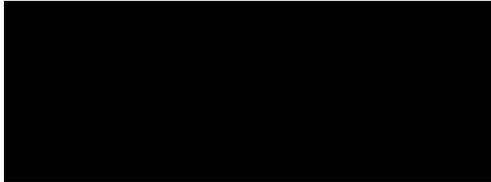


**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



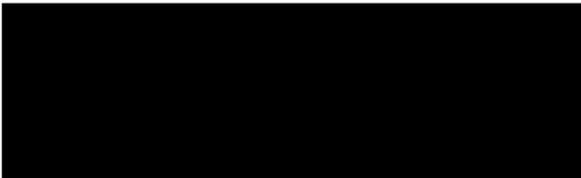
D2

FILE: EAC 04 169 52366 Office: VERMONT SERVICE CENTER Date: JUN 26 2006

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

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a computer software development and computer consulting services company. It seeks to employ the beneficiary as a programmer/analyst and to extend for a seventh year his 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 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 (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In her decision, dated November 8, 2004, the director found that the beneficiary had been employed in the United States in H status since May 21, 1998, that the Form I-129 petition for a one-year extension of the beneficiary's H-1B status was filed on May 14, 2004, and that an application for labor certification on behalf of the beneficiary had been pending at the Department of Labor for 197 days on the date the H-1B extension petition was filed. Noting that 365 or more days had not passed from the filing of the labor certification application to the filing of the one-year extension petition under AC21, the director concluded that the beneficiary was not eligible for an extension of stay under section 106 of AC21.

On appeal counsel asserts that the filing date of the labor certification application was on or about October 27, 2003, which was more than 365 days before the starting date – October 30, 2004 – of the one-year extension period sought for the beneficiary. Counsel contends, therefore, that Citizenship and Immigration Services (CIS) should approve the petition for a one-year extension of the beneficiary's H-1B status.

The record indicates that the beneficiary resided in the United States in H status for six years, that the last visa he was issued during that time period was valid from April 28, 2003 to October 30, 2004, and that the petitioner filed an "Application for Alien Employment Certification" (Form ETA-750) on behalf of the beneficiary with the Pennsylvania Department of Labor and Industry on October 30, 2003. On May 14, 2004 the petitioner filed the Form I-129 petition on behalf of the beneficiary to extend his H-1B status for an additional year, from October 30, 2004 to October 30, 2005. The AAO notes that the labor certification application was filed 365 days before the starting date of the one-year employment period sought in the extension petition. In accordance with a CIS policy memorandum issued by Michael Aytes, Acting Director of Domestic Operations, on December 27, 2005 – entitled "*Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the 21st Century Act of 2000 (AC21) (Public Law 106-313)*" – the AAO determines that the beneficiary is eligible for an exemption from the six-year limitation on her H-1B classification under AC21, section 106(a), and an extension of his H-1B status for a seventh year under AC21, section 106(b).

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 his H-1B classification under AC21.

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