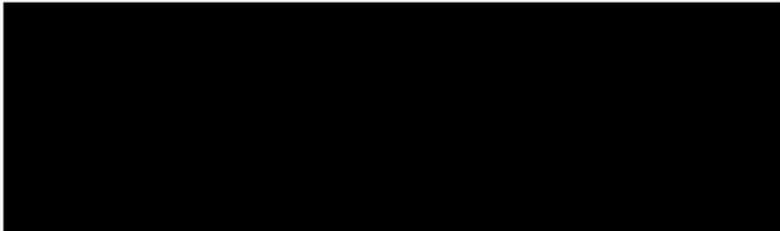




U.S. Citizenship
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FILE: WAC 03 101 52458 Office: CALIFORNIA SERVICE CENTER Date: FEB 23 2006

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:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) upheld the director's decision on appeal. The petition is now being reconsidered by the AAO on motion and will be approved.

The petitioner is a municipal school district that employs the beneficiary as an elementary teacher. The petitioner seeks to extend for a seventh year 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 director and the AAO previously denied the petition on the ground that the beneficiary did not qualify for an exemption from the normal six-year limit on H-1B status.

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 section 11030(A)(a) and (b) of the 21st Century Department of Justice Appropriations Act, 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 regulation at 8 C.F.R. § 214.2(h)(14) further provides that: "A request for a petition extension may be filed only if the validity of the original petition has not expired."

The record of proceeding before the AAO includes (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response thereto with additional documentation; (4) the notice of decision; and (5) Form I-290B and an appeal brief.

In its decision, dated June 22, 2005, the AAO determined that the beneficiary had resided in the United States in H-1B status continuously from June 27, 1997 through June 30, 2003, that the petitioner filed an application for labor certification (Form ETA-750) on behalf of the beneficiary on May 16, 2002, and that the petitioner filed the instant petition (Form I-129) on February 10, 2003 for a one-year extension of the beneficiary's H-1B status from July 1, 2003 to June 30, 2004. Noting that 365 days had not passed from the filing of the labor certification application to the filing of the one-year extension petition under AC21, the AAO ruled that the beneficiary was not eligible for an extension of stay under section 106 of AC21.

Citizenship and Immigration Services (CIS) issued interim guidance from William R. Yates, Associate Director of Domestic Operations, dated May 12, 2005, entitled "*Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313).*"

The AAO has the discretion to reopen a proceeding or reconsider a decision on its own motion under 8 C.F.R. § 103.5(a)(5). In light of the foregoing interim guidance, the AAO will exercise its discretion and reconsider its earlier decision.

The AAO determines, in accordance with the CIS guidance of May 12, 2005,¹ that the beneficiary is eligible for an exemption from the six-year limitation on her H-1B classification under AC21, section 106(a), and to an extension of her H-1B status for a seventh year under AC21, section 106(b), because the petitioner filed a labor certification application (May 16, 2002) more than 365 days before the starting date (July 1, 2003) of the one-year employment period sought for the beneficiary in the extension petition.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden. The beneficiary is eligible for a one-year extension of her H-1B classification under AC21.

ORDER: The appeal is sustained. The petition is approved.

¹ This guidance has been subsequently affirmed by CIS in two policy memoranda from William R. Yates, dated September 23, 2005 and December 27, 2005, both of which are entitled "*Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313).*"