U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D 2

FILE: EAC 05 071 53301 Office: VERMONT SERVICE CENTER Date: SEP 27 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a computer software development and consulting company that seeks to employ the beneficiary as a Programmer Analyst. The petitioner 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), and to extend the beneficiary's H-1B nonimmigrant worker status (H-1B status) beyond the six-year limit set forth in § 214(g)(4) of the Act; 8 U.S.C. 1184(g)(4).

The director found that the beneficiary was ineligible for extension of his H-1B nonimmigrant status because 365 days or more had not passed since the filing date of the beneficiary's labor certification application (filed on February 17, 2004), and the filing of the petitioner's Form I-129, Petition for a Nonimmigrant Worker (Form I-129, filed on January 11, 2005).

Section 214(g)(4) of the Act provides in pertinent part 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 (21st Century DOJ Appropriations Act), however, allows for an exception to the six-year limitation of authorized stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions have remained undecided due to lengthy adjudication delays.

Section 106(a) of AC21, as amended states that:

> [T]he 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 106(b) of AC21, as amended, provides that:

> [T]he 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.

Title 8 of the Code of Federal Regulations (8 C.F.R.) section 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 director found that the beneficiary did not qualify for an extension of his H-1B status under § 106 of AC21, because 365 days or more did not pass between the labor certification application filing and the Form I-129 filing on the beneficiary's behalf. The director found further that employment-based visas were available, and that the petitioner had failed to provide evidence that the beneficiary had an approved Form I-140, Immigrant Petition for Alien Worker (Form I-140). On this basis, the director determined that the beneficiary also did not qualify for an exception to the six-year stay time limit pursuant to section 104(c) of AC21.[1]

The record of proceeding before the AAO contains: the Form I-129 petition and supporting documentation; the director's Request for Evidence letter (RFE), dated February 1, 2005; the director's denial letter; and the Form I-290B, Appeal to the AAO (Form I-290B) with an attached letter and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner contends on appeal that the beneficiary qualifies for an extension of his H-1B status pursuant to § 106(a) of AC21. The petitioner does not contest or address the director's finding that fewer than 365 days passed between the February 17, 2004, labor certification application filing and the petitioner's January 11, 2005, Form I-129 filing. The petitioner asserts, however, that the labor certification application filed on behalf of the beneficiary was approved on July 6, 2004, that the beneficiary was in valid H-1B status until February 26, 2005, and that the beneficiary began his employment with the petitioner on February 26, 2005, more than 365 days after the labor certification application was filed.

The December 27, 2005, and May 12, 2005, U.S. Citizenship and Immigration Services (CIS) Memoranda entitled, *Interim Guidance for Processing Form I-140 Employment-Based Petitioners 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)* (by Michael Aytes, Aytes, Acting Director of Domestic Operations and Wiliam R. Yates, Associate Director for Operations, respectively) each state, in pertinent part in section II that:

> [A] petitioner must establish that the above [section 106(a) of AC21] criteria . . . were or will

[1] Section 104(c) of AC21 enables H-1B nonimmigrant workers with approved Form I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated.

> 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. If the alien would no longer be in H-1B status at the time that 365 days from the filing of the labor certification application or immigrant petition has run, thus leaving a gap in valid status, then the extension of stay request cannot be granted.

In the present matter, the record reflects that the labor certification application filed on behalf of the beneficiary was filed on February 17, 2004, and that the beneficiary's H-1B nonimmigrant worker status was valid through February 26, 2005, more than 365 days later. It is noted, however, that the Form I-129 contained in the record reflects that the requested employment start date for the beneficiary was January 26, 2005, less than 365 days after the filing of the labor certification application. Nevertheless, the record contains a copy of an electronic labor condition application submitted by the petitioner to the Department of Labor on January 10, 2005, indicating that the beneficiary's intended employment start date was February 26, 2005, rather than January 26, 2005. Furthermore, a letter submitted by the petitioner on appeal clarifies that the Form I-129 application mistakenly stated that the beneficiary's intended employment start date was January 26, 2005, rather than February 26, 2005.

The AAO finds that the petitioner has provided sufficient evidence to establish that the petitioner's requested employment start date was February 26, 2005. Accordingly, the beneficiary's employment start date occurred more than 365 days after the labor certification application was filed, and while the beneficiary was in valid H-1B status.

CIS records reflect that the employer on the labor certification application filed an I-140 petition, which was denied by the service center and appealed to the AAO. On July 26, 2006, the appeal was remanded to the service center. Thus, a final determination has not been made on the Form I-140, and the petition may be approved.

The burden of proof in nonimmigrant visa proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner established that the requirements set forth in section 106(a) of AC21 were satisfied in the present matter. The appeal will therefore be sustained.

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