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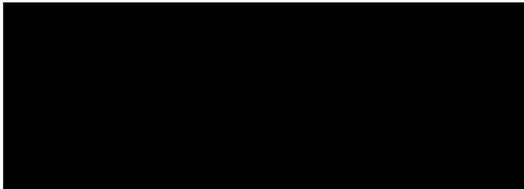
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FILE: EAC 06 096 52090 Office: VERMONT SERVICE CENTER Date: OCT 02 2007

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a provider of information solutions and it seeks to employ the beneficiary as a consultant. 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 because the beneficiary had allowed his authorized period of stay to expire before filing the instant petition. The director found that the petitioner is, therefore, ineligible for the benefits provided for in sections 104(c) or 106 of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (DOJ 21).

On appeal, counsel states that the beneficiary was not maintaining valid H-1B status at the time of the filing of the Form I-129 petition. Counsel states that the petitioner is not seeking an extension of stay, but is seeking approval of the petition, and that the beneficiary will obtain his visa at a consulate overseas.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." However, section 106(a) of AC21, as amended, removed the six-year limitation on the authorized duration of stay in H-1B visa status once 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien.

As amended by § 11030A(a) of DOJ21, § 106(a) of AC21 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 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] 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.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

As found by the director, the beneficiary has been employed in the United States in H-1B status since October 6, 1999, and the maximum period of the beneficiary's authorized stay expired on October 5, 2005.

The first issue in this matter is whether the petitioner's ETA 750 had been pending 365 days or more prior to the date the petition was filed. The petitioner submitted evidence that it filed a labor certification application Form ETA 750 on the beneficiary's behalf on November 12, 2003, more than 365 days prior to the filing of the present petition. The petitioner filed the Form I-129 petition on February 15, 2006, a date subsequent to the enactment of DOJ21. Accordingly, the pending labor certification application filed on the beneficiary's behalf can be the basis for extending his authorized period of stay in the United States in H-1B status beyond the maximum six-year limit as long as all other requirements for extension of stay and H-1B classification are met.

The beneficiary's authorized period of stay expired on October 5, 2005; however, the petition seeking an additional one-year period of authorized employment was not filed until February 15, 2006. The petitioner explains that it is filing for new employment, and is simply requesting petition approval and not an extension of the beneficiary's stay. The petitioner requests that the beneficiary obtain his visa at a consulate. The petitioner thereby implicitly admits that the beneficiary is not eligible for extension of stay in H-1B worker status under section 106(b) of AC21, and instead seeks approval of the petition for new employment solely under section 106(a) of AC21.¹

The AAO finds that sections 106 (a) and (b) of AC21, as amended by DOJ21, must be read as a whole. If the petitioner were allowed to petition for new employment under section 106(a) without regard to section 106(b), and request overseas processing for the alien who is subject to the limitations of section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), the limitations of section 106(b) would also not apply. As such, if section

¹ It is noted that, even if an extension of stay had been requested, the petitioner failed to establish that the beneficiary would have been eligible for this benefit. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, with certain exceptions. In this case, the beneficiary was no longer in a valid nonimmigrant status at the time the instant petition was filed. The petitioner has not demonstrated that the failure to timely file the application for extension of stay meets the requirements for any of the exceptions. Thus, an extension of stay under 8 C.F.R. § 214.1(c)(4) and section 106(b) of AC21, as amended by DOJ21, could not be approved.

106(a) were read separately from 106(b), the petitioner would be allowed to request three years of H-1B status, rather than the maximum one-year increment allowed in section 106(b); the petitioner would likewise be allowed to petition for the alien regardless of whether the labor certification or immigrant petition had been denied, as provided in section 106(b). The alien who has reached the maximum period of stay under section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), would thus be permanently exempt from the stay limitations, regardless of whether the labor certification or immigrant petition was denied. This would be an impermissible reading of AC21, which was designed to prevent those people already here for six years in H-1B status from having to leave the United States due to delays in the processing of their labor certification applications or immigrant petitions. The AAO finds that the limitations contained in section 106(b) must be read together with section 106(a) of AC21, as amended by DOJ21. As the beneficiary is not eligible for an extension of H-1B stay, the petition may not be approved under AC21, as amended by DOJ21.²

Further, even if section 106(a) were a stand-alone provision, the alien in this case is not a nonimmigrant, and thus would not qualify for eligibility. The alien is no longer in H-1B visa status. Section 106(a) of AC21, as amended by DOJ21, exempts "any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status" from the six-year limitation of stay, when other requirements are met. Section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15), defines an immigrant as every alien who is not in one of the nonimmigrant classifications defined in that section. As the beneficiary is no longer in H-1B status, he is not a nonimmigrant, and does not qualify for eligibility under section 106(a) of AC21.

The beneficiary has reached the six-year maximum allowable period of stay as an H-1B nonimmigrant. The petition was filed after the alien's status expired, and he is not eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4) and sections 106(a) and (b) of AC21, as amended by DOJ21. In accordance with the regulation at 8 C.F.R. § 214.2(h)(13)(i)(B), the petition may not be approved.

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.

² It is noted that, even if an alien were found to be permanently exempt without restriction from the limitations of section 214(g)(4) of the Act pursuant to section 106(a) of AC21, as amended, the alien would then be permanently subject to the numerical cap limitations of section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A) for any and all petitions filed on his or her behalf following such a determination. See, section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7).