

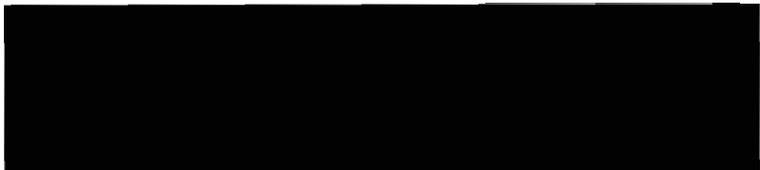
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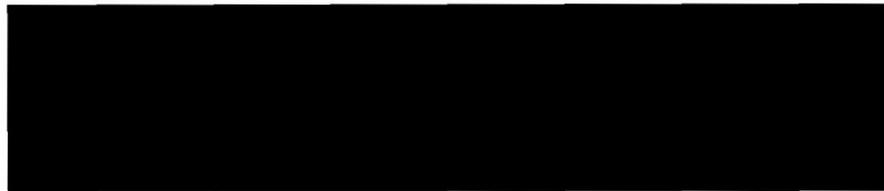
FILE: EAC 04 087 52044 Office: VERMONT SERVICE CENTER Date: FEB 24 2006

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

Ra *Michael T. Kelly*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a provider of technology-enabled advanced analytics that seeks to continue its employment of the beneficiary as a programmer-analyst. The petitioner, therefore, 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

According to the petitioner, the beneficiary was in the United States, in H-1B status, from July 10, 1998 through July 9, 2004. The petitioner filed an application for alien labor certification for the beneficiary on May 15, 2003.

The petitioner filed the instant petition on February 4, 2004 and requested that the beneficiary be granted an additional year of H-1B status, pursuant to the American Competitiveness in the Twenty-First Century Act (AC-21), as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21).

The director denied the petition, holding that since 365 days had not elapsed between the filing of the application for alien labor certification and the filing of the instant petition, the beneficiary did not meet the requirements set forth at AC-21 (as amended by DOJ-21) and therefore did not qualify for a seventh year of H-1B status.

As a general rule, 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 nonimmigrant] shall not exceed 6 years." However, AC-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.

In accordance with two recent CIS policy memoranda, the AAO has determined that the beneficiary is eligible for an exemption from the six-year limitation on his H-1B classification under section 106(a) of AC-21, and to an extension of his H-1B status for a seventh year under section 106(b) of AC-21, because the petitioner filed a labor certification application more than 365 days before the starting date of the employment period sought in the extension petition.

The first memorandum,¹ at page 8, states, in part, the following:

[A]n alien is eligible for an extension of H-1B status beyond the 6th year as long as either the qualifying labor certification application or I-140 petition has or will have been pending for at least 365 days prior to the alien's requested start date, regardless of whether the H-1B extension application was filed prior to the passage of such period.

The second memorandum,² at page 7, states, in part, the following:

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.

¹ 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 the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21)(Public Law 106-313)* HQPRD70/6.2.8-P (May 12, 2005).

² Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year: Adjudicator's Field Manual Update AD05-15*. HQPRD70/6.2.8 (September 23, 2005).

The requested employment start date in the instant petition was July 9, 2004. As noted previously, the application for alien labor certification was filed on May 15, 2003. Therefore, the application for alien labor certification was filed more than 365 days prior to the petition's requested employment start date. Thus, the beneficiary is eligible for a seventh year of H-1B status, and the AAO will reverse 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.

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