U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: WAC 07 137 51409 Office: CALIFORNIA SERVICE CENTER Date: APR 20 2009

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 digital photo manufacturer that seeks to temporarily employ the beneficiary as a senior programmer, and extend the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 requested extension would place the beneficiary beyond the six-year limit.

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 director erroneously denied the petition.

In general, 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] may not exceed 6 years." However, the amended "American Competitiveness in the Twenty-First Century Act" (AC21) removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by sections 11030(A)(a) and (b) of the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21), reads as follows:

(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.

(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 record of proceeding before the AAO includes (1) Form I-129 and supporting documentation for a seventh year extension, filed on April 3, 2007; (2) the director's request for evidence (RFE); (3) counsel's response with additional documentation; (4) the notice of decision, dated October 9, 2007; and (5) Form I-290B and counsel's appeal brief.

The director stated that the beneficiary has resided in the United States in H-1B classification since February 10, 2000. On April 3, 2007, the petitioner applied for an extension of H-1B status for the beneficiary which would have placed the beneficiary beyond his six-year limit. The director noted that the beneficiary's Immigrant Petition for Alien Worker, Form I-140 (SRC 07 800 09640) filed with the Texas Service Center on April 2, 2007 and the beneficiary's Form ETA 9089, Application for Permanent Employment Certification, certified on April 5, 2006 had not been pending for more than 365 days prior to the filing of the instant extension request.

On appeal, counsel contends that the labor certification application, by virtue of the fact that it was filed on behalf of the beneficiary on January 26, 2006, had been pending for more than 365 days and therefore qualified the beneficiary for an extension beyond his six-year limit under AC21 § 106(a).

Upon review, the AAO finds that the beneficiary was in fact eligible for an extension beyond his six year limit under AC21 § 106(a), albeit with some restrictions. As stated above, Section 106 of AC21, as amended by section 11030(A)(a) of DOJ21, provides that if 365 days or more have elapsed since the filing of an application for labor certification, 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)), the six-year limitation will not apply.

In this matter, the application for labor certification was filed on January 26, 2006. The extension request on Form I-129, Petition for Nonimmigrant Worker, was filed on April 3, 2007. Based on these dates, more than 365 days had elapsed since the filing of the labor certification at the time the request for H-1B extension was filed. Therefore, the beneficiary qualified for an extension under Section 106 of AC21, as amended by sections 11030(A)(a) and (b) of DOJ21. Accordingly, the director's decision in this matter was erroneous and is hereby withdrawn.

It should be noted that, upon review of USCIS records, however, the Form I-140, Immigrant Petition for Alien Worker (Receipt No. SRC 07 800 09640), that was filed on behalf of the beneficiary, was denied by the Texas Service Center on November 15, 2007. Therefore, while the beneficiary was eligible for an extension beyond the six-year limitation, the extension period may only be granted from April 7, 2007, the requested start date on the Form I-129, to November 15, 2007, the date the Form I-140 was denied.

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 ordered approved for the period **April 7, 2007 to November 15, 2007**.