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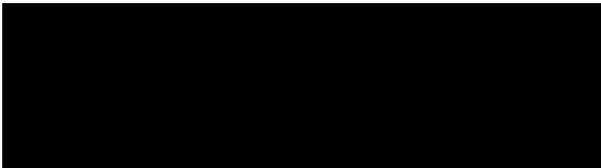
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FILE: WAC 05 083 50274 Office: CALIFORNIA SERVICE CENTER Date: **AUG 07 2006**

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:



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 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 CD and DVD manufacturer that seeks to employ the beneficiary as a systems engineer and to classify him 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 of stay 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 record reflects that the beneficiary held H-1B status from January 16, 1999 to January 15, 2005. The instant petition for a seventh-year extension under AC-21 and the DOJ Authorization Act was filed on January 31, 2005. The petitioner filed a labor certification application on behalf of the beneficiary with the State of California Employment Development Department on November 20, 2003. Counsel states that because the beneficiary meets the terms of AC-21 and the DOJ Authorization Act (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 petitioner’s previous lawyer advised the petitioner that since the labor certification was pending, it was not necessary to request an H-1B extension.

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.

The regulation at 8 C.F.R. § 214.1(c)(4) states the following regarding requests for extensions of stay:

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.”

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, the petition was filed 16 days following the expiration of the original petition. 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, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance Regarding the Impact of the Department of Labor (DOL) 's PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year*, HQPRD 70/6.2.8 (September 23, 2005). 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. *Canon 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.

Counsel asserts that the request for extension was late because petitioner's original lawyer gave the petitioner bad legal advice. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Counsel's assertions are not supported by any documents in the record and are insufficient to meet the petitioner's burden in this regard. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.