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U.S. Citizenship
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Services

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[REDACTED]

JUN 22 2005

FILE: WAC 03 101 52458 Office: CALIFORNIA SERVICE CENTER Date:

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 materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a municipal school district that employs the beneficiary as an elementary teacher. 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 21st 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 February 10, 2003; (2) the director's request for evidence (RFE); (3) counsel's response letter with additional documentation; (4) the notice of decision, dated December 16, 2003; 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 June 27, 1997 through June 30, 2003. As the director noted in his decision, the petitioner filed a labor certification application (Form ETA-750) on behalf of the beneficiary on May 16, 2002, followed by the instant petition (Form I-129) on February 10, 2003 to extend the beneficiary's H-1B status by one year. Since 365 days had not passed between the filing of the Form ETA-750 and the filing of the extension of status petition, the director concluded that the beneficiary was ineligible for exemption from the six-year limitation on H-1B classification and an extension of her H-1B status under AC21.

On appeal counsel argues that while AC21, section 106(a), specifies that the 365-day period a labor certification application (Form ETA-750) or an employment-based immigrant petition (Form I-140) must be pending for a beneficiary to qualify for an exemption from the six-year limitation on H-1B classification begins on the filing date of that application or petition, it does not specify that the end date for measuring whether the 365-day pending period has been met is the filing date of the H-1B extension petition. In the absence of specific language in the statute, or any regulations governing the implementation of AC21 section 106(a), counsel argues that the end date for measuring whether the 365-day pending period was met should be the date the H-1B extension petition is adjudicated. Since the H-1B petition in this case was adjudicated by the service center on December 16, 2003, which was more than 365 days after the Form ETA-750 was filed on behalf of the beneficiary (May 16, 2002), counsel argues that 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).

The AAO does not agree with counsel's argument. The regulations governing applications and petitions filed with Citizenship and Immigration Services (CIS) require that eligibility for an immigration benefit be established at the time of filing. As 8 C.F.R. § 103.2(b)(12) specifically provides:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

This regulation has general applicability to all applications and petitions before the CIS, as reflected in its case law. The principle is clear. A visa petition may not be approved at a later date based on a set of facts not present at the time of filing. See *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); see also *Matter of Katigbak*, 14 I&N 45, 49 (Comm. 1971). Congress is presumed to be familiar with existing law pertinent to the legislation it enacts. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979); *Valansi v. Ashcroft*, 278 F.3d 203, 212 (3rd Cir. 2002); *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 961 n. 3 (BIA 1995). Likewise, it is presumed that if Congress had intended to make the general rule in 8 C.F.R. § 103.2(b)(12) inapplicable to petitions for extension of H-1B classification beyond the general six-year limitation, it would have done so clearly and unequivocally in AC21. But it did not. Thus,

8 C.F.R. § 103.2(b)(12) applies to petitions for extension of H-1B status under AC21, as it does to all other petitions and applications before CIS.

In the case at bar the petition for extension of H-1B status for a seventh year was filed on February 10, 2003, which was less than 365 days after the filing of the labor certification application on May 16, 2002. Therefore, the beneficiary was not eligible for an exemption from the six-year limitation on her H-1B classification under AC21 section 106(a), and an extension of her H-1B status for a seventh year under AC21 section 106(b), at the time her extension petition was filed. In accordance with section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), limiting the authorized period of admission for an H-1B nonimmigrant to six years, the extension petition must be denied.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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