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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 03 060 54640 Office: VERMONT SERVICE CENTER Date: APR 21 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 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 owns satellites and provides telecommunications services. It seeks to continue to employ the beneficiary as an operations specialist. The petitioner endeavors to extend the classification of 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 on the basis that the beneficiary had reached the time limit for an H-1B nonimmigrant's temporary admission to the United States, and was not eligible for an extension beyond the six-year limitation in H-1B nonimmigrant status. In addition, the director found that the beneficiary was not eligible for the extension allowed pursuant to the American Competitiveness in the 21st Century Act (AC21) given that the beneficiary had changed from H-1B to J-1 nonimmigrant status on June 1, 2002. To derive benefits from AC21, a person must maintain valid H-1B nonimmigrant status.

On appeal, counsel states that on May 15, 2002, the petitioner filed an I-539 application to change the beneficiary's nonimmigrant classification from H-1B to J-1. Counsel contends that on June 21, 2002, the day when the beneficiary reached the maximum time limit in H-1B nonimmigrant status, the beneficiary ended his employment with the petitioner. On December 17, 2002, while the I-539 application was pending with the Immigration and Naturalization Service (the INS), now Citizenship and Immigration Services (CIS), counsel states that the petitioner filed a I-129 petition with the request to extend the beneficiary's stay in H-1B nonimmigrant status based upon the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). According to counsel, the INS, now CIS, had approved the beneficiary's I-539 application, and issued an approval notice with the notice date of December 13, 2002. Counsel states that section 11030A(a) of the 21st Century DOJ Appropriations Act amends section 106 of the AC21, and exempts foreign nationals in nonimmigrant status from the six-year limit in H-1B nonimmigrant status if 365 days or more have elapsed since the filing of the alien employment certification application (Form ETA 750). Counsel, furthermore, states that section 11030A(b) of the Appropriations Act allows for H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period. Counsel maintains that, although the beneficiary changed to J-1 nonimmigrant status, the intent of Congress would be to allow the beneficiary to re-obtain H-1B nonimmigrant status and extend the beneficiary's stay in the United States.

Upon review of the evidence in the record, the AAO finds that the beneficiary is not eligible to derive benefits from either the AC21 or the 21st Century DOJ Appropriations Act.

The evidence in the record contains, in part, the following: (1) the I-129 petition, filed on December 18, 2002, to extend the beneficiary's stay in H-1B nonimmigrant status; (2) the I-539 application receipt notice - with a May 16, 2002 receipt date; (3) correspondence from the Georgia Department of Labor indicating that it had received the Form ETA 750 on May 24, 2001; (4) the beneficiary's Form I-797A indicating that the H-1B classification would end on June 21, 2002; (5) conference report statements by Senator Patrick Leahy and Representative Lamar Smith; and (6) the denial letter stating that the beneficiary changed to J-1 nonimmigrant status on June 1, 2002.

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 an employment-based immigrant petition (Form I-140) or an application for adjustment of status; and (2) 365 days or more had passed since the filing of the Form ETA 750 or the Form I-140. Section 104(c) of AC21 enables H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

On November 2, 2002, the 21st Century DOJ Appropriations Act was signed into law; it amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of 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 Form ETA 750; or (2) 365 days or more have passed since the filing of Form I-140. Section 106 of AC21 allows for H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

The AAO finds unpersuasive counsel's assertion that the intent of Congress would be to allow the beneficiary to re-obtain H-1B nonimmigrant status and extend his stay in H-1B status. No legal ground exists to support counsel's assertion. Conference report statements by Senator Patrick Leahy and Representative Lamar Smith do not establish a legal basis to support counsel's assertion.

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); *Shaar v. INS*, 141 F.3d 953, 956 (9th Cir. 1998); *Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991). Section 104(c) of AC21 explicitly allows H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period, and section 106 of the 21st Century DOJ Appropriations Act has the same provision. However, both AC21 and the 21st Century DOJ Appropriations Act require that the nonimmigrant hold H-1B status in order to extend H-1B nonimmigrant status beyond the six-year period. No provision in either section would allow the beneficiary in the immediate petition to "re-obtain" H-1B nonimmigrant status and extend the beneficiary's H-1B nonimmigrant stay beyond the six-year period.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is eligible to extend H-1B nonimmigrant status beyond the six-year maximum period. Accordingly, the AAO shall 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 not sustained that burden.

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