U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

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APR 05 2007

FILE: WAC 05 140 51706 Office: CALIFORNIA SERVICE CENTER Date:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

The petitioner is an application service provider for portal technology. It seeks to extend the employment of the beneficiary as a chief sales engineer. 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).

On August 26, 2005, the director denied the petition determining that the beneficiary had exceeded his six-year limitation in H-1B status and is ineligible for an exemption pursuant to section 106(a) of 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 asserts that the director misread the California Form Employment Development Department receipt letter which indicated the priority date is December 12, 2001 not December 12, 2004 as the director noted in his decision.

The record of proceeding before the AAO contains: (1) the April 18, 2005 Form I-129 and supporting documents; (2) the director's August 26, 2005 decision; and (3) the Form I-290B and counsel's brief on appeal. The AAO reviewed the record in its entirety before issuing its decision.

In general, section 214(g)(4) of the INA, 8 U.S.C. § 1184(g)(4) provides that: "[T]he 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)(i) provides:

> (A) A beneficiary shall be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.
>
> (B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15) (H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. . . .

The regulation at 8 C.F.R. § 214.2(h)(13)(iii)(A) provides:

> *Alien in a specialty occupation or an alien of distinguished merit and ability in the field of fashion modeling.* An H-1B alien in a specialty occupation or an alien of distinguished merit and ability 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 the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

To be eligible for an extension beyond the six-year limitation under section 106 of AC21, the beneficiary must have completed six years in an "L" and/or "H" status and been maintaining a valid "H-1B" status at the time of filing. Finally, in order to be eligible for extension of stay under section 106 of the AC21, 365 days or more must have elapsed since filing of the Immigrant Petition for Alien Worker (Form I-140) or the filing of a Labor Certification Application (Form ETA-750) with the Department of Labor.

AC21 removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by section 11030(A)(a) of the 21st Century DOJ Appropriations Authorization Act, section 106(a) of AC21 reads:

> (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 the 21st Century DOJ Appropriations Authorization Act amended section 106(a) of AC21 to read:

> (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 question before the AAO is whether the petitioner has provided evidence that the beneficiary is exempt from the six-year limitation pursuant to section 106 of AC21.

The record reflects that the beneficiary has reached his six years of authorized stay in H status by virtue of previous H-1B petitions. CIS records indicate that the beneficiary changed status to H-1B on April 19, 1999. The record contains copies of the Form I-797A notices indicating the beneficiary had been approved H-1B classification for the periods May 17, 2000 to January 10, 2003 and January 11, 2003 to April 19, 2005. The petitioner filed the Form I-129 on April 18, 2005. The record contains an acknowledgement from the California Employment Development Department (EDD) dated December 14, 2001 indicating that a labor certification application (ETA-750) was filed by [redacted] on behalf of the beneficiary on December 12, 2001. In an RFE dated May 23, 2005, the director requested that the petitioner submit an updated letter indicating that the case remains pending subsequent to its transmittal to the "Backlog Processing Center." As noted by the director in his decision, upon receipt of the labor certification application, the backlog processing center issues "45-day letters" to the employers inquiring if they wished to continue with the processing of the application. Failure of the employer to respond within 45 days closed the labor certification application. The petitioner did not submit proof of the Form ETA-750 applicant's, [redacted] filing a response with the backlog processing center or that the labor certification application is still pending.

The petitioner filed the Form I-129 petition on April 18, 2005 a date subsequent to the enactment of the 21st Century DOJ Appropriations Act on November 2, 2002 and AC21 applies to this matter. However, the petitioner has not provided evidence that the beneficiary is exempt from the six-year limitation. In order to be eligible for an extension of stay under section 106 of AC21, 365 days or more must have elapsed since the filing of the Form ETA-750, and such application cannot have been denied.

In this matter, the beneficiary's authorized stay expired on April 19, 2005. The petitioner has not submitted proof that the December 12, 2001 Form ETA-750 applicant, [redacted] is currently prosecuting the labor certification application or that it remains pending. Thus, the alien is not eligible for benefits under AC21. Therefore the alien is not eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4) and section 106(a) of AC21. In accordance with the regulation at 8 C.F.R. § 214.2(h)(13)(ii)(B), 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.