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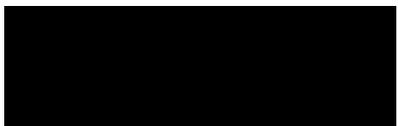


FILE: LIN 03 131 50063

Office: NEBRASKA SERVICE CENTER

Date: ^{HPS} AUG 17 2005

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, Director
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 dismissed. The petition will be denied.

In order to employ the beneficiary as a graphic packaging design/senior industrial designer, the petitioner, a corporation that manufactures corrugated boxes and packaging materials, 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 (INA), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that, because this petition was filed after the beneficiary's H-1B status had lapsed, the beneficiary is not eligible for extension of H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21).

In general, section 214(g)(4) of the INA, 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 Twenty-First Century Department of Justice Appropriations Authorization Act (21st 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.

As amended by § 11030(A)(a) of the 21st Century DOJ Appropriations Act, section 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 11030(A)(b) of the 21st Century DOJ Appropriations Act amended section 106(a) of AC21 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 indicates that the petitioner filed an application for alien employment certification on December 26, 2001, and that the instant petition was filed on March 17, 2003, 448 days after the filing of the application and 141 days after the beneficiary's nonimmigrant status lapsed.

As evident in the following portion of his decision, the director denied the petition on the basis that the beneficiary was not eligible for benefits under AC21 because the beneficiary was not in H or L status at the time the petition was filed:

The record indicates that the beneficiary has been in the United States under Section 101(a)(15)(H) or (L) of the [INA] for a period of six years, such period having expired on October 27, 2002. It is noted that the immediate petition requesting a seventh year of status was filed on March 17, 2003. Although the petitioner submitted evidence establishing that it has filed a labor certification application, it does not appear that the immediate request qualifies as a seventh year extension. The immediate petition is not indicative of a request for an extension of stay as it was filed more than four months after the beneficiary's prior status expired. The delay in filing the petition has created a disruption in the continuity of the extension process. Consequently, the Service cannot consider the immediate request as a qualifying seventh-year extension request, and the petition may not be approved.

Since the beneficiary has remained in the United States in H or L status for over six years and the petitioner has not satisfied the requirements for an extension of stay under AC21, no further extensions of the petition may be granted.

Counsel does not dispute the fact that the beneficiary was not in status at the time petition was filed. Rather, counsel contends (brief, at page 2) that the following circumstances entitle the beneficiary to H-1B status under AC21 as amended:

[The beneficiary] first entered the United States in L-1 status. He later changed his status to H-1B. As of October 27, 2002, [the beneficiary] had spent six years in the United States in L-1 and H-1B status. His H-1B status expired on that date. As a result, [the beneficiary] and his family are now in Canada. However, [the petitioner] has filed a labor condition application with the U.S. Department of Labor on [the beneficiary's] behalf. This application has been pending for more than one year.

As evident in the following excerpt (from page 3 of the brief), the crux of counsel's argument is that AC21 exempts from the six-year in-status limitation any previous beneficiary of an approved H-1B petition for whom a labor certification application has been pending for more than 365 days, and, therefore, the fact that the beneficiary was out of status at the time the petition was filed is irrelevant:

[The statutory language at section 106(a) of AC21] states clearly that if two conditions are met, namely (1) the beneficiary of an H-1B petition has previously been granted H-1B status, and (2)

a labor certification application required for the beneficiary's immigration has been pending for more than 365 days, the six-year limitation under INA section 214(g)(4) does not apply. If the six-year limitation does not apply, there is no reason why an individual who is only disqualified for H-1B status because of that six-year limitation should not be granted H-1B status. This is the situation in the instant case. The only reason [the beneficiary] is not eligible for H-1B status is the six-year limitation of Section 214(g)(4). However, the DOJ Appropriations Act states clearly that the six-year limitation does not apply to individuals in [the beneficiary's] position. Therefore, [the beneficiary] is eligible for H-1B status.

Counsel misconstrues section 106(a) of AC21 by failing to read it in conjunction with its companion provision, section 106(b), which implements the exemption stated in section 106(a). Section 106(b) clearly limits the implementation of the exemption at section 106(a) exclusively to aliens who are eligible for an extension of stay ("The Attorney General shall extend the stay of an alien who qualifies for an exemption in one-year increments . . ."). Counsel's reference to legislative history is irrelevant. Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984). As the beneficiary here is not entitled to an extension of stay, he falls outside the coverage of AC21.

If the alien is not otherwise eligible for an extension of H-1B status, then Citizenship and Immigration Services (CIS) will not approve a request for extension of H-1B status. The request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the Form I-129 is filed. See Memorandum from ██████████, Acting Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD03-09*. HQBCIS 70/6.2.8-P (April 24, 2003). "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." 8 C.F.R. § 214.1(c)(4). There are exceptions to this rule, but none of them apply to the instant petition. The regulations also state, "A request for a petition extension may be filed *only if the validity of the original petition has not expired.*" 8 C.F.R. § 214.2(h)(14) (Emphasis added). The petition was filed in this case several months following the expiration of the original petition. The regulations are clear, and do not allow for an extension of status when the beneficiary is no longer in the original H-1B status.

The AAO also notes that the legislature is presumed to be familiar with background existing law when it legislates. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979); *Valansi v. Ashcroft*, 278 F.3d 203, 212 (3rd Cir. 2002); *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 n.3 (BIA 1995). It is equally presumed that had Congress intended to amend the current regulation requiring that the application for the seventh year extension be filed while the alien is currently maintaining valid H-1B status, it would have affirmatively done so.

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.