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FILE: EAC 04 178 50511 Office: VERMONT SERVICE CENTER Date: NOV 03 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.

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 dismissed. The petition will be denied.

The petitioner manufactures and services aircraft. It seeks to employ the beneficiary as a field service engineer and extend for one year his stay in the United States as a nonimmigrant worker in a specialty occupation (H-1B classification) 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, who had already spent six years in the United States in H-1B status, did not qualify for an exemption from the statutory six-year limit because he was not in valid H-1B status, but rather in TN status, at the time the instant petition was filed.

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 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 the director indicated that the beneficiary had been in the United States in continuous H-1B status for six years – from August 1, 1997 to August 1, 2003. At that point in time the beneficiary changed status to TN and continued working in the United States. The instant petition, filed on May 20, 2004, seeks to change the beneficiary's classification back to H-1B and to extend his stay for one year – from July 1, 2004 to July 1, 2005 – under the provisions of AC21. The director determined that AC21 required the beneficiary to be in valid H-1B status at the time the petition was filed. As the beneficiary was no longer in valid H-1B status at the time of filing, the director found that he was ineligible for the requested one-year extension of stay in H-1B status.

On appeal counsel asserts that AC21 does not require the beneficiary to maintain H-1B status to be eligible for a seventh-year extension of stay. Counsel quotes the language in subsection 106(a)(1) of AC21 stating that the exemption from the six-year limitation on H-1B status applies to any alien beneficiary who was "previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(B) of such Act if 365 or more days have passed since the filing of . . . [a]ny application for labor certification." According to counsel, the beneficiary fulfills the statutory requirements for a seventh-year extension under AC21 because he was previously provided nonimmigrant (H-1B) status for six years and an application for alien employment certification was filed for the beneficiary (by the petitioner) on March 12, 2003, which was more than 365 days before both the filing date of the instant petition and the starting date of the one-year employment period requested in the petition.

The AAO does not agree with counsel's interpretation of AC21. The requirement that the beneficiary be in valid H-1B status to be eligible for an exemption from the normal six-year limitation is clear in subsection (b) of section 106, which is entitled "extension of H-1B worker status" and provides for extensions of stay in one-year increments for qualified aliens. The beneficiary in the instant petition is not seeking an extension of H-1B worker status, since he was not in H-1B status at the time of filing. Rather, he is seeking a change of nonimmigrant status from TN to H-1B. The provisions of AC21 provide for an extension of stay in one-year increments based on an extension of existing H-1B status, not a change to H-1B status from another status. Though counsel points out that no implementing regulations have been issued for AC21, the AAO notes that the regulation at 8 C.F.R. § 214.2(h)(14) provides in general with respect to H-1B workers that "[a] request for a petition extension may be filed only if the validity of the original petition has not expired."

This interpretation is supported by the memorandum of William R. Yates, Acting Associate Director for Operations, CIS, *Guidance for Processing H-1B petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273)*, HQBCIS 70/6.2.8-P, dated April 24, 2003. The memorandum states on page two: "The request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the petition (Form I-129) is filed with the BCIS. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded [H-1B] status, or where such status expired before the application or petition was filed."

Based on the foregoing analysis, the AAO determines that the beneficiary is not eligible under AC21 for a one-year extension of stay in H-1B status.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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