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

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U.S. Citizenship and Immigration Services

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FILE: WAC 07 133 51147 Office: CALIFORNIA SERVICE CENTER Date: AUG 18 200

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 director of the service center 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 private equity and investment firm that seeks to employ the beneficiary as a business systems analyst. 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 director determined that the beneficiary was not entitled to be employed for an additional year under the provisions of the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (21st Century DOJ Appropriations Authorization Act) because the application for foreign labor certification filed on behalf of the beneficiary by Investors Bank & Trust Co. had been withdrawn.

On appeal, counsel asserts that the instant petition should be approved for the following three reasons: the underlying labor certification was withdrawn rather than denied; the proffered petition is a request for a change of employer, not an extension; and, at the time of filing, the labor certification was still pending and had not been withdrawn.

The record indicates that the beneficiary has been the beneficiary of a series of approved H-1B petitions from January 5, 2001 to April 23, 2008. The instant petition for a change of employer was filed on March 26, 2007, with the dates of intended employment from March 26, 2007 to April 23, 2008. The beneficiary's former employer, Investors Bank and Trust Co., filed an ETA 750, Application for Alien Employment Certification, on behalf of the beneficiary, with a priority date of March 25, 2005. The Department of Labor's Employment & Training Administration website at http://pds.pbls.doleta.gov/pbls_pds.cfm reports the status of that ETA 750 as "withdrawn." On appeal, counsel states, that the instant petition should be approved because the underlying labor certification was withdrawn rather than denied, the proffered petition is a request for a change of employer, not an extension, and, at the time of filing, the labor certification was still pending and had not been withdrawn.

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] shall not exceed 6 years." However, AC21 removes the six-year limitation on the authorized period of stay in H-1B visa 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 § 11030(A)(a) of the 21st Century DOJ Appropriations Authorization Act, § 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 § 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.

In this matter, the beneficiary has been employed in the United States in H-1B status for six years since January 5, 2001. The beneficiary was exempted from the six-year maximum limitation and was granted extensions through April 23, 2008.

The AAO acknowledges counsel's assertions on appeal that the instant petition should be approved because the underlying labor certification was withdrawn rather than denied, the proffered petition is a request for a change of employer, not an extension, and, at the time of filing, the labor certification was still pending and had not been withdrawn. As discussed above, AC21 was designed to prevent those people already here for six years in H-1B status from having to leave the United States due to delays in the processing of their labor certification applications or immigrant petitions. So, regardless that the labor certification application filed on behalf of the beneficiary was still pending at the time of filing, as the same labor certification application has now been withdrawn, the rationale for allowing benefits under AC21, including the instant request for a change of employer, is gone since there is no longer any underlying labor certification to sustain the request. In accordance with the foregoing, the beneficiary is no longer eligible for benefits under AC21. 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 petition for a change of employer must be denied. Accordingly, the appeal will be dismissed, and the petition will be denied.

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.