



U.S. Citizenship  
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Services

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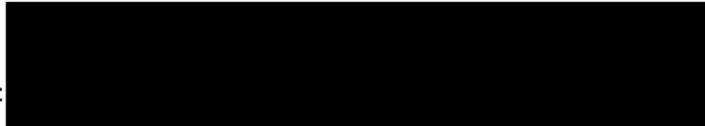
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FILE: LIN 04 212 51919 Office: NEBRASKA SERVICE CENTER Date: SEP 07 2006

IN RE: Petitioner:  
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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a university that employs the beneficiary as a researcher. The petitioner seeks to extend for a seventh year the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 did not qualify for an exemption from the normal six-year limit on H-1B status.

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." However, the amended American Competitiveness in the Twenty-First Century Act ("AC21") removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by section 11030(A)(a) and (b) of the 21<sup>st</sup> Century Department of Justice Appropriations Act, reads as follows:

- (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.
- (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.

The record of proceeding before the AAO includes (1) Form I-129 and supporting documentation for a seventh year extension, filed on June 21, 2004; (2) the director's request for evidence (RFE); (3) counsel's response letter with additional documentation; (4) the notice of decision, dated March 28, 2005; and (5) Form I-290B.

The record shows that the beneficiary resided in the United States with H-1B classification continuously from August 14, 1997 through the date of filing the petition on July 21, 2004, with authorization to remain until January 9, 2005. The AAO notes that the maximum 6-year period of stay of the beneficiary expired on August 13, 2005. As the director noted in his decision, the petitioner provided a copy of an I-797 receipt notice which indicated that a Form I-140 Immigrant Petition For Alien Worker (EB-2/National Interest Waiver) was filed by the beneficiary on September 13, 2002 (LIN 02 284 51745). The aforementioned petition was subsequently denied on March 23, 2004 along with the corresponding Form I-485. The I-140 petition was appealed on April 26, 2004. The appeal was dismissed by the AAO on February 17, 2005. The director noted that since the immigrant petition and the Form I-485 were no longer pending before the Service, the beneficiary is ineligible for an extension of her H-1B status pursuant to the provision of AC21. The director noted that since the beneficiary had remained in the United States in H or L status for over six years and the petitioner had not satisfied the requirements for an extension of stay under AC21, no further extensions of the petition could be granted.

Counsel filed a motion to reopen or reconsider that was considered by the director. The director noted that the petitioner provided evidence that it filed a Form I-140 petition on the beneficiary's behalf (LIN 05 062 52475). The director noted that the petitioner also indicated that it had filed an ETA-750 application for alien labor certification on the beneficiary's behalf with the Nebraska Workforce Development agency pursuant to "special handling" guidelines. The director noted that it appeared that this request was filed on or about November 9, 2004, but that the petitioner provided no documentary evidence from the state labor agency in Nebraska. Further, the director noted that both the Form I-140 and the request for labor certification were filed after the filing date of the instant petition, July 21, 2004. The director also noted that neither the I-140 petition nor the request for labor certification had been pending for at least 365 days. The director found that the evidence failed to establish that the beneficiary qualified for an additional year of H-1B status pursuant to the provisions of AC21.

Counsel indicated on the Form I-290B that she would send a separate brief and/or evidence to the AAO within 30 days. On August 9, 2006, counsel indicated that she did not file a brief or evidence in support of this appeal.

On the Form I-290B, counsel asserts that the beneficiary is eligible for an H-1B extension under AC21, section 106(a). Counsel admits that the beneficiary's original Petition For Immigrant Worker (EB-2/National Interest Waiver) was denied, and that the petitioner submitted a separate I-140 petition while the appeal from the decision on the original I-140 petition was pending. Counsel appears to assert that because the appeal of the first I-140 petition was pending while the most recent I-140 petition was filed that the beneficiary is eligible for an extension of her H-1B status.

The AAO does not agree with counsel's assertion. A final determination was made by the AAO when it dismissed the appeal of the first I-140 petition. Therefore the beneficiary is not eligible for extension of her

H-1B status. Section 106 of AC21, as amended, provides that the alien for whom an application for labor certification or an immigrant petition for alien worker has been filed for at least 365 days may be granted a one-year extension of his or her H-1B visa until a decision has been made to deny such application or petition. A final decision to deny the petition was made on February 17, 2005. Thus, the petitioner was not eligible to extend the visa classification on behalf on the beneficiary for one year.

The petitioner's I-140 petition was filed on November 09, 2004 after the petitioner's H-1B petition was filed and was not pending for 365 days prior to the expiration of the beneficiary's maximum stay in H-1B status on August 13, 2005.

In the case at bar, the petition for extension of H-1B status for a seventh year was filed on July 21, 2004, which was before the filing of the labor certification application in November 2004 or the I-140 petition filed on December 28, 2004. As noted above, the first I-140 was denied and its subsequent appeal was dismissed by the AAO on February 17, 2005. The second I-140 was not pending for at least 365 day as of the date the beneficiary's maximum authorized period of stay in H-1B would have expired on August 13, 2005. Therefore, the beneficiary was not eligible for an exemption from the six-year limitation on her H-1B classification under AC21 section 106(a), and an extension of her H-1B status for a seventh year under AC21 section 106(b), at the time her extension petition was filed. 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 extension petition must be denied.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

**ORDER:** The appeal is dismissed. The petition is denied.