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U.S. Citizenship
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Services

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FILE: EAC 03 055 55578 Office: VERMONT SERVICE CENTER Date: JUN 28 2005

IN RE: Petitioner: [Redacted]
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:



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, Director
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 global provider of computer-based business applications/systems that seeks to employ the beneficiary as a software 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).

The director denied the petition because the beneficiary had remained in the United States in H-1B status for over 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,” (AC21) and the Twenty-First Century Department of Justice Appropriations Authorization Act” (21st Century DOJ Appropriations 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 AC21 and the 21st Century DOJ Appropriations Authorization Act.

On appeal, counsel submits a brief.

The beneficiary in the instant case has been the beneficiary of an approved H-1B petition, valid from July 15, 1996 to July 15, 2002. In a letter dated January 10, 2003, counsel claimed that the beneficiary had been employed by the petitioner in its Toronto office since June 28, 2002. On July 12, 2001, the petitioner filed an application for alien employment certification with the U.S. Department of Labor, which was approved on September 30, 2002. On October 18, 2002, the petitioner filed a petition for an immigrant worker on behalf of the beneficiary. The instant petition for a seventh-year extension under AC21 and the 21st Century DOJ Appropriations Authorization Act was filed on December 12, 2002. Counsel states that because the beneficiary meets the terms of AC21 and the 21st Century DOJ Appropriations Authorization Act (the beneficiary is the beneficiary of an employment-based immigrant petition or an application for adjustment of status and the application for labor certification was filed more than 365 days prior to filing for the seventh-year extension), the director’s decision was in error.

Although it appears that the alien’s H-1B status terminated on June 28, 2002, when he left the United States in order to work for the petitioner’s Toronto office, counsel states that the beneficiary’s immigration status at the time of filing is irrelevant for purposes of the 21st Century DOJ Appropriations Authorization Act, as long as 365 days have elapsed since the filing of a labor certification application on behalf of the beneficiary. Counsel cites the legislative history, stating that it shows a clear intent to confer the benefit on aliens, regardless of whether they have exceeded the initial H-1B limitations or have left the country.

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.

AC21 and the 21st Century DOJ Appropriations Authorization Act provide that Citizenship and Immigration Services (CIS) shall extend the stay of an alien who qualifies for the exemption in one-year increments; however, this does not waive the extension requirements at 8 C.F.R. § 214.1(c)(4), which state 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. There is no exception that would allow an extension of stay to be granted to an alien who has failed to maintain nonimmigrant status because he or she has changed that status or left the United States.

If the alien is not otherwise eligible for an extension of stay, then CIS will not approve a request for extension of H-1B status. "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." 8 C.F.R. § 214.1(c)(4).

There are exceptions to this rule, but none of them apply to the instant petition. The regulations also 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). In this case, counsel claims that the beneficiary began working for the petitioner's Toronto office on June 28, 2002. In any event, the beneficiary's authorized period of stay terminated on July 15, 2002. The petition was filed over five months following the expiration of the validity period of the original approved petition. Further, although counsel cites to a June 21, 2001 memorandum, more recently, CIS has clarified that the request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the Form I-129 is filed. See Memorandum from William R. Yates, Acting Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD03-09*. HQBCIS 70/6.2.8-P (April 24, 2003). Clearly, the beneficiary in this case was not in the United States or otherwise in H-1B status at the time of filing. Finally, while counsel states that the legislative intent indicates that a beneficiary does not have to be in valid status at the time of filing a request for extension, and cites to a conference report, the language of the statute is clear that CIS shall only extend the status or stay of an H-1B worker. CIS regulations are clear, and do not allow for an extension of status when the beneficiary is no longer in the original H-1B status. In the present matter, the AAO will not 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. *INS v. Phinpathya*, 464 U.S. 183 (1984).

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.