U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 0 8 2008

WAC 07 012 51153

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner provides staffing services. It claims to employ over 2,000 personnel and to have $25 million in gross annual income when the petition was filed. It seeks to extend the employment of the beneficiary as a business analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On February 21, 2007, the director issued a Notice of Intent to Deny (NOID) the petition. The director referenced: (1) the November 29, 2002 Application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration and noted that the beneficiary had identified himself as a United States citizen and had signed this form attesting to the truth of all allegations made therein; and (2) the November 10, 2004 Application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration where again the beneficiary had identified himself as a United States citizen and had signed the form attesting to the truth of all allegations made therein. The director found that the beneficiary's representations that he was a United States citizen constituted false claims to obtain a federal or state benefit and thus the beneficiary is inadmissible under section 212(a)(6)(c)(ii) of the Act. The director determined the beneficiary's inadmissibility required a determination that the beneficiary is not clearly eligible for classification under section 101(a)(15)(h)(1)(b) of the Act.

Upon review of the record including the petitioner's rebuttal to the NOID, the director denied the petition on March 5, 2008. The director determined that due to the inconsistencies in the record, the petitioner had not established that the beneficiary qualifies for the classification sought; that the petitioner had not submitted sufficient evidence in rebuttal to the NOID to overcome the grounds for denial; and that accordingly, the petition for qualification of the beneficiary as an H-1B worker is denied. The director also found that due to the beneficiary's inadmissibility under section 212(a)(6)(c)(ii) of the Act, the beneficiary's request to extend status is also denied.

The Form I-129 in this matter was filed October 11, 2006 (WAC 07 012 51153) and requested that the beneficiary's H-1B employment be continued without change with the same employer for intended employment from November 29, 2006 to November 29, 2007. The record contains evidence that the beneficiary has been in L-1A and H-1B classification from October 5, 1999. In a September 25, 2006 letter in support of the petition, the petitioner requested an extension of the beneficiary's employment for a seventh year.

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/L-1A nonimmigrant] shall not exceed 6 years" and that an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year. AC-21 (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-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.

The request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the Form I-129 is filed. *See* Memorandum from William R. Yates, Acting Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD03-09.* HQBCIS 70/6.2.8-P (April 24, 2003). The regulations state: "A request for a petition extension may be filed *only if the validity of the original petition has not expired.*" 8 C.F.R. § 214.2(h)(14) (Emphasis added). The petition in this matter was filed October 118, 2006 prior to the expiration of the beneficiary's sixth year of H-1B status on November 28, 2006.

Although the director did not adequately adjudicate the merits of the petition or the request for a seventh year extension of H-1B status, the AAO reviews appeals on a *de novo* basis. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Upon review of CIS records, the AAO finds that a Form I-140, Immigrant Petition for Alien Worker, was filed January 27, 2006 (WAC 06 091 50662) by Adoption Services of America, Inc. on behalf of the beneficiary, based on a Form ETA 750, Labor Condition Application, with a priority date of March 1, 2003. The record shows that the Form ETA 750 was approved August 17, 2005 and that the Form I-140 was approved February 2, 2007. Thus, the petitioner has established that the beneficiary is eligible for the requested extension from November 29, 2006 to November 28, 2007 pursuant to Section 11030(A)(b) of DOJ-21 as it amended section 106(a) of AC-21.

Therefore, as the beneficiary is eligible for an extension of stay under sections 106(a) and (b) of AC21 the decision of the director will be withdrawn and the petition approved.

The AAO makes no determination on whether the beneficiary is admissible, as this issue is outside the scope of its jurisdiction.

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 director's March 5, 2008 decision is withdrawn. The petition is approved.