: NOV 07 2005

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, Director  
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 architectural and interior design firm that seeks to extend the employment of the beneficiary as an architectural draftsman and to classify him 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 found that the beneficiary had reached the six-year maximum authorized period of admission as an H-1B nonimmigrant and denied the petition. On appeal, counsel asserts that the beneficiary qualifies for an extension of stay under the 21<sup>st</sup> Century Department of Justice Appropriations Act.

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] 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), 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 undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030(A)(a) of the DOJ Authorization Act, § 106(a) of AC-21 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 11030(A)(b) of the DOJ Authorization Act amended § 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 reflects that, on October 18, 2001, the director granted the petitioner's previous H-1B extension request on behalf of the beneficiary until January 31, 2003. On January 31, 2003, the petitioner submitted the instant H-1B extension request. Because the beneficiary had been working in H-1B status for six years, the director requested proof of the beneficiary's exemption from the six-year limit, including information regarding the applicant's employment history and immigration status for the previous six years. The petitioner responded with a copy of the beneficiary's passport, the petitioner's immigration status and employment history since his first arrival in the United States, and several H-1B receipt and approval notices. As none of these proved the applicant was eligible for an extension beyond the six-year limit, the director denied the petition. The petitioner then filed a motion to reopen or reconsider, along with a copy of a labor certification application filed on behalf of the beneficiary on July 17, 2002. The director granted the motion but denied the petition, as the labor certification application had not been pending for over 365 days when the I-129 was filed on January 31, 2003.

On appeal, the petitioner submits a copy of an alien labor certification application filed on behalf of the beneficiary by a previous employer, filed on January 16, 2002.

The record of proceeding before the AAO contains: (1) Form I-129 with supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) the petitioner's motion to reopen/reconsider with supporting documentation, (6) the director's second denial letter, and (7) Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal, counsel contends that the beneficiary is qualified, under AC21, for an extension beyond his six-year limit because he had a labor certification application that had been pending on his behalf for more than 365 days when the instant petition was filed. The petitioner established that a copy of that labor certification application was previously unavailable.

The AAO finds that the beneficiary is eligible for a 7<sup>th</sup> year extension of status. The beneficiary had an alien labor certification application pending for more than 365 days when the current petition for H-1B extension was filed. Although the petitioner did not submit this to the director when requested, it is now part of the record. This pending labor certification establishes the beneficiary's eligibility, under AC21, as amended, for exemption to the six-year maximum period of authorized stay. 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 and Form I-485 and H-1B Petitions Affected by American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313)*. HQPRD 70/6.2.8-P (May 12, 2005). Accordingly, the AAO shall 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. Accordingly, the appeal will be sustained and the petition will be approved.

**ORDER:** The appeal is sustained. The director's order is withdrawn and the petition is approved.