U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

NOV 03 2009

FILE: WAC 07 256 50735 Office: CALIFORNIA SERVICE CENTER Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. 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 engaged in information technology consulting and seeks to employ the beneficiary as a programmer/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 denied the petition because the beneficiary had remained in the United States in H-1B status for longer than six years and the petitioner had not satisfied the requirements for an extension of stay under the "American Competitiveness in the Twenty-First Century Act," (AC-21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ Authorization Act). The director determined that because the petitioner did not file for an extension for the beneficiary while the beneficiary was still in valid H-1B status, the beneficiary was not eligible for approval under AC-21 and the DOJ Authorization Act.

On appeal, counsel contends that the director erroneously denied the petition. Specifically, counsel contends that "the extension of stay component could be denied, but as long as the petitioner demonstrated that a 'specialty occupation' existed and that the beneficiary qualified for the []specialty occupation, the classification has to be approved." No additional evidence was submitted in support of this contention.

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, AC-21 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 DOJ Authorization Act, § 106(a) of AC-21 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 DOJ Authorization Act amended § 106(b) of AC-21 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.

United States Citizenship and Immigration Services (USCIS) records reflect that the following H-1B approval notices have been issued on behalf of the beneficiary: EAC-00-053-51834, valid from February 9, 2000 to August 24, 2002; EAC-01-180-54529, valid from June 22, 2001 to April 14, 2004; EAC-02-280-52582, valid from October 4, 2002 to August 30, 2005; EAC-03-188-53041, valid from June 11, 2003 to May 12, 2006; and EAC-06-125-52443, valid from May 11, 2006 to May 12, 2007.

On July 24, 2007, the petitioner filed an application for alien employment certification with the U.S. Department of Labor, which was approved. The instant petition for a seventh-year extension under AC-21 and the DOJ Authorization Act was filed on August 30, 2007, over three months after the expiration of the beneficiary's status.

If the alien is not otherwise eligible for an extension of H-1B status, then Citizenship USCIS will not approve a request for extension of H-1B status. The regulations state, "A request for a petition extension may be filed *only if the validity of the original petition has not expired.*" 8 C.F.R. § 214.2(h)(14) (Emphasis added). The petition was filed in this case several months following the expiration of the original petition, requesting a petition extension of the previously approved H-1B petition (EAC-06-125-52443). Moreover, in an undated letter of support from the petitioner, included with Form I-129, the petitioner clearly acknowledges that the petition was filed late. Specifically, the petitioner states, "We apologize for the delay and respectfully request you to use your discretion to waive the delay in filing the request for extension of stay." While counsel contends on appeal that the beneficiary does not have to be in valid status at the time of filing a request for extension as long as a specialty occupation exists, the regulations are clear and do not allow for an extension petition to be approved when the validity of the original underlying petition has expired. *Id.*

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.