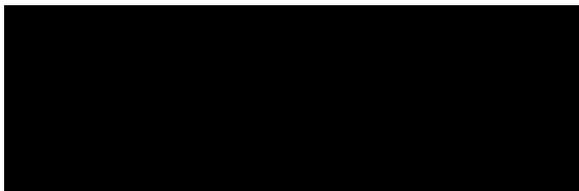


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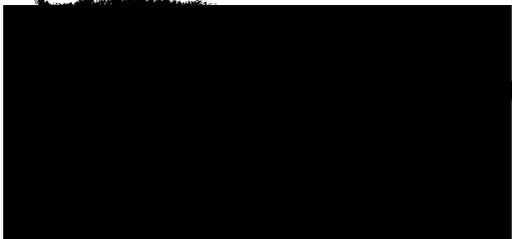
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FILE: WAC 04 005 55053 Office: CALIFORNIA SERVICE CENTER Date: AUG 23 2005

IN RE: Petitioner: [REDACTED]
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:



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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner is a managed health care company that seeks to extend the employment of the beneficiary as a sr. 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).

The director denied the petition after determining that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the 21st Century Department of Justice Appropriations Authorization Act because a final decision was made on the alien's employment based immigrant 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] shall not exceed 6 years." However, 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), removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030(A)(a) of the DOJ Authorization Act, § 106(a) of AC-21 reads:

(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 the DOJ Authorization Act amended § 106(a) of AC-21 to read:

(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 director stated that the beneficiary has resided in the United States in H-1B classification since December 4, 1997. On October 6, 2003, 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 specifically requested a copy of the notice of action pertaining to a previously filed I-140 petition. The petitioner responded with evidence of a pending labor certification application from California's Employment Development Department that was filed on February 15, 2002 (case number 149074). The director noted that CIS records indicated that the beneficiary's Immigrant Petition for Alien Worker, Form I-140 (WAC0020353002) filed with the California Service Center was denied in the year 2000. The director denied the H-1B 7th year extension petition because the I-140 petition had been denied.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal, counsel contends that the beneficiary is qualified for an extension beyond his six-year limit under AC21 § 106(a) as it was originally enacted because he has a pending labor certification application that was pending for more than 365 days before the instant petition was filed. Counsel notes that an alien beneficiary is not precluded from having multiple labor certification filings and/or I-140 immigrant visa petitions as long as they are not frivolous. Counsel explains that the alien's pending labor certification is based on a different position than the first labor certification and subsequent I-140 petition. Counsel asserts that the erroneous interpretation of Public Law 107-273 requires that the H-1B extension be granted as the statutory requirements were met.

The beneficiary is eligible for a 7th year extension of status. While the AAO acknowledges that an I-140 petition filed on behalf of the beneficiary was denied in the year 2000, which would have made the beneficiary ineligible for a 7th year extension, the beneficiary subsequently obtained a new labor certification application which was pending for more than 365 days when the current petition for H-1B extension was filed. Therefore, the beneficiary does meet the requirement that 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment based immigrant; or (2) 365 days or more have passed since the filing of the employment based immigrant petition (Form I-140). See Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by American*

Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313). HQPRD 70/6.2.8-P (May 12, 2005). Accordingly, the AAO shall withdraw 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. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.