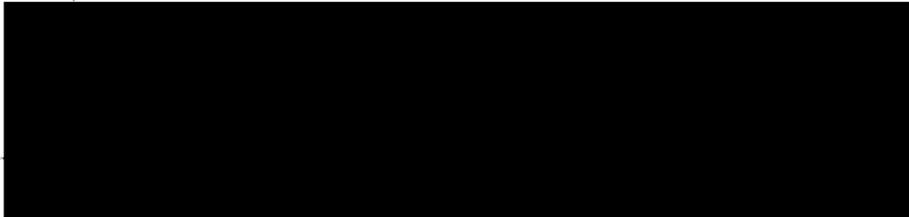




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FILE: EAC 04 208 51865 Office: VERMONT SERVICE CENTER Date: JUN 26 2006

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

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 consulting company. It seeks to employ the beneficiary as a software engineer and to extend for one 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 21<sup>st</sup> 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 decision; and (3) Form I-290B, an appeal brief, and supporting materials.

In her decision, dated July 22, 2004, the director found that the beneficiary had resided in the United States in H-1B status for the maximum time period of six years allowed under 8 C.F.R. § 214.2(h)(13)(iii)(A)] and that the petitioner's employment-based immigrant petition (Form I-140) on behalf of the beneficiary was denied on April 27, 2004. The director concluded that the beneficiary was not eligible for an extension of stay under section 106 of AC21 because he did not have an employment-based immigrant petition pending and had not maintained lawful nonimmigrant status.

In its appeal brief, dated August 19, 2004, the petitioner points out that the date of the service center's denial of the Form I-140 petition was March 11, 2004, and that the beneficiary had maintained nonimmigrant status based on the service center's approval the previous year of an extension petition valid until September 29, 2004. Since the Form I-140 petition was filed on July 16, 2003, denied on March 11, 2004, appealed on April 2, 2004, and no final decision had been issued on the appeal, the petitioner asserts that the director erred in denying the Form I-129 petition on July 22, 2004. The petitioner claims that the beneficiary is entitled to a one-year extension of his H-1B status under section 106 of AC21 because his Form I-140 petition was pending for more than 365 days.

The record shows that the beneficiary has resided in the United States in H-1B status for the maximum six-year period allowed under section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), and that his last one-year extension was approved by the service center on May 2, 2003, with a validity period running from September 30, 2003 to September 29, 2004. The petitioner filed an employment certification application on behalf of the beneficiary on July 20, 2001, which was approved by the U.S. Department of Labor on May 12, 2003. Citizenship and Immigration Services (CIS) records reflect that the petitioner filed an employment-based immigrant petition (Form I-140) on behalf of the beneficiary in July 2003, which was denied by the Vermont Service Center on March 11, 2004. The petitioner filed a timely appeal on April 2, 2004, which was dismissed by the AAO on November 10, 2005. On July 9, 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 September 29, 2004 to September 28, 2005. The AAO notes that the Form I-140 employment-based immigrant petition was filed more than 365 days before the starting date of the one-year employment period sought in the Form I-129 extension petition, that the beneficiary was in valid nonimmigrant status at the time the Form I-129 petition was filed, and that the final decision on the Form I-140 petition was not issued until after the expiration of the one-year extension period requested in the Form I-129 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 21<sup>st</sup> 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 his H-1B classification under AC21, section 106(a), and an extension of his H-1B status for one year – from September 29, 2004 to September 28, 2005 – 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.