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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D1

[redacted]

FILE: WAC 08 071 50559 Office: CALIFORNIA SERVICE CENTER Date: JAN 04 2010

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]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, 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 sustained in part, and denied in part. The petition will be approved through May 12, 2008.

The petitioner is a private school that seeks to continue its employment of the beneficiary as its education director. 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 the following: (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 record indicates that the beneficiary entered into H-1B nonimmigrant status on March 28, 2001, and that such status ended on March 27, 2008. U.S. Citizenship and Immigration Services (USCIS) records indicate that six H-1B approvals have been issued on behalf of the beneficiary:

- LIN 01 024 53587, valid March 28, 2001 through September 30, 2003;
  LIN 02 279 52273, valid September 6, 2002 through August 31, 2005;
- LIN 04 065 53044, valid January 8, 2004 through January 7, 2007;
- LIN 06 053 52980, valid December 21, 2005 through March 28, 2007;
- WAC 07 125 50770, valid March 29, 2007 through March 27, 2008; and
- WAC 07 217 53648, valid December 27, 2007 through March 27, 2008.

The first issue before the AAO is whether the beneficiary is eligible for additional time in H-1B status based upon the American Competitiveness in the Twenty-First Century Act[1] (AC-21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act[2] (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:

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[1] American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

[2] Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

(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.*

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states 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.*

(emphasis added to identify sections amended by DOJ-21.)

Subsequent to the enactment and effective date of AC-21 as amended by DOJ-21 (hereinafter referenced as AC-21), the Department of Labor (DOL) issued the "Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System," [69 Fed. Reg. 77326], (Perm Rule) (published on December 27, 2004, and effective as of March 28, 2005). The DOL Perm rule, in general, provides for the revocation of approved labor certifications if a subsequent finding is made that the certification was not justified. It is codified at 20 C.F.R. § 656.32.

The DOL issued a second rule, the "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," published on May 17, 2007, (72 Fed. Reg. 27904), which took effect on July 16, 2007 (Perm Fraud rule). The DOL Perm Fraud rule, now found at 20 C.F.R. § 656.30(b), provides for a 180-day validity period for labor certifications that are approved on or after July 16, 2007. Petitioning employers have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS. The regulation at 20 C.F.R. § 656.30(b)(2) also established an implementation period for the continued validity of labor certifications that were approved by DOL prior to July 16, 2007; such labor certifications must have been filed in support of an I-140 petition within 180 calendar days after the effective date of the DOL final rule (July 16, 2007) in order to remain valid.

In this matter, the AAO finds that more than 365 days elapsed from the date another employer filed the application for labor certification (April 30, 2001) to the date the petitioner filed the Form I-129, request to extend the employment of the beneficiary (January 11, 2008). The AAO also notes, however, that the application for labor certification filed by the petitioner was certified on March 8, 2005. The effective date of the DOL Perm Fraud rule, as set forth at 20 C.F.R. § 656.30(b)(2), is July 16, 2007 and as is further explicated in the Perm Fraud rule, the validity of labor certification applications approved prior to that date expire within 180 calendar days after the effective date of the DOL Perm Fraud rule, if not filed in support of a Form I-140. As such, the AAO finds that the petitioner's labor certification application filed on April 30, 2001 expired, or ceased to be valid, on January 13, 2008.

The AAO notes that USCIS issued a policy memorandum regarding this issue on May 30, 2008.[3] In that policy memorandum, USCIS addressed the intersection of 8 C.F.R. § 656.30(b) and AC-21. As noted by the May 30, 2008 policy memorandum, previous field guidance did not take into account the fact that petitioners were now required to file Forms I-140 within the 180-day validity period stipulated by the DOL in order to remain valid. As such, the policy memorandum instructed adjudicators that extensions of stay could be granted pursuant to AC-21 only if the "labor certification is unexpired at the time of filing of the Form I-129."

Unless the DOL regulations on the validity of labor certifications are deemed to be ultra vires and/or otherwise contrary to the plain language of the Act, USCIS must take them into consideration when evaluating the *bona fides* of labor certifications certified by DOL. An "administrative agency's regulations are presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute." *Travelers Ins.*

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[3] *See* Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277*, HQ 70/6.2 (May 30, 2008).

*Co. v. Kulla*, 216 Conn. 390, 399 (1990) (citing *Phelps Dodge Copper Products Co. v. Groppo*, 204 Conn. 122, 128 (1987)). Therefore, based upon the supplemental information in DOL's Perm Fraud rule as well as the plain language of 20 C.F.R. § 656.30, a labor certification that is invalid may not provide the basis for an approval of a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act. *See generally* 72 Fed. Reg. 27904, 27925, 27939. Therefore, it follows, for the reasons discussed *infra*, that a labor certification that is invalid may not provide a basis for an AC21 based exemption to section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

The primary issue in this matter revolves around the definition of the term "deny" as used in section 106(b)(1) and 106(b)(2) of AC-21, as amended by DOJ-21. The statute itself does not provide a definition of the term "deny," and the congressional record also fails to directly define this term. Therefore, an analysis of the plain language of the statute and, failing that, the congressional intent behind the statute, must be undertaken to determine whether the statute incorporates the term "valid" or "invalid" or "expired" as those terms relate to a labor certification that is being used as a basis to extend an alien's stay under section 106(b)(1).

Again, sections 106(b)(1) and 106(b)(2) use only the term "deny" when outlining the parameters of the factors involved in the extension of an alien's stay under AC21. Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991). We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

As the plain meaning of the word "deny" does not by its own definition incorporate the term "invalid" or "expired" when referring to a labor certification that forms the basis for an extension of an alien's stay based on an exemption under subsections 106(b)(1) and (2), the AAO must therefore examine the legislative intent in enacting AC-21 and the subsequent amendment of AC-21 by DOJ-21 to ensure that a literal application of the statute will not produce a result demonstrably at odds with the intent of its drafters. *See Samuels, Kramer & Co. v. CIR*, 930 F.2d 975, *cert. denied*, 112 S. Ct. 416. Senator Leahy and Representative Smith (TX), sponsors of the DOJ21, but not of AC21, both made comments stating that § 11030A of DOJ21 permits H-1B aliens who have labor certification applications caught in lengthy agency backlogs to extend their status beyond the sixth year limitation. 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002); *accord* 148 Cong. Rec. S11063 (daily ed. Nov. 14, 2002). Representative Smith also noted that AC-21 was put in place to

recognize the lengthy delays at the legacy Immigration and Naturalization Service (INS) in adjudicating petitions and that DOJ-21 addresses the lengthy processing delays at the DOL. Representative Smith observed that the DOJ21 legislation allowed those who are about to exceed their six years in H-1B status to not be subject to the additional requirement of having to file the immigrant petition by the end of the sixth year, which he noted "is impossible when DOL had not finished its part in the process." 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002). Thus, the legislative history of DOJ-21 underscores the legislative concern regarding the lengthy processing delays occurring at DOL. More importantly, the main purpose of the legislative change appears centered on providing an additional means by which aliens may remain in the United States and continue to work during the time their application for permanent resident status is pending.

Therefore, contrary to the assertions of counsel, the legislative history of DOJ21 does not in any way reflect an intent to indefinitely extend an alien's stay in a temporary, nonimmigrant status once DOL finishes its part, i.e., adjudicating the labor certification application, in the employment-based immigrant visa process. Rather, as noted above, the law was designed to permit H-1B nonimmigrants to continue their stay in the United States and work in H-1B status as long as there was a pending and ongoing process to obtain lawful permanent resident status in the United States.[4] To interpret this statutory provision otherwise and provide a means by which an alien can remain indefinitely and thereby permanently in the United States in a temporary, nonimmigrant status is demonstrably at odds with the Act as a whole as well as with the clear intent behind the drafting of section 106 of AC-21, as amended by DOJ-21.

The AAO acknowledges counsel's assertion that a denial of a labor certification differs from that of a labor certification application that has expired. However, for the reasons discussed, giving the words "deny" or "denied" their ordinary meaning and construing the terms in relation to the intent of the statute and the Act as a whole, the terms "deny" or "denied" incorporate the meaning of the terms "invalid" and "expired." Both a denial issued through an individualized decision as well as an expiration of the validity of a labor certification result in the invalidity of the labor certification and are evidence that DOL has completed its process of adjudicating the labor certification application and that the beneficiary's application process for obtaining lawful permanent resident status in the United States by way of that labor certification has ended.

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[4] The AAO notes that an "extension of stay" must be distinguished from an extension of H-1B status, which occurs through a "petition extension." Although those seeking H-1B status are currently permitted to file one form to request a petition extension, extension of stay, and change of status, they are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). The AAO observes that in general, according to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21. On the other hand, the title of section 106(b) of AC21 reads "Extension of H-1B Worker Status." In this situation, where the title uses the word "[s]tatus" and the text uses the word "stay," the text of the statute prevails. The title of a statutory section is not controlling, and where it is contrary to the text of the statute, the text is controlling. *Immig. and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 308-309 (2001).

Thus, whether the validity of a labor certification application is terminated by a denial or by regulatory expiration, the lack of a valid labor certification application precludes USCIS from further processing petitions or applications dependent upon those labor certification applications. Again, to accept counsel's contrary interpretation, USCIS would be required to indefinitely extend an individual's stay in the United States in one-year increments once a labor certification had been approved, even if the labor certification expired according to DOL regulations or was otherwise considered invalid. To reiterate, nothing in the AC-21 or DOJ-21 legislative history serves to suggest that Congress intended that petitioners on behalf of individual aliens retain the ability to have those aliens remain in the United States indefinitely, e.g., for twenty or thirty years, simply by failing or choosing not to file an immigrant petition on their behalf. Rather, the legislative intent reflects only a desire to shield individual aliens from the inequities of government bureaucratic inefficiency and does not include a mandate for an infinite extension of stay in a nonimmigrant status when the petitioner fails to file an immigrant petition for the beneficiary.

Of significant import when considering the legislative intent regarding the impact of AC-21, the AAO observes that when DOJ-21 amending AC-21 was passed, the DOL regulations pertinent to this matter, 20 C.F.R. § 656.32 and 20 C.F.R. § 656.30(b) had not been codified. Thus, when Congress used the word "denied" to indicate the completion of DOL processing, DOL had not set forth a process to "revoke" approved labor certification applications (20 C.F.R. § 656.32) and had not enacted rules governing the term of validity of an approved labor certification application (20 C.F.R. § 656.30(b)). It thereby follows that Congress was unaware of and did not foresee DOL's use of additional terms when describing the DOL administrative process, thus Congress would not have contemplated the use of or rejection of those terms. As Congress was not aware of such regulations the rationale set forth in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) does not apply.

As observed above, using counsel's reasoning, an individual's stay in H-1B status would be almost completely unrestricted once 365 days had elapsed since the filing of an application for labor certification, provided the labor certification was subsequently approved and as long as the petitioner did not file an immigrant petition on behalf of the individual. Once these conditions were met, the individual's stay would absurdly result in continuous one-year extensions with no requirement that the petitioner ever file any petition that would ultimately result in the beneficiary obtaining lawful permanent resident status in the United States. To avoid this incongruous outcome, the AAO has applied the most reasonable interpretation of the term "deny" such that it complies with and complements Congressional intent in establishing an exemption from the maximum six-year stay in H-1B status. As such, USCIS must consider the validity of the DOL labor certification application when adjudicating an AC21 H-1B extension petition, as without a valid labor certification upon which to base a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act, the approval of an employment-based immigrant petition is proscribed.

Finally, as indicated previously, the AAO notes that current USCIS policy is in accord with this statutory interpretation of AC21 as amended by DOJ21. Specifically, to assist USCIS adjudicators

when considering an extension of stay under AC-21 section 106(a) in light of the DOL regulations, the policy memorandum cited at footnote 3 expressly stated the following:

> USCIS will *not* grant an extension of stay under AC21 § 106(a) if, at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by DOL. USCIS sees no reason to consider a labor certification that has expired through the passage of time differently than one that had been denied or, for that matter revoked. In addition, the filing of an immigrant petition with an expired labor certification would result in the automatic rejection, or if accepted in error, denial of that EB immigrant petition, which in turn, acts as a statutory bar to the granting of an extension beyond the 6-year maximum.

Accordingly, the director did not err as a matter of law or policy in concluding that the beneficiary is not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants under section 214(g)(4) of the Act. Therefore, the beneficiary is ineligible for additional time in H-1B status on that basis, and the petition was properly denied on that ground.

The second issue before the AAO is whether the beneficiary is eligible to recapture time spent outside the United States. Although counsel has failed to establish that the beneficiary is eligible for relief under AC-21 and DOJ-21 at this time, the record establishes that the beneficiary is nonetheless eligible for an extension of her H-1B status, as she had not yet exhausted her six years of authorized stay at the time this petition was filed.

As was noted previously, as 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." The regulation at 8 C.F.R. § 214.2 (h)(13)(iii)(A) states, in pertinent part, the following:

> An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless . . . . [emphasis added].

Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." The plain language of the statute and the regulations indicates that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is further supported and explained by the court in *Nair v. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum[5] issued by USCIS adopting *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, September 2, 2005),[6] as formal policy.

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[5] Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, *Procedures for*

As indicated by the AAO in *Matter of I-*, the petitioner is in the best position to organize and submit proof of the beneficiary's departures from and reentry into the United States. Copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of dates the beneficiary spent outside the country, could be subject to error in interpretation, might not be considered probative, and may be rejected. Similarly, a statement of dates spent outside of the country must be accompanied by consistent, clear and corroborating proof of departures from and reentries into the United States. The petitioner must submit supporting documentary evidence to meet his burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO finds the record sufficient to establish that the beneficiary was outside the United States between March 27, 2007 and May 12, 2007, for a total period of 46 days. In accordance with the statutory and regulatory provisions previously cited, and the judicial decision in *Nair v. Coultice*, the AAO determines that the time the beneficiary spends in the United States after lawful admission in H-1B status is the time that counts toward the maximum six-year period of authorized stay. The beneficiary in this case was admitted to the United States in H-1B status after returning from abroad. While outside the United States she was not in any status for U.S. immigration purposes. Thus, the beneficiary interrupted her period of H-1B status when she departed the country, and renewed her period of H-1B upon readmission to the United States. Based upon the evidence of record, the AAO determines that the beneficiary is entitled to recapture 46 days and extend the maximum period of her H-1B classification for that period of time. Accordingly, the AAO finds that her status should be extended through May 12, 2008.

The beneficiary is ineligible for additional time in H-1B status under AC-21. However, as she had not exhausted her period of authorized stay at the time the petition was filed, she is eligible for extension of her H-1B status through May 12, 2008.

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 in part and denied in part. In accordance with the above discussion, the petition is approved through May 12, 2008.

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*Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005).

[6] *Matter of I-* is available at http://www.uscis.gov/files/article/sep0205_02d2101.pdf (accessed October 5, 2009).