U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: LIN 03 244 50438 Office: NEBRASKA SERVICE CENTER Date: JUN 15 2006

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.

Robert P. Wiemann, 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 dismissed. The petition will be denied.

The petitioner is a health sciences publisher. It seeks to employ the beneficiary as a systems analyst. The petitioner 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 director denied the petition stating that the petitioner was not in valid status when the Form I-129 petition was filed seeking an extension of H-1B eligibility under the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (21st Century DOJ Appropriations Authorization Act).

On appeal, counsel states that the beneficiary was in status at the time the present petition was filed (August 13, 2003), and that the petitioner is entitled to an extension of H-1B eligibility under the above mentioned Act as the petitioner had a pending labor certification with a priority date of May 3, 2002. The labor certification application was subsequently certified on August 19, 2003.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year. In accordance with the regulation at 8 C.F.R. § 214.2(h)(13)(ii)(B), when an alien has spent the maximum allowable period of stay in the United States, a new petition may not be approved, with certain exceptions.

The petitioner seeks the beneficiary's services as a systems analyst. The petitioner wishes to continue the beneficiary's previously approved employment without change, and to extend the stay of the beneficiary in the United States. The petitioner indicates on the petition that it seeks to extend the beneficiary's H-1B status from May 3, 2003 to May 2, 2004.

The director denied the present petition, finding that the beneficiary had already been employed in the United States since March 4, 1997 in H-1B status, and that he had reached the maximum six-year period of stay in the United States. The director found that the beneficiary's H1B status expired on February 14, 2003 because his requested extension was denied by CIS. The director then held that the Form ETA-750, which has now been pending for more than one year, cannot be used for purposes of AC21, and that the beneficiary was out of status when the present petition was filed on August 13, 2003. The petition was accordingly denied.

On appeal, counsel asserts that the beneficiary has an approved labor certification that was filed more than 365 days prior to the filing of the present petition, that the beneficiary was in status when the present petition was filed, and that the petition should accordingly be approved.

Upon review of the evidence in the record, the AAO finds that the beneficiary is not eligible for approval of an H-1B petition in accordance with section 106(a) of the American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21), as amended by section 106(a) of the Twenty-first Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act).

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 establishes the following:

- The petitioner filed, on behalf of the petitioner, an Application for Employment Certification on May 3, 2002.

- On February 12, 2003, the petitioner filed a petition (LIN 03 106 51823) for extension of classification on behalf of the beneficiary;

- CIS records indicate that the petition for extension of classification (LIN 03 106 51823) was denied on or about September 19, 2003, and then appealed to the AAO;

- CIS records indicate that the petitioner's appeal (LIN 03 106 51823) was sustained by the AAO and the beneficiary's status extended for an additional 138 days (from February 14, 2003 until July 2, 2003).

- The petitioner filed a Form I-129 petition (the present petition) for continuation of previously approved employment without change on August 13, 2003, seeking continuation of the beneficiary's H-1B status from May 3, 2003 until May 2, 2004;

In order to extend or amend the beneficiary's stay in the United States in the H-1B classification, the petitioner must demonstrate that the beneficiary qualifies for benefits under section 106(a) of the AC21, as amended by the 21st Century DOJ Appropriations Act. In addition, 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. 8 C.F.R. § 214.1(c)(4). *See also* Memorandum from William R. Yates, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Approciations Authorization Act* (Public Law 107-273)(April 24, 2003).

Here, the petitioner submitted evidence that the petitioner filed a labor certification application Form ETA 750 on the beneficiary's behalf on May 3, 2002, more than 365 days prior to the filing of the present petition. The director's decision to the contrary is withdrawn.

As previously noted, the petitioner filed the present petition on August 13, 2003, a date subsequent to the enactment of the 21st Century DOJ Appropriations Act on November 2, 2002. Accordingly, the pending labor certification application on the beneficiary's behalf can be the basis for extending his authorized period of stay in the United States in H-1B status beyond the maximum six-year limit as long as all other requirements for an extension of stay are met.

Pursuant to 8 C.F.R. § 214.1(c)(4), 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. In this case, the beneficiary had reached the maximum allowable period of time in H-1B status before the instant petition/application for extension of stay was filed, and was not in valid nonimmigrant status at the time of filing.. The petitioner has not demonstrated that the failure to timely file the application for extension of stay meets the requirements for any of the exceptions.

In this case, the beneficiary's authorized period of stay expired on July 2, 2003; however, the petition seeking a one-year extension was not filed until August 13, 2003. CIS may not extend the beneficiary's status if he is no longer in status. Accordingly, the beneficiary has reached the 6-year maximum allowable period of stay as an H-1B nonimmigrant, and the alien is not, therefore, eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4) and section 106(a) of AC21. The petition may not 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 not sustained that burden.

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