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U.S. Citizenship
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FILE: LIN 05 108 50352 Office: NEBRASKA SERVICE CENTER Date: **JUL 26 2006**

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. 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 telemarketing firm that seeks to employ the beneficiary as a database administrator. 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record reflects that the beneficiary has been in the United States, in H-1B status, since June 25, 1999. The beneficiary was most recently granted an extension of H-1B status from March 12, 2003 through June 24, 2005 to work for the petitioner. The petitioner filed an application for alien labor certification for the beneficiary on May 4, 2004.

The petitioner filed the instant petition on February 28, 2005, requesting that the beneficiary be granted an additional year of H-1B status pursuant to the American Competitiveness in the Twenty-First Century Act (AC-21) (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21)). The requested start date of employment in the petition is June 25, 2005.

The director denied the petition, holding that since 365 days had not elapsed between the filing of the application for alien labor certification and the filing of the instant petition, the beneficiary did not meet the requirements set forth at AC-21 (as amended by DOJ-21) and therefore did not qualify for a seventh year of H-1B status.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC-21 removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays, and DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

(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 DOJ-21 amended section 106(a) of AC-21 to state the following:

(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.

Recent Citizenship and Immigration Services (CIS) policy memoranda have clarified how CIS is to implement these provisions of AC-21 and DOJ-21. In accordance with these policy memoranda, the AAO has determined that the beneficiary is eligible for an exemption from the six-year limitation on his H-1B classification under section 106(a) of AC-21, and for an extension of his H-1B status for a seventh year under section 106(b) of AC-21.

These memoranda provide, in part, that a petitioner is not required to wait 365 days after filing a qualifying labor certification application to file Form I-129 requesting the extension of a beneficiary's stay, so long as the labor certification application will have been pending for at least 365 days prior to the requested start date. 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 the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21)(Public Law 106-313)* HQPRD70/6.2.8-P (May 12, 2005); Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year: Adjudicator's Field Manual Update AD05-15*. HQPRD70/6.2.8 (September 23, 2005). Specifically, the first memorandum, at page 8, states the following:

[A] petitioner must establish [that] the [requirements of Section 106(a)] were or will be met either on or before the requested start date on the H-1B extension application. Thus, an alien is eligible for an extension of H-1B status beyond the 6th year as long as either the qualifying labor certification application or I-140 petition has or will have been pending for at least 365 days prior to the alien's requested start date, regardless of whether the H-1B extension application was filed prior to the passage of such period.

The date of the filing of the application for alien labor certification, May 4, 2004, was more than 365 days prior to the beneficiary's June 24, 2005 expiration of H-1B status and the June 25, 2005 requested employment start date specified on the Form I-129. Thus, the fact that the petitioner filed the Form I-129 petition on February 28, 2005 does not bar the beneficiary from a seventh year of H-1B status, and the AAO will reverse the director's denial of the petition.

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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.