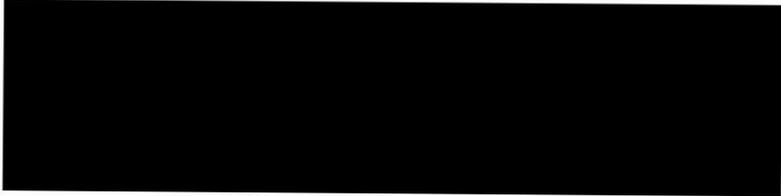




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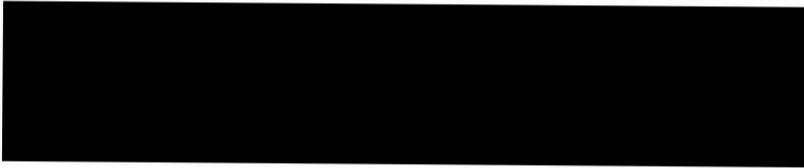


FILE: WAC 02 259 50325 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2006

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

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

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a wholesaler and distributor of natural stones that seeks to extend the employment of the beneficiary as a management coordinator. The petitioner 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 after determining that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ Authorization Act), because the petitioner did not establish that the beneficiary had maintained 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] shall not exceed 6 years.” However, AC21 as amended by the DOJ Authorization 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 petitioner submitted the Form I-129 on August 15, 2002 and requested that the beneficiary's status be extended from July 15, 2002 until July 15, 2003 under AC21. However, the beneficiary's status ended on March 1, 2002. The record reflects that the beneficiary had been in the United States in H-1B status for the following periods: 05/11/95 to 10/1995; 05/1996 to 11/1998; 11/18/98 until 03/01/2001; and 03/01/2001 until 03/01/2002.

The petitioner submits an acknowledgment letter from the Employment Development Department of the State of California confirming that the petitioner filed a labor certification application for the beneficiary on April 16, 2001. The petitioner asserts that it received the approval notice for the March 2001 until March 2002 H-1B extension on May 16, 2002.

The director denied the instant H-1B 7<sup>th</sup> year extension petition because the evidence of record indicated that the beneficiary was not in status at the time this petition was filed and, therefore, is ineligible to extend status under the provisions of AC21.

On appeal, counsel does not contest the factual basis of the director's decision. Rather, counsel asserts that "Petitioner believes that the unavoidable gap between the expiration of the latest H-1B extension of status approval (expiration March 1, 2001) and the eligibility to apply for one-year extensions under the AC21 Act was an extraordinary circumstance beyond its control." Accordingly, counsel is requesting that CIS excuse the untimely filing under the following provision of 8 C.F.R. § 214.1(c)(4):

[F]ailure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
- (ii) The alien has not otherwise violated his or her nonimmigrant status;
- (iii) The alien remains a bona fide nonimmigrant; and

- (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

As indicated above, the petitioner asserts it received the approval notice for the March 2001 until March 2002 H-1B extension on May 16, 2002. The record reflects that the petitioner did not file the instant petition requesting the 7<sup>th</sup> year extension under the provision of AC21 until August 15, 2002, which is more than 60 days after receiving said approval notice, and more than four months after the beneficiary's status had expired. Although counsel asserts the petitioner's belief that the untimely filing was due to extraordinary circumstances beyond its control, the record contains no evidence of such circumstances, and counsel's assertions are vague and unsupported. The record does not establish that the delay was due to extraordinary circumstances beyond the petitioner's control.

The beneficiary is not eligible for a 7<sup>th</sup> year extension of status. As stated at 8 C.F.R. § 214.1(c)(4), absent the exercise of CIS's discretion to excuse a failure to apply for an extension while the beneficiary was in status, due to extraordinary circumstances beyond the petitioner's control, an extension of stay may not be approved for an alien who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. The beneficiary was not in status when the instant extension petition was filed. Counsel has not established that failure to maintain the beneficiary's status was due to extraordinary circumstances beyond the petitioner's control. Accordingly, the AAO shall not excuse the failure to file the instant petition while the beneficiary was still in status. The director's denial of the petition shall not be disturbed.

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 not sustained that burden.

**ORDER:** The appeal is dismissed. The petition is denied.