U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 04 188 52637 Office: VERMONT SERVICE CENTER Date: APR 12 2006

IN RE: Petitioner:
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:

[redacted]

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 director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner provides human capital management and e-business solutions. It seeks to employ the beneficiary as a software engineer. 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. On appeal, counsel contends that the beneficiary qualifies for the extension.

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 seeks the beneficiary's services as a software engineer. It 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 July 7, 2004 to July 7, 2005.

The director denied the petition, finding that the beneficiary 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, case number 2003-0458, from the Department of Labor (DOL). According to the director, prior to the filing of the petition offered here, 365 days or more had not lapsed since the petitioner filed the labor certification; as such, the director concluded that the beneficiary was not eligible for benefits under the AC21.

On appeal, counsel states that the extension should be granted, *nunc pro tunc*, since but for the early filing date the beneficiary is eligible for a one-year extension.

Upon review of the evidence in the record, the AAO finds the beneficiary eligible to derive benefits from the AC21, as amended by the 21st Century DOJ Appropriations Act (DOJ21).

The record of proceeding before the AAO contains: (1) the Form I-129 filed on June 11, 2004; (2) the letter from the Nebraska Workforce Development, dated July 1, 2003, which indicates a priority date of July 1, 2003 for case number 2003-0458; (3) the director's denial letter; (4) the petitioner's motion to reopen; (5) the director's second decision denying the petition; and (6) the Form I-290B.

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, the AC21, as amended by DOJ21, 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 21st Century DOJ Appropriations Act, § 106(a) of the AC21 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 21st Century DOJ Appropriations Act amended § 106(a) of AC21 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.

Upon review of the evidence in the record, the AAO finds that the beneficiary is eligible to derive benefits from the AC21, as amended by DOJ21.

The instant petition was filed on June 11, 2004. In the denial letter, the director determined that when the instant petition was filed, 365 days had not lapsed since the filing of the labor certification (case number

2003-0458) on July 1, 2003. The Form I-129 petition indicates July 7, 2004 as the starting date of employment. The AAO finds that the CIS 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, is instructive here. The memorandum states that the labor certification application only needs to have been pending for 365 days prior to the start date of the proposed employment. Here, the start date of employment is July 7, 2004. The labor certification, which has been pending since July 1, 2003, would therefore be pending for over 365 days on the July 7, 2004 requested starting date of employment.

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.