

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



FILE: EAC 05 187 52532 Office: VERMONT SERVICE CENTER Date: FEB 26 2007

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

The petitioner is a medical practice. It seeks to extend the employment of the beneficiary as a pulmonary, critical care and sleep physician. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 because the beneficiary had remained in the United States in H-1B status for six years and the petitioner had not satisfied the requirements for an extension of stay under the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (21<sup>st</sup> Century DOJ Appropriations Authorization Act). The director determined that because the petitioner did not file for an extension for the beneficiary while the beneficiary was still in valid H-1B status, the beneficiary was not eligible for approval under AC21 and the 21<sup>st</sup> Century DOJ Appropriations Authorization Act.

On appeal, counsel asserts that the petitioner is not requesting an extension of the beneficiary's H-1B status, but rather is requesting that the petition be approved for consular processing in Toronto, Canada as the beneficiary is not subject to the six-year limitation.

The facts of the matter are not in dispute. The beneficiary was admitted into the United States in June 1998 as an H-1B nonimmigrant. The beneficiary completed his six-year employment as an H-1B nonimmigrant on June 30, 2004. On February 14, 2004, prior to the expiration of the beneficiary's H-1B classification, two Forms I-140 Immigrant Petition for Alien Worker were filed on the beneficiary's behalf. A Form I-485, Application for Adjustment of Status was filed along with the Forms I-140. On January 13, 2005, the beneficiary was paroled into the United States on the basis of the pending Form I-485 application. On June 20, 2005, the petitioner submitted the Form I-129 that is the subject of this appeal. In a June 17, 2005 letter appended to the petition, counsel for the petitioner noted the language under AC21 regarding the exemption from the six-year limitation, the pending Forms I-140 and I-485 on the beneficiary's behalf, the age of the pending petitions as over 365 days, and USCIS guidance indicating that an alien who was an H-1 nonimmigrant, but who was paroled pursuant to a grant of advance parole, may apply for an extension of H-1 status if there is a valid and approved petition. As observed above, the director denied the petition, as the beneficiary had not filed for an extension while the beneficiary was still in valid H-1B status.

Upon review of CIS records, the AAO finds that both the Forms I-140 and the Form I-485 relied upon by the petitioner to establish eligibility under AC-21 have been denied. CIS records reflect that Form I-140, EAC 04 128 51999, was denied on January 11, 2006. Form I-140, EAC 04 128 52020, was denied on January 31, 2006, and again denied on a motion to reopen on May 5, 2006. CIS records further reflect that Form I-485 filed concurrently with the Forms I-140 was denied on January 31, 2006. All three decisions are final. The applicable law in this matter is as follows:

First, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years" and that an alien may not seek extension, change of status,

or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year. AC-21 (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21)) removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays and DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

Second, as amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

(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 DOJ-21 amended section 106(a) of AC-21 to state the following:

(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.

Section 106(b)(3) of AC-21 indicates that the Attorney General [now Secretary, Department of Homeland Security] shall extend the stay of an eligible alien under Section 106(a) until such time as a final decision is made to grant or deny the alien's application for an immigrant visa or for adjustment of status. As the Forms

I-140 and the Form I-485 were denied, the beneficiary is no longer entitled to an extension of stay in one-year increments under AC-21. For this reason, the petition must be denied.

The AAO acknowledges that recent guidance issued by CIS indicates that "eligibility for the exemptions is not restricted solely to requests for extensions of stay while in the United States," and "[a]liens who are eligible for the 7<sup>th</sup> year extension may be granted an extension of stay regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold H-1B status." See page 3 of the Memorandum from Michael Aytes, Associate Director, Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent for the United States for Over One Year*. HQPRD 70/6.2.8 (December 5, 2006).

In this matter, however, the AAO does not find it necessary to reach the issue of the beneficiary's eligibility for an extension or for consular processing as CIS records clearly show that a final decision has been made to deny the alien's application for an immigrant visa and for adjustment of status. Thus, there is no basis upon which the alien may rely to extend his stay under Section 106(a). As noted above, section 106(b)(3) of AC21 limits the implementation of the exemption at section 106(a) until such time as a final decision is made - 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 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.