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U.S. Citizenship  
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FILE: EAC 04 213 51566 Office: VERMONT SERVICE CENTER Date: JUN 26 2006

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, 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 sustained. The petition will be approved, in accordance with the following discussion.

The petitioner is an office products retailer that seeks to continue its employment of the beneficiary as a business systems analyst. 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 denial letter; and (3) the Form I-290B and supporting documentation. 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 November 18, 1998 through June 15, 2004. The petitioner filed an application for alien labor certification on behalf of the beneficiary on March 28, 2003.

The petitioner filed the instant petition on July 12, 2004 and requested that the beneficiary be granted an additional year of H-1B status, pursuant to the American Competitiveness in the Twenty-First Century Act (AC-21) (as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21)).

The AAO notes that this petition was filed nearly one month after the expiration of the beneficiary's nonimmigrant status. Although the petitioner requested an extension of the beneficiary's nonimmigrant status, it offered no explanation of its failure to file a timely extension.

The director denied the petition, finding the beneficiary unqualified for an additional year of H-1B status. The director found that, since the beneficiary had not maintained his valid nonimmigrant status, he was unable to receive benefits under AC-21.

On appeal, counsel contends that the beneficiary is qualified for an additional year of H-1B status. Although counsel concedes that the beneficiary's nonimmigrant status expired before the extension was filed and that there was no justifiable reason for the delay in filing the petition, she requests that the petition be approved and that CIS notify the United States Consulate in Montreal, Canada that the petition has been approved.

The AAO has reviewed the record and finds that the beneficiary is not eligible for relief under AC-21 as amended by DOJ-21. However, he is entitled to additional H-1B time, as he had not exhausted six years of H-1B status at the time the petition was filed.

As noted previously, the beneficiary had been in the United States, in H-1B status, since November 18, 1998 at the time the petition was filed. Accordingly, he was entitled to an extension of his status through November 17, 2004, and the director should have approved the petition through that date and notified the requested consulate of said approval.

The beneficiary is not, however, eligible for any relief under AC-21, as amended by DOJ-21.

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, 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 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.

CIS issued a memorandum regarding these provisions of AC-21 and DOJ-21 on April 24, 2003. See Memorandum from [REDACTED], 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:

<sup>1</sup> See also Memorandum from [REDACTED] 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).

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).

As counsel correctly notes, the beneficiary is not qualified for an extension of H-1B status. However, AC-21, DOJ-21, and the memoranda cited above pertain to extension of status requests only. Since the beneficiary is ineligible for an extension of status, he cannot avail himself of AC-21 and DOJ-21 at this time. AC-21 and DOJ-21 apply to nonimmigrant aliens only – a class to which the beneficiary has not belonged since June 15, 2004.

Therefore, the beneficiary is ineligible for a seventh year of H-1B status, and the petition was properly denied on that ground.

Accordingly, the beneficiary is eligible for an additional five months of H-1B status (the period that elapsed between June 15, 2004 and November 17, 2004), and the petition is approved for a period of five months (i.e., the time that remained of his six years of authorized stay at the time the petition was filed). The beneficiary is not, however, eligible for any relief under AC-21 and DOJ-21 at this time, as he was not in a valid nonimmigrant status at the time this petition was filed.

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 sustained. The petition is approved, in accordance with the discussion above.