U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

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FILE: EAC 04 067 53315 Office: VERMONT SERVICE CENTER Date: SEP 02 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 consulting company. It seeks to employ the beneficiary as a programmer analyst 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.

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 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 record of proceeding before the AAO includes (1) Form I-129 and supporting documentation for a seventh year extension, filed on January 9, 2004; (2) the director's request for evidence (RFE); (3) the petitioner's response thereto; (4) the notice of decision, dated June 10, 2004; as well as (5) Form I-290B and an appeal brief.

In his decision the director found that the beneficiary's H-1B status expired on December 10, 2003. Since the petition for a one-year extension under AC21 was not filed until January 9, 2004, the director determined that the beneficiary was not in valid H-1B status at the time of filing. As such, he was ineligible for an extension of stay under section 106 of AC21. On appeal counsel argues that the director erred in ruling that the beneficiary was not in valid H-1B status on January 9, 2004, the date the instant petition was filed, and asserts that the requirements have been met under section 106 of AC21 for granting a one-year extension of the beneficiary's H-1B status.

The record shows that the beneficiary entered the United States in H-1B classification on October 4, 1997 and maintained continuous H-1B status until December 10, 2003. [1] On December 9, 2003 the petitioner filed a timely H-1B extension application with the Vermont Service Center seeking to recapture an additional 30 days – which would extend the beneficiary's H-1B classification to January 9, 2004 – based on time the beneficiary spent outside the United States on a work assignment from September 2, to October 1, 2003. The service center director denied the application on the ground that the 30 days the beneficiary spent outside the country were not interruptive of the beneficiary's employment and did not entitle him to an extension of his H-1B classification. The petitioner appealed the decision. The AAO sustained the appeal and approved the petition until January 9, 2004. *See* EAC 04 047 53189. Since the instant petition under section 106 of AC21 to extend the beneficiary's H-1B status for an additional year was filed on January 9, 2004, the validity of the petition had not expired and the petition extension application was timely filed in accordance with 8 C.F.R. § 214.2(h)(14). Accordingly, the petitioner has overcome the basis of the director's denial.

Counsel asserts that the petitioner filed a Form ETA-750 application for labor certification with the State of California's Employment Development Department (CA EDD) on December 23, 2002, which had been pending for more than 365 days at the time the instant petition for a one-year extension of H-1B classification was filed with the Vermont Service Center on January 9, 2004. The record includes a letter to counsel form CA EDD, dated January 3, 2003, acknowledging receipt of the petitioner's "Application for Alien Employment Certification" on behalf of the beneficiary with a priority date of December 23, 2002. Based on this documentary evidence the AAO concludes that the petitioner had a labor certification application pending for more than 365 days at the time the instant petition was filed. As such, the beneficiary was 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).

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[1] According to counsel, the extension beyond six years included 65 days that were recaptured, pursuant to rulings of the California Service Center, for time the beneficiary spent outside the country.

Based on the foregoing analysis, the AAO determines that the beneficiary is eligible for a one-year extension of his H-1B classification under AC21.

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.

ORDER: The appeal is sustained. The petition is approved.