

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

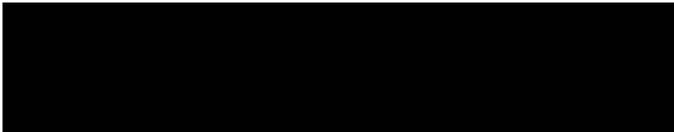
PUBLIC COPY

D2



FILE: EAC 04 176 51652 Office: CALIFORNIA SERVICE CENTER Date: **FEB 23 2006**

IN RE: Petitioner:
Beneficiary:



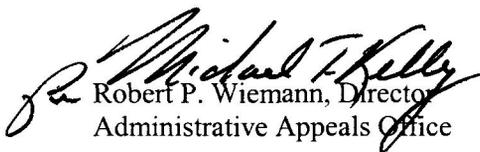
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

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, 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 computer consulting firm that seeks to extend the employment of the beneficiary as a programmer-analyst and to continue his 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 director found that the beneficiary was not eligible for an extension of stay beyond six years under sections 104(c) or 106 of the Twenty-First Century Department of Justice Appropriations Act (21st Century DOJ Appropriations Authorization Act) because less than 365 days had elapsed between when the petitioner filed the alien employment certification application and the date the petition was filed. On appeal, counsel asserts that the beneficiary is eligible for an extension of approval of 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] shall not exceed 6 years.” The American Competitiveness in the Twenty-First Century Act (AC21), as amended by the 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.

CIS headquarters issued an operations memorandum, which confirms counsel's interpretation of CIS's policy on this issue. 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). The pertinent part of the memorandum revises section 33.3(g)(8) of the *Adjudicator's Field Manual (AFM)* to read as follows:

As discussed in section 31.2(d) of the *AFM*, assuming the alien is otherwise qualified for an extension of H-1B status, USCIS will grant an extension beyond the 6th year if the filing date of a pending or approved labor certification application or a pending or approved EB immigrant petition is 365 days or more prior to the requested employment start date on the H-1B petition. Such extension should be granted regardless of whether the H-1B extension application was filed prior to the passage of such period. However, if the alien would no longer be in H-1B status at the time that 365 days from the filing of the labor certification application or immigrant petition has run, then the extension of stay request cannot be granted. . . .

On June 12, 2003, the petitioner submitted an application for labor certification with the State of New Jersey Department of Labor. On May 25, 2004, the petitioner submitted the instant H-1B extension request which stated a start date for the extended employment of July 8, 2004, which is more than 365 days after the filing of the application for labor certification, and which coincides with the end date of the previously approved period of H-1B employment. On these facts, the AAO finds that the beneficiary is eligible for a 7th year extension of status. This pending labor certification establishes the beneficiary's eligibility, under AC21, as amended, for exemption from the six-year maximum period of authorized stay.

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 petition is approved.