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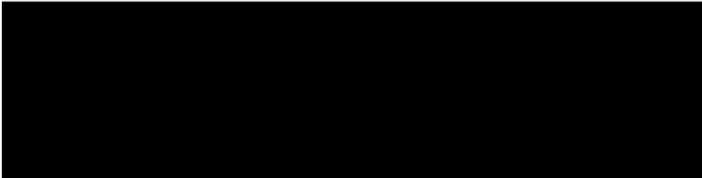
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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

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FILE: EAC 07 247 50829 Office: VERMONT SERVICE CENTER

Date: **JUN 03 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The director of the service center 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 biomedical company that seeks to employ the beneficiary as a senior biologics manager. 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 director denied the petition, finding that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act because a final decision was made on the alien's employment-based immigrant 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." However, the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21<sup>st</sup> 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.

The record indicated that the beneficiary has resided in the United States in H-1B classification since September 7, 2001. On August 28, 2007, the petitioner applied for an extension of H-1B status for the beneficiary from September 6, 2007 until September 6, 2008, which would have placed the beneficiary beyond his six-year limit. The director noted that U.S. Citizenship and Immigration Services (USCIS) records indicated that the beneficiary's Immigrant Petition for Alien Worker, Form I-140 (LIN0702853306) filed with the Nebraska Service Center on November 7, 2006 was ultimately denied on June 29, 2007.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

USCIS records indicate that the Form I-140 was initially denied on April 20, 2007. Records further indicate that an appeal was filed on June 8, 2007, and the appeal was assigned receipt number LIN0702853306. The director determined that the appeal was late and instead treated it as a motion to reopen pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2) and assigned it receipt number LIN0717851513. On appeal of the H-1B petition, counsel contends that according to the USCIS case inquiry page, the appeal of LIN0717851513 was still pending as of September 14, 2007. Therefore, counsel's contention on appeal in the instant matter is that the beneficiary clearly qualified for an extension beyond his six-year limit under AC21 § 106(a) as it was originally enacted, because he was the beneficiary of an employment-based immigrant petition that was still pending at the time of filing.

Counsel is correct in asserting that USCIS will not consider a decision to be final for purposes of this analysis when a timely and non-frivolous I-140 appeal is pending. In this matter, as indicated above, it appears from USCIS records that a late appeal was filed with the Nebraska Service Center on June 8, 2007, and it was treated as a motion to reopen. The motion was granted, the previous decision of the director was upheld, and a denial notice was sent on June 29, 2007. It appears, however, that the June 29, 2007 decision was mailed only to the petitioner's prior counsel, and not to the petitioner or its counsel at that time. Ultimately, the June 29, 2007 decision was faxed to the petitioner's current counsel on October 24, 2007, and an appeal of that decision was filed on November 21, 2007 (LIN0804751191). This appeal is currently pending before the AAO. The beneficiary, therefore, is eligible for a 7th year extension of status.

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 decision of the director is withdrawn and the petition is approved.