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U.S. Citizenship
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FILE: WAC 04 136 53126 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2006

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:

SELF-REPRESENTED

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 director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal.

The petitioner is a distributor of personal computers. It seeks to employ the beneficiary as a management assistant. 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 on the ground that the beneficiary's authorized period of stay expired before filing the instant petition; thereby making the beneficiary ineligible 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) (21st Century DOJ Appropriations Authorization Act).

On appeal, the petitioner states that the beneficiary's H-1B status expired due to changes in management.

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] may not exceed 6 years." Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year.

Section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. As the above statute indicates, the beneficiary must be eligible to adjust status except for the per-country limitations. (Emphasis added.)

Part of the 21st Century DOJ Appropriations Authorization Act amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment-based immigrant; or (2) 365 days or more have passed since the filing of the employment-based immigrant petition (Form I-140).

The record contains evidence that the petitioner filed a labor certification application, Form ETA 750, on the beneficiary's behalf on August 7, 2001.

The petitioner filed the Form I-129 petition on April 12, 2004, a date subsequent to the enactment of the 21st Century DOJ Appropriations Act on November 2, 2002. Accordingly, the pending labor certification application on the beneficiary's behalf can be the basis for extending his 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 an extension of stay are met. Although there is no appeal from the denial of an application for extension of stay, 8 C.F.R. § 214.1(c)(5), and CIS generally rejects all appeals from the denial of an extension of stay, the regulation at 8 C.F.R. § 214.2(h)(13)(ii)(B) prohibits approval of a Form I-129 petition filed on behalf of an H-1B or L-1 nonimmigrant worker who has met the maximum allowable period of authorized stay. Thus, the AAO must in this case consider whether the alien was in status or in an authorized period of stay in order to determine whether the petition was properly denied.

In this case, the beneficiary's authorized period of stay expired on April 17, 2003 and the petition seeking a one-year extension was not filed until April 12, 2004. CIS may not extend the beneficiary's status if he is no longer in status. Accordingly, the beneficiary has reached the 6-year maximum allowable period of stay as an H-1B nonimmigrant, and the petition was filed after the alien's status expired.

The regulation at 8 C.F.R. § 214.1(c)(4), which relates to extensions of stay and timely filing and maintenance of status, conveys that "[a]n 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." There is an exception to this rule. It is as follows:

Failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
- (ii) The alien has not otherwise violated his or her nonimmigrant status;
- (iii) The alien remains a bona fide nonimmigrant; and
- (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

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). The petition was filed in this case about one year following the expiration of the beneficiary's H-1B status.

In a June 21, 2001 memorandum CIS stated 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).

In this case, the beneficiary's authorized period of stay expired on April 17, 2003 and the petition seeking a one-year extension was not filed until April 12, 2004. The record contains a letter from the beneficiary's physician stating that the beneficiary's temporary memory loss caused the delay in filing. The petitioner states on appeal that the change in the petitioner's management caused the delay in filing the H-1B petition. The submitted evidence is not persuasive in excusing the late filing. A change in management is not an extraordinary circumstance beyond the control of the petitioner that would result in a delay, which is here a year-long delay, in filing the H-1B petition. The AAO notes that it is the responsibility of the petitioner, not the beneficiary, to file the H-1B petition.

CIS may not extend the beneficiary's status if he is no longer in status. Accordingly, the beneficiary has reached the 6-year maximum allowable period of stay as an H-1B nonimmigrant, the petition was filed after the alien's status expired, and the alien is therefore 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.