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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 246 53320 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2005

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:

SELF-REPRESENTED

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.

The petitioner provides software products and services. It seeks to employ the beneficiary as a senior systems analyst. The petitioner, therefore, 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 petitioner sought to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. On appeal, counsel contends that the director erroneously denied the petition.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, 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.

The petitioner seeks the beneficiary's services as a senior systems analyst, and wishes to continue the beneficiary's previously approved employment without change, and to extend the stay of the beneficiary in the United States. The petitioner indicates on the petition that it seeks to extend the beneficiary's H-1B status from December 7, 2003 to December 7, 2004.

The director denied the petition, finding that because the beneficiary had already been employed in the United States since December 1997 in H-1B and/or L-1 status, he had reached the maximum six-year period of stay in the United States. The director stated that counsel sought to qualify the beneficiary for benefits under the American Competitiveness in the 21st Century Act (the AC21) by submitting a letter acknowledging receipt of an application for alien employment certification, case number [REDACTED] from the Department of Labor (DOL). According to the director, prior to the filing of the instant petition, 365 days or more have not lapsed since the petitioner filed the labor certification application. As such, the director determined that the beneficiary was not eligible for benefits under the AC21.

On appeal, counsel claims that the petitioner seeks to extend the beneficiary's H-1B status as of the starting date of employment, which is December 7, 2003. Counsel states that the labor certification would be pending for over 365 days on October 29, 2003, which is before the requested December 7, 2003 starting date of employment. Counsel emphasizes that the regulations do not state that the petition must be filed after 365 days have lapsed. According to counsel, the director should have issued a request for evidence (RFE) to provide the petitioner an opportunity to re-file the petition by December 7, 2003.

Upon review of the evidence in the record, the AAO finds that the beneficiary is not eligible to derive benefits from the amendment to section 106(a) of the AC21 by the 21st Century DOJ Appropriations Act.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on August 29, 2003; (2) a letter from the Foreign Labor Certification Office, dated October 11, 2002; (3) the director's denial letter; and (4) Form I-290B.

To extend or amend the beneficiary's stay in the United States to December 7, 2004 in the H-1B classification, the petitioner needed to prove that the beneficiary qualifies for benefits under either section 106(a) of the AC21 or the 21st Century DOJ Appropriations Act.

Section 106(a) of the AC21 allowed an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien was the beneficiary of a Form I-140 or an application for adjustment of status; and (2) 365 days or more had passed since the filing of the labor certification application that is required for the alien to obtain status as an employment-based immigrant, or 365 days or more had passed since the filing of the Form I-140.

On November 2, 2002, the 21st Century DOJ Appropriations Act was signed into law. It amended section 106(a) of the AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of the AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any labor certification application that is required or used by the alien to obtain status as an employment-based immigrant; or (2) 365 days or more have passed since the filing of the Form I-140.

Based on the evidence in the record, the beneficiary does not qualify for benefits under the amendment to section 106(a) of the AC21 by the 21st Century DOJ Appropriations Act.

The instant petition was filed on August 29, 2003. In the denial letter, the director properly determined that when the instant petition was filed, 365 days had not lapsed since the filing of the labor certification (case number [REDACTED] on October 9, 2002. Counsel's statement that the labor certification would be pending for over 365 days on October 29, 2003, which is before the requested December 7, 2003 starting date of employment, is not persuasive because the instant petition was filed on August 29, 2003, not October 29, 2003. Furthermore, the petitioner's requested start day of employment is irrelevant in determining whether the labor certification has been pending for 365 days at the time an H-1B petition is filed.¹

¹ The AAO acknowledges that the memorandum entitled "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)," signed by William Yates, CIS Associate Director for Operations, on May 12, 2005, supports counsel's contention that the labor certification application only needs to have been pending for 365 days prior to the start date of the proposed employment.

While the AAO is loathe to differ with the stated interpretation of the law as set forth in a CIS memorandum, we do not find counsel's contention, even as supported by the Yates' memorandum, of this particular issue to be sufficiently persuasive. The AAO is not bound by the statutory interpretation set forth in the

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.

CIS regulations also affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Co.* 17 I&N Dec. 248 (Reg. Comm. 1978).

Thus, the statute under which the petitioner seeks to qualify the beneficiary for a seventh-year extension clearly requires that 365 days or more have elapsed since the filing of the application for labor certification at the time of filing the petition.

Counsel states that the director should have issued an RFE to provide the petitioner an opportunity to re-submit the petition by December 7, 2003. CIS is required to issue a request for evidence when initial evidence of eligibility is missing from the initial submission. If the evidence submitted does not establish eligibility, raises questions regarding eligibility, the issuance of the RFE is discretionary. 8 C.F.R. § 103.2(b)(8). Here, the director denied the petition without issuing an RFE because of evidence of clear ineligibility to meet

memorandum. The memorandum is not the product of formal rulemaking procedures, nor is it a precedential decision. It is strictly an operational memorandum from the Associate Director for Operations directing CIS Service Centers and Regional Directors in their adjudicative work. See *Yeboah v. U.S. Dept. of Justice*, 345 F.3d 216, 222 n. 4 (3rd Cir. 2003) (finding that an INS memorandum should not be afforded deference because it lacks statutory construction and was not the product of formal rule-making procedures); see also *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) ("It is doubtful that an internal agency memorandum of this sort could confer substantive legal benefits upon aliens or bind [CIS]."). Second, the specific interpretation of the law as set forth in counsel's brief and as supported by the Yates' memo is supported by the statute itself, or by CIS regulations.

statutory requirement that the labor certification have been pending for 365 days at the time of the filing of the H-1B petition.

Upon review, the AAO finds that counsel's argument, as supported by the memorandum's interpretation of the number of days the labor certification must have been pending prior to the filing date of the petition, is not consistent with the plain and sensible meaning of the statute. *Cf. Beltran-Tirado v. INS*, 213 F.3d 1179, 1185 (9th Cir. 2000) (noting that a court is not obligated to accept an interpretation that it is contrary to the plain and sensible meaning of the statute). The petitioner has not established that the beneficiary is eligible to extend his stay in the H-1B classification beyond the six-year maximum period.

The AAO notes that the U.S. Department of Justice, Executive Office of Immigration Review indicates that effective on July 9, 2004, [REDACTED] was to be suspended from the practice of law for 15 months.

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.