U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 04 252 52540 Office: VERMONT SERVICE CENTER Date: JUL 31 2006

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Michael T. Kelley

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 computer consulting services company. It seeks to employ the beneficiary as a principal consultant and extend for one year his 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 grounds that the beneficiary, who had already spent six years in the United States in H-1B status, did not qualify for an exemption from the statutory six-year limit because he had not maintained valid H-1B status at the time the instant petition was filed and did not submit persuasive documentary evidence that he had a pending labor certification application (Form ETA-750).

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 21st 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; (2) the director's decision; and (3) Form I-290B, an appeal brief, and supporting materials.

In her decision the director indicated that the beneficiary first entered the United States in H-1B status on July 1, 1997. The record includes a photocopy of the latest approval notice issued to the petitioner, which granted the beneficiary H-1B status from August 30, 2001 to August 29, 2004. The instant petition seeks to extend the beneficiary's H-1B status under AC21 for an additional year – from August 30, 2004 to August 30, 2005. As noted in the director's decision, however, the instant petition was not filed until September 7, 2004, at which time the beneficiary was no longer in valid H-1B status. Absent any explanation from the petitioner of why the filing was delayed, the director found that the beneficiary was ineligible for the requested one-year extension of stay in H-1B status. The director also noted that the copy of the ETA-750 application in the record was unsupported by any documentation confirming that it had actually been filed by the petitioner and was currently pending with the appropriate government office, as required for the beneficiary to be eligible for a one-year extension of H-1B status under AC21.

The regulation at 8 C.F.R. § 214.1(c)(4) – *Timely filing and maintenance of status* – provides as follows:

> 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, except that 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 1997) or removal proceedings under section 240 of the Act.

On the appeal form (Form I-290B) counsel asserts that the petitioner was unable to file the instant petition on time due to extraordinary circumstances within the contemplation of 8 C.F.R. § 214.1(c)(4) – namely, a debilitating medical condition. In the appeal brief, however, counsel asserts that it was the beneficiary, not the petitioner, who was ill and bedridden – with nephrolithiasis, a kidney ailment – in late August and early September 2004. As supporting evidence counsel submits a medical certificate from an internal medicine specialist, dated December 7, 2004, stating that [redacted]" was evaluated that day and that absolute bed rest under treatment was ordered from August 19 to September 4, 2004. The medical certificate appears to conflate the names of the beneficiary, [redacted] and the petitioner's vice president, [redacted] Moreover, the date of the medical certificate (December 7, 2004), which states that the patient was evaluated that day, postdates the bedrest order (August 19, 2004) by nearly four months. Counsel explains that the certificate is a duplicate because

misplaced the original, but no other contemporaneous documentation has been submitted to show that the medical certificate was actually written in August 2004, and to whom it applies. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). No such competent evidence has been submitted by the petitioner to corroborate who had the kidney ailment, when the diagnosis was made, and when the bedrest was ordered. Furthermore, if it was the beneficiary who was ill and bedridden in late August and early September 2004, that would not be a ground for an extraordinary circumstances exception under 8 C.F.R. § 214.1(c)(4) because the beneficiary is not a recognized party and does not have standing to file a petition for an extension of his H-1B classification. *See* 8 C.F.R. § 103.2(a)(3).

For the reasons discussed above, the petitioner has failed to overcome the director's finding that the beneficiary is ineligible for an extension of H-1B classification under AC21 because he was not in valid H-1B status at the time the instant petition was filed. The record shows that the beneficiary's H-1B status expired on August 29, 2004, nine days before the extension petition was filed on September 7, 2004.

In addition, no further evidence has been submitted on appeal to show that the petitioner had a labor certification application (Form ETA-750) pending for 365 days or more as of the commencement date (August 30, 2004) of the one-year extension period sought in the petition filed on September 7, 2004. In order to establish that a labor certification application has been pending for 365 days or more, the petitioner must submit either a document from the state agency that accepted the filing or from a DOL regional office. *See Memorandum from William R. Yates, Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273)*, HQBCIS 70/6.2.8-P (April 24, 2003). Neither type of document has been submitted, and the only evidence of the labor certification application in the record is a copy of the application itself, which bears the date May 1, 2004. If that a true copy of the petitioner's application, it would not have been pending for 365 days or more before the beginning of the one-year employment period sought in the extension petition. For this reason as well, the instant appeal may not be approved.

Based on the foregoing analysis, the AAO determines that the beneficiary is not eligible under AC21 for a one-year extension of stay in H-1B status.

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.