U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: LIN 05 046 51963 Office: NEBRASKA SERVICE CENTER Date: AUG 15 2006

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:

SELF-REPRESENTED

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 before the AAO on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an Internet technology and management company that seeks to employ the beneficiary as a systems analyst programmer. The petitioner, therefore, 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 because the petitioner sought to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. Counsel submits a timely appeal.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101 (a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year.

The petitioner wishes to continue the beneficiary's previously approved employment without change, and to extend or amend the stay of the beneficiary in the United States. The petitioner indicates on the petition that it seeks to extend the beneficiary's H-1B status from February 15, 2005 to February 14, 2006.

The director denied the petition, finding that because the beneficiary had already been employed in the United States since February 16, 1999 in H-1B status, he had reached the maximum six-year period of stay in the United States. The director stated that counsel sought to qualify the beneficiary for benefits under the American Competitiveness in the 21st Century Act (the AC21) by submitting a labor certification letter issued by the Illinois Department of Employment Security indicating that the petitioner filed a request for labor certification on the beneficiary's behalf on December 8, 2003. The director denied the petition, finding that the labor certification had not been pending for 365 days or more at the time the instant petition was filed.

On appeal, the petitioner states that the issue with the petition is the date of filing; thus, the AAO should approve the petition.

Upon review of the evidence in the record, the AAO finds that the beneficiary is eligible to derive benefits from the amendment to section 106(a) of the AC21 by the 21st Century DOJ Appropriations Act.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on December 2, 2004; (2) the letter from the Illinois Department of Employment Security, dated June 29, 2004; (3) the director's denial letter; and (4) the Form I-290B.

To extend or amend the beneficiary's stay in the United States to February 14, 2006 in the H-1B classification, the petitioner needed to prove that the beneficiary qualifies for benefits under either section 106(a) of the AC21 or the 21st Century DOJ 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." However, AC-21 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.

Based on the evidence in the record, the AAO finds the beneficiary qualifies for benefits under the amendment to section 106(a) of the AC21 by the 21st Century DOJ Appropriations Act. The instant petition was filed on December 2, 2004. In the denial letter, the director concluded that when the instant petition was filed, 365 days had not lapsed since the filing of the labor certification (file number V-IL 53436-Y) on December 8, 2003. The AAO does not concur with the director's conclusion. The memorandum entitled

"Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)," signed by William Yates, CIS Associate Director for Operations, on May 12, 2005, states that the labor certification application only needs to have been pending for 365 days prior to the start date of the proposed employment. The beneficiary's start date of employment is February 15, 2005; thus, the LCA would have been pending for over 365 days prior to the start date.

As related in the discussion above, the petitioner has established that the beneficiary is eligible to extend his stay in the H-1B classification beyond the six-year maximum period.

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.