

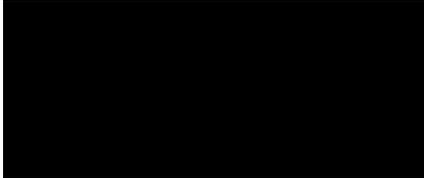
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**U.S. Citizenship  
and Immigration  
Services**

*D2*



FILE: SRC 04 049 52487 Office: TEXAS SERVICE CENTER Date: **NOV 14 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*

Robert P. Wiemann, Director  
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 an international banking business that seeks to extend its authorization to employ the beneficiary as a "Sales Officer I." The petitioner seeks to extend for a seventh year the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 did not qualify for an exemption from the normal six-year limit on H-1B status.

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 21<sup>st</sup> 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 for a seventh year extension, filed on December 9, 2003; (2) the notice of decision, dated April 26, 2004; and (5) Form I-290B and counsel's appeal brief.

The record shows that the beneficiary resided in the United States with H-1B classification continuously from August 1, 1997 through August 1, 2003. Evidence in the record indicates that the petitioner filed a labor certification application (Form ETA-750) on behalf of the beneficiary on December 6, 2002, followed by the instant petition (Form I-129) on December 9, 2003 to extend the beneficiary's H-1B status by one year. As such, it appears that the director erroneously concluded that 365 days had not passed between the filing of the Form ETA-750 and the filing of the extension of status petition, thereby disqualifying the beneficiary for exemption from the six-year limitation on H-1B classification and an extension of her H-1B status under AC21. In this case, however, the AAO must consider whether the alien was in status or in an authorized period of stay in order to determine whether the petition was properly denied.

On appeal counsel states that at the time of filing on December 9, 2003, the instant petition included evidence of a labor certification filed on December 6, 2002, as well as evidence of the then unadjudicated H-1B extension petition to recapture time, which since has been erroneously denied by the director. Counsel states further that, since the said petition should have been approved, the beneficiary is entitled to an exemption from the six-year limitation on H-1B classification under AC21 section 106(a) and an extension of her H-1B status for one year under AC21 section 106(b).

Citizenship and Immigration Services (CIS) records reflect that the petitioner filed a form I-129 petition to extend the H-1B employment of the beneficiary on July 28, 2003, under receipt number SRC 03 211 53606, which was denied by the Service Center on April 15, 2004. The petitioner appealed the decision, and the AAO dismissed the appeal on October 4, 2005. Thus, the beneficiary was not in status at the time that the instant petition was filed on December 9, 2003.

If the alien is not otherwise eligible for an extension of H-1B status, then 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 William R. Yates, 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 petitioner has not demonstrated that the failure to timely file the application for extension of stay meets the requirements for any of the exceptions. The beneficiary's authorized period of stay expired on August 1, 2003; however, the petition seeking a one-year extension was not filed until December 9, 2003. CIS may not extend the beneficiary's status if she is no longer in status. Accordingly, the beneficiary has reached the 6-year maximum allowable period of stay as an H-1B nonimmigrant, the petition was filed after the alien's status expired, and therefore the alien is not eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4) and section 106(a) of AC21. In accordance with the regulation at 8 C.F.R. § 214.2(h)(13)(ii)(B), the petition may not be approved.

The AAO notes that while the statute does not specifically refer to limiting eligibility under the DOJ Authorization Act to those whose status is still valid, 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 (3<sup>rd</sup> 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.