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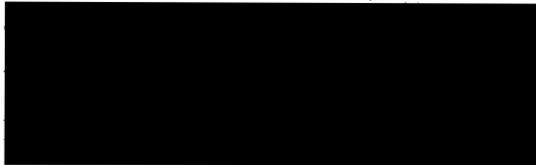
U.S. Department of Homeland Security  
20 Massachusetts Avenue NW, Room 3000  
Washington, DC 20529



U.S. Citizenship  
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FILE: EAC 05 100 50809 Office: VERMONT SERVICE CENTER Date: DEC 27 2006

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:  
[Redacted]

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.

*for* *Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The 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 ceramic components and substrates manufacturer that seeks to continue its employment of the beneficiary as a research scientist. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The director found that the beneficiary was in the United States, in H-1B status, from February 1998 through February 1, 2005. The instant petition was received at the service center on February 22, 2005.

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 of [an H-1B nonimmigrant] shall not exceed 6 years." However, the American Competitiveness in the Twenty-First Century Act (AC-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 the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21) broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

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.

The record reflects that CIS approved a previous petition to extend the beneficiary's stay in H-1B status for the period February 1, 2004 through February 1, 2005. In his February 18, 2005 letter of support, counsel acknowledged that the petitioner was filing the extension subsequent to the expiration date of the beneficiary's previously approved H-1B status. Counsel stated that neither the petitioner nor the beneficiary had noticed the expiration date of the previously accorded status, and asked for *nunc pro tunc* approval of the petition and extension of the beneficiary's H-1B status.

In his April 25, 2005 request for additional evidence, the director asked for further explanation of the petitioner's failure to file a timely extension of the beneficiary's nonimmigrant status.

The director, noting that the beneficiary had exhausted his six-year period of authorized admission in H-1B status, also requested evidence to establish that the beneficiary qualified for an additional year of H-1B status, pursuant to AC-21, as amended by DOJ-21.

The director noted that in order to qualify for the exemption, the petitioner must demonstrate that 365 or more days must have passed since the filing of either (1) a Form ETA-750, application for alien labor certification; or (2) a Form I-140, Immigrant Petition for Alien Worker. If the petitioner were to attempt to demonstrate that 365 days had passed since the filing of a Form ETA-750, the director noted that one of three types of documentation must be submitted: (1) a document from the State Workforce Agency notifying either the petitioner, the petitioner's representative, the Department of Labor (DOL), or Citizenship and Immigration Services (CIS) that the Form ETA-750 had been pending 365 days or more; (2) a document from one of the DOL's Employment and Training Administration regional offices notifying either the petitioner, the petitioner's representative, the DOL, or CIS that the Form ETA-750 had been pending 365 days or more; or (3) a copy of an approved Form ETA-750. No matter which of the three documents was submitted, it was to include the name of the petitioning employer, the date the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the pending ETA-750.

In his May 2, 2005 response, counsel submitted none of the requested evidence. Counsel did not address the petitioner's failure to file a timely extension, and he submitted none of the evidence requested by the director to demonstrate that the beneficiary qualifies for benefits under AC-21, as amended by DOJ-21. To support his contention that the beneficiary qualifies for benefits under AC-21 as amended by DOJ-21, counsel submitted receipt notices for a Form I-140 filed on August 30, 2004 and a Form I-485, Application to Adjust to Permanent Resident Status, also filed on August 30, 2004.

The director denied the petition on May 19, 2005. In her denial, she noted that counsel had not responded to the portion of the request for additional evidence requesting a more detailed explanation of the petitioner's failure to file a timely extension request. The director also noted that counsel had submitted none of the

requested documents that would demonstrate the beneficiary's entitlement to receive benefits under AC-21 as amended by DOJ-21. She also stated that the Forms I-140 and I-485 had been denied on February 16, 2005.

On appeal, counsel contends that the director erred in denying the petition, and that the beneficiary is entitled to an additional year of H-1B status.

On appeal, counsel asserts that the beneficiary is entitled to an additional year of H-1B status. Counsel states that although the Form I-140 was denied on February 16, 2005, an appeal of that denial was presently pending.

As noted by the director in her request for additional evidence, in order to qualify for an additional year of H-1B status under AC-21 as amended by DOJ-21 the petitioner must demonstrate that either a Form I-140 or ETA-750 have been pending for at least 365 days.

The Form I-140 was received at the service center on August 30, 2004, less than six months before the Form I-129 was filed. The requested employment start date on the Form I-129 was February 8, 2005. Counsel cannot demonstrate that this Form I-140 had been pending for 365 days as of February 8, 2005.

As such, the only other way for counsel to demonstrate that the beneficiary is entitled to benefits under AC-21 as amended by DOJ-21 is to show that a Form ETA-750 was filed at least 365 days prior to February 8, 2005.

The record contains a copy of a certified mail return receipt, which states that it was received by the State of New York, Department of Labor, Alien Employment Certification Office on January 7, 2002. Although not stated by counsel, the AAO presumes that with this document, counsel is attempting to demonstrate that a Form ETA-750 was filed on that date, and that the beneficiary therefore qualifies for an additional year of H-1B status under AC-21, as amended by DOJ-21.

However, the director provided a list of specific documents that the petitioner was to submit if it were to demonstrate that a Form ETA-750 had been filed more than 365 days before February 8, 2005. As noted previously, the petitioner was to provide at least one document from the following list of three: (1) a document from the State Workforce Agency notifying either the petitioner, the petitioner's representative, the DOL, or CIS that the Form ETA-750 had been pending 365 days or more; (2) a document from one of the DOL's Employment and Training regional offices notifying either the petitioner, the petitioner's representative, DOL, or CIS that the Form ETA-750 had been pending 365 days or more; or (3) a copy of an approved Form ETA-750. The document was to include the name of the petitioning employer, the date the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the pending ETA-750.

None of these items was submitted, and the certified mail return receipt copy does not satisfy the director's request. As such, counsel has not demonstrated that the beneficiary is the beneficiary of a Form ETA-750 that was filed more than 365 days prior to February 8, 2005.

Moreover, the beneficiary is unqualified for an additional year of H-1B status due to the fact that he was not in H-1B status at the time the petition was filed. CIS addressed this issue in an April 24, 2003 memorandum. 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)<sup>1</sup>. This memorandum, at page 2, states the following:

The request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the petition (Form I-129) is filed with the BCIS [now CIS]. 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.

AC-21 and DOJ-21 provide that CIS shall extend the stay of an alien who qualifies for the exemption in one-year increments; however, this does not waive the extension requirements at 8 C.F.R. § 214.1(c)(4), which state that 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 (none of those exceptions have been established here).

If the alien is not otherwise eligible for an extension of stay, then CIS will not approve a request for extension of H-1B status. "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). Further, the regulation at 8 C.F.R. § 214.2(h)(14) provides that "[a] request for a petition extension may be filed only if the validity of the original petition has not expired." As the beneficiary was out of status and the validity of the previous petition had expired as of the filing date, the extension of status may not be granted.

The petitioner has not demonstrated that the beneficiary qualifies for an additional year of H-1B status pursuant to AC-21, as amended by DOJ-21.<sup>2</sup> Therefore, the AAO will not disturb the director's denial of the petition.

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 sustained that burden.

**ORDER:** The appeal is dismissed. The petition is denied.

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<sup>1</sup> See also Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6<sup>th</sup> Year: Adjudicator's Field Manual Update AD05-15*. HQPRD70/6.2.8 (September 23, 2005).

<sup>2</sup> The AAO dismissed the appeal of the Form I-140 (EAC 04 249 50085) on October 7, 2005. Thus, even if the AAO were to find that a Form ETA-750 had been pending for 365 days as of February 8, 2005, the petitioner would be ineligible for benefits under AC-21, as the one-year extension may only be approved until such time as the I-140 petition is denied. Section 106(b) of AC-21.