U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 300(
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 07 073 50929 Office: CALIFORNIA SERVICE CENTER Date: AUG 21 20

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

The petitioner is a communications, media, and computer graphics company that seeks to continue its employment of the beneficiary as a research scientist. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 request for additional evidence; (4) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record establishes that the beneficiary was in the United States, in H-1B status, from January 11, 2001 through January 10, 2007 (the date the petition was filed). The petitioner filed an application for alien labor certification for the beneficiary on July 10, 2003. The issue before the AAO is whether the beneficiary is eligible for additional time in H-1B status based upon the American Competitiveness in the Twenty-First Century Act[1] (AC-21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act[2] (DOJ-21).

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.

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[1] American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

[2] Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

Section 11030(A)(b) of DOJ-21 amended section 106(b) 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.

The petitioner filed the petition on January 10, 2007, and submitted documentation to establish that it had filed a labor certification on behalf of the beneficiary on July 10, 2003. However, upon receipt of information from the Department of Labor indicating that the labor certification had been denied, the director denied the instant petition on May 16, 2007.

In his June 15, 2007 memorandum, counsel stated the following:

> The Petitioner did not receive any decision or any other correspondence from the Department of Labor in connection with the Beneficiary's labor certification case. Undersigned counsel of record did not receive any decision or any other correspondence from the Department of Labor in connection with the Beneficiary's labor certification case. The petitioner was advised by telephone that the application was denied due to the Petitioner's failure to respond to a Notice of Findings/45-day letter.

Counsel submits a supplemental letter, dated September 24, 2007, in which he states the following:

> As explained in our motion/appeal, the reason the USCIS denied the case is that the Department of Labor had erroneously closed the case, which we have been in the process of seeking to reopen. The Department of Labor has now reopened the case and on September 14, 2007 issued the enclosed Notice of Findings. As indicated in the Notice of Findings, the July 10, 2003 filing date of the labor certification has been reinstated. As the Beneficiary's labor certification application has been pending for more than 365 days, he is eligible for the requested H-1B extension.

The record includes documentation from the Department of Labor indicating that the labor certification has in fact been re-opened, and that the July 10, 2003 filing date has been maintained. This information was not before the director at the time she made her decision.

The requested employment start date in the instant petition was January 10, 2007. The application for alien labor certification was filed on July 10, 2003. Therefore, the application for alien labor certification

was filed more than 365 days prior to the petition's requested employment start date. Thus, the beneficiary is eligible for an additional year of H-1B status, and the AAO will reverse the director's denial of the petition.

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.