U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: LIN 06 020 51122 Office: NEBRASKA SERVICE CENTER Date: JUN 04 2008

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reconsider. The motion will be granted. Upon reconsideration, the appeal is dismissed. The petition is denied.

The petitioner is a state university that seeks to employ the beneficiary as an associate professor. 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 denied the petition because the beneficiary had exhausted her permissible period of stay in H-1B nonimmigrant status, having been physically present in the United States from April 29, 1998 until March 29, 2004. The director further found that the beneficiary is not exempt from this six-year limitation due to her ineligibility for the benefits provided for in sections 104(c) or 106 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) (DOJ 21).

In a decision dated February 26, 2007, the AAO affirmed the director's decision and dismissed the appeal. On April 18, 2007, counsel filed a "Motion to Reconsider." On motion, counsel contends that even though the beneficiary was not maintaining valid H-1B status at the time of the filing of the Form I-129 petition, she is eligible for an extension of her H-1B status for one year pursuant to AC21.

The petitioner filed the instant petition on October 26, 2005 and requested that the beneficiary be granted three years of H-1B status (September 30, 2005 through September 29, 2008), 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). In response to the director's request for evidence, counsel amended the petition to request a one-year extension under AC21 from September 30, 2005 through September 29, 2006. The director denied the petition, finding the beneficiary ineligible for additional time in H-1B status.

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 as [an H-1B] nonimmigrant may not exceed 6 years." However, section 106(a) of AC21, as amended, removed the six-year limitation on the authorized duration of stay in H-1B visa status once 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien.

As amended by § 11030A(a) of DOJ21, § 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 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

> (b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] 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.*

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

As found by the director, the beneficiary has been employed in the United States in H-1B status since April 29, 1998. [1] The maximum period of the beneficiary's authorized stay expired on March 29, 2004.

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[1] The director erroneously states in his decision that the beneficiary was entitled to recapture a period of 21 days she spent outside the United States, and that she was previously approved a one-year extension under AC21. Counsel correctly notes, however, that the beneficiary is not entitled to recapture any time spent outside the United States, and that the instant petition is the first extension sought under the provisions of AC21. As noted, the beneficiary was in valid H-1B status from April 29, 1998 until March 29, 2004, which is a total of five years, eleven months and one day, and she never left the United States during this time. The regulations state that the period of authorized admission as H-1B nonimmigrant is six years. 8 C.F.R. § 214.2(h)(15)(ii)(B)(1). Since the beneficiary did not reach the maximum allowable time in H-1B states, she remains eligible for one additional month in H-1B status provided the petition filed on her behalf is filed as a petition for new employment. As such, the erroneous statement made by the director regarding the beneficiary's recapture time and prior AC21 petition extension are hereby withdrawn.

The petition seeking an additional one-year period of authorized employment was not filed until October 26, 2005. The petitioner explains that it is filing for an extension of H-1B status.

The first issue in this matter is whether the petitioner's ETA 750 had been pending 365 days or more prior to the date the petition was filed. The petitioner submitted evidence that it filed a labor certification application Form ETA 750 on the beneficiary's behalf on November 24, 1999, more than 365 days prior to the filing of the present petition. On November 10, 2003, the petitioner filed an I-140 petition on behalf of the beneficiary. That petition was denied on August 23, 2005. The petitioner appealed the denial of the I-140 petition on September 20, 2005, and the appeal is still pending. The petitioner filed the Form I-129 petition on October 26, 2005, a date subsequent to the enactment of DOJ21. Accordingly, the pending I-140 petition filed on the beneficiary's behalf can be the basis for extending her 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 extension of stay and H-1B classification are met.

As required by section 106(a)(1), the petitioner has established that at least 365 days have passed since the filing of a labor certification application. Furthermore, the record also shows that the beneficiary had previously been in the United States in H-1B status for six years, and that her immigrant visa application is still pending.

The second issue in this matter is whether the director properly denied the petition on the basis that the beneficiary was ineligible for an extension of stay.[2]

The record reflects that after the beneficiary's H-1B status expired on April 28, 2004, she continued working for the petitioner under a grant of employment authorization allowed to those who have a pending Form I-485, Application to Adjust Status to Permanent Residence under 8 C.F.R. § 274a.12(c)(9).

For purposes of Section 245(c)(6) [defining aliens not eligible to adjust status], an alien will not be deemed to be an "unauthorized alien" as defined in section 274A(h)(3) of the Act while his or her properly filed Form I–485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service pursuant to 8 CFR 274a.12 to engage in employment, or if the alien had been granted employment authorization prior to the filing of the adjustment application and such authorization does not expire during the pendency of the adjustment application.

The regulations at 8 C.F.R. § 274a.12(c)(9) states the following:

> (c) *Aliens who must apply for employment authorization.* An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. BCIS, in its discretion, may establish a specific

[2] Although no appeal lies from the denial of an extension of stay request, this issue is properly before the AAO in this matter, because the approvability of the petition for H-1B status is dependent upon the beneficiary's eligibility for an extension of stay under AC21. 8 C.F.R. § 214.1(c)(5).

> validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.
>
> (9) An alien who has filed an application for adjustment of status to lawful permanent resident pursuant to part 245 of this chapter. For purposes of section 245(c)(8) of the Act, an alien will not be deemed to be an "unauthorized alien" as defined in section 274A(h)(3) of the Act while his or her properly filed Form I–485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service pursuant to 8 CFR 274a.12 to engage in employment, or if the alien had been granted employment authorization prior to the filing of the adjustment application and such authorization does not expire during the pendency of the adjustment application. Upon meeting these conditions, the adjustment applicant need not file an application for employment authorization to continue employment during the period described in the preceding sentence;

In its decision, the AAO noted that the beneficiary was ineligible to extend her stay because she was no longer in nonimmigrant status at the time of filing the petition. The underlying issue that must be addressed is whether the beneficiary, who has employment authorization based on her pending Form I-485, qualifies for an exemption under section 106(a) of AC21, thereby permitting a change of status to H-1B classification and a one-year extension of stay under section 106(b) of AC21.[3]

The AAO will first address counsel's argument that the beneficiary did not need to be maintaining H-1B status at the time the application for extension under AC21 was filed. As such, the question is whether sections 106(a) and/or (b) of AC21 require the beneficiary to be in H-1B status to qualify for an extension of stay beyond the six-year limit imposed by section 214(g)(4) of the Act.

Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier*

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[3] It is noted for the record that, at the time the instant petition was filed, there was no evidence that the beneficiary had been present outside the United States for the immediate prior year. In addition, there was no indication that the beneficiary qualified under one of the limited exemptions from the six-year limit in 8 C.F.R. § 214.2(h)(13)(iii). Therefore, it appears that the only basis for the beneficiary to have been exempt from the six-year limit imposed by section 214(g)(4) of the Act at that time was to establish her eligibility for an exemption from this limit under section 106(a) of AC21.

Inc., 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

In general, according to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21. On the other hand, the title of section 106(b) of AC21 reads "Extension of H-1B Worker Status." In this situation, where the title uses the word "[s]tatus" and the text uses the word "stay," the text of the statute prevails. The title of a statutory section is not controlling, and where it is contrary to the text of the statute, the text is controlling. *Immig. and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 308-309 (2001).

In addition, even if the title and text of a statute were given even weight, in evaluating the overall purpose of sections 106(a) and (b) of AC21, section 106(a) states that the limitation contained in section 214(g)(4) of the Act shall not apply to an alien previously granted an H-1B visa or H-1B status where 365 days or more have passed since the filing of either a labor certification application or an employment-based immigrant petition. In referring to this section of the Act, section 106(a) specifically states "the [six-year] limitation . . . with respect to the duration of authorized stay shall not apply" to the alien. Thus, based on the use of the phrase "duration of authorized stay" in section 106(a) in interpreting "authorized admission" in section 214(g)(4) of the Act, it would appear on its face that Congress intended the phrase "extend the stay" in section 106(b) to mean "extension of stay" and not "petition extension" or extension of status. In other words, as section 214(g)(4) of the Act only limits the admission period or *stay* of the alien in H-1B status, not directly the classification period itself, sections 106(a) and (b) must thereby lift the restriction on the alien's stay in H-1B status for these sections of AC21 to have any effect. *See also* 56 Fed. Reg. 31553, 31557 (July 11, 1991) (interpreting Public Law 101-649 as limiting the "period of stay" for H-1B aliens to six years).

Moreover, as indicated previously, the H-1B regulations as they existed prior to AC21 clearly distinguished an H-1B "petition extension" from an "extension of stay" request. 8 C.F.R. § 214.2(h)(15)(i) (2000). The regulations also equated the word "status" to the word "classification" and not to the period of authorized stay in the United States. *See* 8 C.F.R. § 248.3(b) (2000); *see also* 8 C.F.R. §§ 214.1(c)(2), 245.2(a)(4)(ii)(C), and 103.6(c)(2) (2000). If Congress wanted to change these regulations and have the word stay mean status or to create some other medium, it could have done so through AC21 or later in 2002 when it amended section 106 of AC21. As Congress chose not to redefine the term "stay" in passing AC21 or in revisiting this law and as the pertinent congressional record related to AC21 fails to provide any guidance as to its meaning in H-1B extension cases, it thereby follows that use of the word stay by the prior and current regulations comports with Congressional intent. It is presumed that Congress is aware of U.S. Citizenship and Immigration Services (CIS) regulations at the time it passes a law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

Based on this reasoning, it is concluded that section 106(b) of AC21 deals strictly with an alien's extension of stay in the United States in H-1B status, not with an extension of the H-1B petition. In other words, based on the plain language of the text of section 106(b) of AC21, there is no requirement that the alien be in H-1B status to qualify for an extension of stay under this provision. Therefore, even after a prior H-1B petition had expired, provided (1) the beneficiary qualified for an exemption under section

106(a) of AC21, (2) he or she was physically present in the United States in a valid nonimmigrant status at the time of filing,[4] and (3) his or her labor certification, immigrant petition, immigrant visa application, or adjustment of status application was still pending, an alien would remain eligible for a one-year extension of stay under section 106(b) of AC21.

This conclusion regarding section 106(b) of AC21 does not in itself, however, mean that an alien not in H-1B status at the time of filing is eligible for an exemption under section 106(a) of AC21. To determine this, section 106(a) must also be examined. Under the plain language of section 106(a) of AC21, as amended, it is clear that the six-year limit imposed by section 214(g)(4) of the Act "shall not apply to *any* nonimmigrant alien previously issued a[n H-1B] visa or otherwise provided [H-1B] nonimmigrant status" as long as the required 365 days have passed since a labor certification or immigrant petition had been filed. Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added). Congress

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[4] While 8 C.F.R. § 214.2(h)(14) states that a "petition extension" must be filed prior to the expiration of "the original [H-1B] petition," 8 C.F.R. § 214.2(h)(15)(i) only requires that the beneficiary "be physically present in the United States at the time of the filing of the extension of stay," not that the beneficiary be in valid H-1B status at the time it is filed. The additional requirement of 8 C.F.R. § 214.1(c)(4) that the alien, with certain exceptions, must "maintain the previously accorded status" has previously been interpreted by CIS as meaning the same prior status. However, 8 C.F.R. § 248.1(b), regarding general eligibility for change of status, states in part that "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed." In the change of status context, "previously accorded status" means the status previously held by the alien and not the same prior status. As the phrase "previously accorded status" is not defined in the regulations and as its use in 8 C.F.R. § 214.1(c)(4) is not distinguished from its use in 8 C.F.R. § 248.1(b), it shall be interpreted as having the same meaning – the status previously held by the alien, not the same prior status held by the alien.

In addition, if the same meaning of "previously accorded status" as it is used in 8 C.F.R. § 248.1(b) were not applied to 8 C.F.R. § 214.1(c)(4), it would create the situation where an alien could change status and be approved for a specific classification but be unable to extend his or her stay. As an example, an employer files an initial I-129 requesting H-1B classification, change of status, and extension of stay on behalf of an alien in B-2 visitor status whose authorized stay is about to expire but who has not previously spent time in the United States in H or L status. If otherwise qualified and if "previously accorded status" in 8 C.F.R. § 214.1(c)(4) meant the same prior status, CIS would be permitted to grant the H-1B petition approval and change of status but be prohibited from granting the extension of stay request, solely because the alien was not in H-1B status at the time the petition was filed, even though the alien had never held H-1B status at any time in the past. Not only is this result contrary to current and past practices, it would be contrary to logic and the intent of the relevant sections of the Act.

Moreover, 8 C.F.R. § 214.1(c)(3) – classes ineligible for extension of stay – does not list H-1B classification as being an ineligible class. Instead, the limitation on extensions of stay in H-1B status are addressed solely by 8 C.F.R. § 214.2(h)(13)(iii), which is based on section 214(g)(4) of the Act. Additionally, 8 C.F.R. § 248.2 – classes ineligible for change of status – only prohibits certain classes from changing to H-1B classification, not all classes.

specifically states that "any nonimmigrant alien" would be eligible for the exemption, provided the other requirements were met. If Congress had meant section 106(a) of AC21 to apply exclusively to those aliens currently in H-1B status, they could have used the article 'a' instead of "any" and used the words 'currently in' instead of "provided."

As section 106(a) plainly reads, there is no requirement that a nonimmigrant alien be in H-1B status at the time the exemption to the six-year limit is sought; it requires only that the alien had been issued an H-1B visa or had otherwise been in H-1B status at some point in the past. As the statutory language is clear, there is no need to consider the legislative history of the applicable law or the related floor statements. Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *Immig. and Naturalization Serv. v. Phinpathya*, 464 U.S. 183.

Therefore, until and unless regulations to the contrary are issued on this subject, section 106(a) of AC21 shall be interpreted by CIS as applying to aliens presently in the United States in any nonimmigrant classification. Counsel is correct that the beneficiary need not have been previously maintaining H-1B status to qualify for the AC21 exemption. The extension may not be approved; however, as the beneficiary was not maintaining a valid nonimmigrant status.

The record reflects that the beneficiary, prior to filing the current petition, was granted employment authorization based on a pending Form I-485 application. 8 C.F.R. § 274a.12(c)(9). Her previous H-1B visa status expired on April 28, 2004. Although the beneficiary was authorized to engage in employment under 8 C.F.R. § 274a.12(c)(9), the beneficiary was not a nonimmigrant as that term is defined at section 214 of the Act, 8 U.S.C. § 1184. Thus, the beneficiary is not exempt from the limitation in section 214(g)(4) of the Act and is thereby ineligible for a one-year extension of stay under section 106(b) of AC21, *supra*.

The AAO noted in its previous decision that the petitioner additionally failed to establish that the beneficiary was eligible for an extension of stay under 8 C.F.R. § 214.1(c)(4). That regulation states that 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 was no longer in a valid nonimmigrant status at the time the instant petition was filed. 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. Thus, an extension of stay under 8 C.F.R. § 214.1(c)(4) may not be approved. For this additional reason, the petition may not be approved.

The petitioner has failed to establish that the beneficiary is eligible for an extension of stay under section 106(b) of AC21, as amended by DOJ21, or under 8 C.F.R. § 214.1(c)(4). Thus, the director's decision will not be disturbed.

As a final note, the petitioner is seeking an extension of status and continuation of previously approved employment without change on the Form I-29 petition. Title 8 C.F.R. § 214.2(h)(14) provides that a request for a petition extension may be filed only if the validity of the original petition has not expired. In this case, the petition extension was filed after the alien's previous H-1B status expired, and therefore the

request to extend the alien's previously approved H-1B status must be denied pursuant to 8 C.F.R. § 214.2(h)(14). For this additional reason, 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 met that burden.

ORDER: The motion is granted. The previous decisions of the director and the AAO will be affirmed. The petition is denied.