U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 06 108 50928 Office: NEBRASKA SERVICE CENTER Date: JAN 09 2008

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:

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.

Michael T. Kelly
for Robert P. Wiemann, Chief
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 for the one-year period of April 10, 2006 through April 9, 2007.

The petitioner is an integrated information technology services firm that seeks to continue its employment of the beneficiary as a software engineer. The petitioner, therefore, seeks 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; (3) 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 first issue before the AAO is whether the petitioner has complied with the regulatory criteria pertaining to its certified labor condition application (LCA). The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

When it filed the petition on March 2, 2006, the petitioner submitted an LCA certified for employment in Florence, Kentucky, valid from April 9, 2006 through April 9, 2009. However, as noted by the director in his May 25, 2006 request for additional evidence, the petitioner had stated on the Form I-129 that the beneficiary would be working in Cincinnati, Ohio. In response, the petitioner submitted an LCA certified for employment in Cincinnati, Ohio, valid from June 2, 2006 through April 9, 2009.

In his August 23, 2006 denial, the director stated that CIS was unable to approve the petition, as the LCA certified for employment in Cincinnati, Ohio did not cover the period between April 9, 2006 (the date the beneficiary's previous status expired) and June 2, 2006.

On appeal, the petitioner contends that the director erred in denying the petition. The AAO finds the petitioner's assertions that CIS itself created this lapse and that it is unable to obtain a back-dated certified LCA unpersuasive. As the LCA submitted in the petitioner's response to the director's request for evidence (the LCA certified for employment in Cincinnati, Ohio) was certified on a date subsequent to the filing of the petition, it satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1), 8 C.F.R. § 214.2(h)(4)(iii)(B)(1), nor 8 C.F.R. § 103.2(b)(12), and is therefore defective.

However, the AAO disagrees with the director's implicit finding that the LCA submitted at the time the petition was filed (certified for employment in Florence Kentucky) is defective. Section 212(n)(4)(A) of the Act, states the following:

> (A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

According to Mapquest, Florence, Kentucky is 19.29 miles away from Cincinnati, Ohio.[1] Florence, Kentucky is located in Boone County, Kentucky, in which the Cincinnati-Northern Kentucky International Airport is located. The United States Census Bureau classifies Boone County, Kentucky as a component of the Cincinnati-Middletown Ohio-Kentucky-Indiana Metropolitan Statistical Area.[2] Accordingly, the AAO finds that the LCA certified for employment in Florence, Kentucky, covers Cincinnati, Ohio, the location listed as the location of intended employment on the Form I-129, and should have been accepted by the director as satisfying the LCA requirements. The director erred in denying the petition on this ground.

The AAO turns next to the issue of whether the beneficiary is eligible for additional time in H-1B status based upon 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 record establishes that the beneficiary was in the United States, in H-1B status, from March 25, 2000 through March 2, 2006 (the date the petition was filed). The petitioner filed an application for alien labor certification on behalf of the beneficiary on November 6, 2002. A Form I-140, Immigrant Petition for Alien Worker, was approved on April 25, 2005.[3]

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.[4]

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

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[1] *See* http://www.mapquest.com (accessed December 10, 2007).

[2] *See* http://www.census.gov/population/www/estimates/metro_general/2006/List4.txt (accessed December 10, 2007).

[3] *See* LIN 04 233 50089, approved April 25, 2005.

[4] Section 104(c) of AC-21, referenced in the petitioner's February 24, 2006 letter of support, does not apply to this case. Section 104 of AC-21 is entitled "Limitation on Per Country Ceiling with Respect to Employment-Based Immigrants," and subsection (c) of section 104 is entitled "One Time Protection Under Per County Ceiling." However, employment-based visa numbers for South Korea, the beneficiary's country of chargeability, are currently available, so this section is inapplicable to this case.

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.

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states 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.

As noted previously, the Form I-140 was approved on April 25, 2005. The record does not indicate that the beneficiary has been granted an immigrant visa, or that his status has been adjusted to that of an alien lawfully admitted for permanent residence. Accordingly, the beneficiary is eligible for benefits under section 106(b) of AC-21, as amended by DOJ-21. The beneficiary is eligible for a seventh year of H-1B status, and the AAO will reverse the director's denial of the petition.

The petitioner was incorrect in stating that eligible beneficiaries are entitled to three additional years in H-1B status. AC-21 as amended by DOJ-21 only allows for additional amounts of time in H-1B status in one-year increments only; three additional years are not available in a single 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 for the one-year period of April 10, 2006 through April 9, 2007