

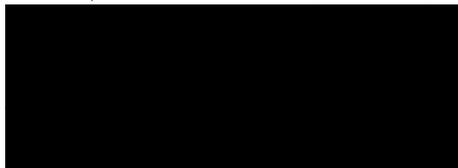
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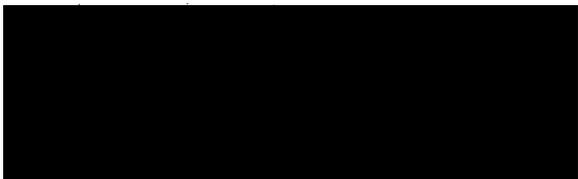
JUN 28 2005

FILE: EAC 03 024 53265 Office: VERMONT SERVICE CENTER Date:

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 non-profit private school that seeks to employ the beneficiary as a pre-kindergarten teacher/director. 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 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 submits a brief.

The beneficiary held H-1B status from January 1996 to May 21, 2002. On July 16, 2001, the petitioner filed an application for alien employment certification with the U.S. Department of Labor, which was approved. On April 21, 2002, the petitioner filed a petition for an immigrant worker on behalf of the beneficiary. The instant petition for a seventh-year extension under AC-21 and the DOJ Authorization Act was filed on October 31, 2002. Counsel states that because the beneficiary meets the terms of AC-21 and the DOJ 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.

Counsel states that the beneficiary's immigration status at the time of filing is irrelevant for purposes of the DOJ 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, 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(a) 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.

If the alien is not otherwise eligible for an extension of H-1B status, then Citizenship and Immigration Services (CIS) will not approve a request for extension of H-1B status. 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). "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). The petition was filed in this case several months following the expiration of the original petition. 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, the regulations are clear, and do not allow for an extension of status when the beneficiary is no longer in the original H-1B status.

The AAO notes that while the statute does not specifically refer to limiting eligibility under the DOJ Authorization Act to those whose status is still valid, the legislature is presumed to be familiar with background existing law when it legislates. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979); *Valansi v. Ashcroft*, 278 F.3d 203, 212 (3rd Cir. 2002); *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 n.3 (BIA 1995). It is equally presumed that had Congress intended to amend the current regulation requiring that the application for the seventh year extension be filed while the alien is currently maintaining valid H-1B status, it would have affirmatively done so.

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.