U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: EAC 03 200 52868 Office: VERMONT SERVICE CENTER Date: NOV 14 2005

IN RE: Petitioner:
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.

Robert P. Wiemann, Director
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.

The petitioner is a manufacturer of paper shredders that seeks to employ the beneficiary as a mechanical engineer. The petitioner, therefore, endeavors to classify 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 record reflects that the beneficiary was in the United States, in H-1B status, from October 1, 1994 through September 30, 2000. The petitioner filed an application for alien labor certification for the beneficiary on November 9, 1998. The beneficiary filed a timely change of status application prior to the expiration of his H-1B status, and he obtained F-1 (student) status.

The petitioner filed the instant petition on June 30, 2003 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 director denied the petition, holding that since the beneficiary was no longer in H-1B status at the time the petition was filed, he did not meet the requirements of AC-21 and DOJ-21, and therefore did not qualify for a seventh year of H-1B status.

On appeal, counsel contends that the beneficiary qualifies for a seventh year of H-1B status. Counsel cites AC-21 and DOJ-21, provides legislative history, and argues that, even if the director was correct in denying the petition under AC-21 and DOJ-21, the petition should still be approved under 8 C.F.R. § 214.1(c)(4).

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 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). 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.

The director cited the first sentence quoted above in his denial. However, the AAO finds that this sentence, when read in context with the sentence that follows it, is meant to ensure that applicants seeking relief under AC-21 and DOJ-21 have continuously maintained lawful nonimmigrant status. The regulation at 8 C.F.R. § 214.1(c)(4) provides that: "[a]n 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." The AAO finds nothing in the AC-21 and DOJ-21 statutes to require that the previously maintained status must have been H-1B status. In this case, the beneficiary never failed to maintain lawful nonimmigrant status. Thus, the extension of the petition for one year should be approved.

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.