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FILE: EAC 06 163 53322 Office: VERMONT SERVICE CENTER Date: OCT 02 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.

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 appeal will be dismissed. The petition will be denied.

The petitioner is a veterinary hospital and health center. In order to resume employment of the beneficiary as a biologist, it endeavors to classify the beneficiary for an additional year as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Counsel maintains that the petition merits approval under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended by the 21<sup>st</sup> Century Department of Justice (DOJ) Appropriations Authorization Act. Specifically, counsel relies upon section 106 of AC21, which exempts, in one-year increments, certain beneficiaries from the six-year limit that statute and regulation impose on the amount of time that nonimmigrant aliens may stay in the United States in H or L status.

As indicated in this excerpt from his decision, the director denied the petition on the basis that the exemption at section 106 of AC21 does not here apply because the beneficiary has not maintained status:

To be eligible for an extension beyond the six-year limitation under section 106 of AC21, the beneficiary must have completed six years in an "L" and/or "H" status and been maintaining a valid "H-1B" status at the time of filing. Finally, in order to be eligible for extension of stay under section 106 of the AC21, 365 days or more must have elapsed since filing of the Immigrant Petition for Alien Worker (Form I-140) or the filing of the Labor Certification (Form ETA-750) with the Department of Labor.<sup>1</sup>

You state in your petition that the beneficiary left the United States on December 12, 2005 and is not currently in the United States. In order to be eligible for an extension under the provisions of AC21 the beneficiary must be in the United States and maintaining their [sic] status. Because the beneficiary is not in [the] United States he is not eligible for an extension under AC21.

Counsel argues that the petitioner must prevail because the beneficiary belongs to a class that section 106 expressly identifies for its coverage without condition concerning the beneficiary's location at the time an H-1B petition is filed on his behalf.

As discussed below, the AAO finds that the director's denial of the petition was correct. The beneficiary could not be a proper subject of an H or L petition at the time that the petition was filed, because he was at

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<sup>1</sup> The director did not dispute counsel's assertion (brief on appeal, at page 2) that, at the time the petition was filed, an application for labor certification had been pending for more than two years. The record contains copies of letter and e-mail correspondence with Department of Labor (DOL) channels that indicates that at the date of the filing of the instant petition DOL had not yet adjudicated an application for labor certification that the petitioner had filed on behalf of the beneficiary on April 19, 2004.

that time outside the United States for less than the 365-day period that CIS regulation requires to pass before an H or L petition may be filed on behalf of an alien who has exceeded his maximum authorized stay in the United States in H or L status. The beneficiary is not eligible for an exception to the six-year limitation under AC21, as amended. Accordingly, the appeal shall be dismissed and the petition shall be denied.

In general, section 214(g)(4) of the INA, 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.” The regulation at 8 C.F.R. § 214.2(h)(13)(i) provides:

(A) A beneficiary shall be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15) (H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. . . .

The regulation at 8 C.F.R. § 214.2(h)(13)(iii)(A) provides:

*Alien in a specialty occupation or an alien of distinguished merit and ability in the field of fashion modeling.* An H-1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

AC21 removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and AC21 broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by section 11030(A)(a) of the 21<sup>st</sup> Century DOJ Appropriations Authorization Act, section 106(a) of AC21 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 21<sup>st</sup> Century DOJ Appropriations Authorization Act amended section 106(a) of AC21 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.

As counsel notes, regulations implementing AC21 have not yet been issued.<sup>2</sup>

The question before the AAO is whether section 106 of AC21 requires CIS to approve a petition for a continuation of the validity of a beneficiary's H-1B classification in a situation where, at the time the petition was filed, the beneficiary has accrued more than six years of continuous stay in H-1B status, has a labor certification or immigrant petition that has been pending adjudication for over 365 days prior to the filing, but is outside the United States.

As the brief on appeal and the petitioner's checkmark at the box at section 5 of the Form I-129 for consular notification indicate, the petitioner is not seeking an extension of stay. Rather, the petitioner has filed the present petition with the mistaken expectation that it is exempt from the time-out-of-country requirements imposed by section 214(g)(4) of the INA, 8 U.S.C. § 1184(g)(4), and by 8 C.F.R. § 214.2(h)(13).

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<sup>2</sup> Hereinafter all AC21 references are to AC21 as amended by 21<sup>st</sup> Century DOJ Appropriations Authorization Act.

Counsel's "Statement of the Case" section of the brief on appeal recounts these facts that comport with the information in the record of proceeding:

In May 2005, the petitioner filed an H-1B petition on behalf of the beneficiary requesting a 7<sup>th</sup> year in H-1B classification. The petition was approved. The petition was based on an exemption from the 6-year limit on stay in H-1B status provided by AC21. . . .

In May 2006, the petitioner again filed an H-1B petition on behalf of the beneficiary, requesting an 8<sup>th</sup> year of H-1B classification based on the exemptions from the usual time limits pursuant to AC21. The basis for classification of the petition was notated as a continuation of previously approved employment without change with the same employer, and requested consular notification of the petition approval in lieu of an extension of stay. Consular notification was necessitated because the employee had traveled abroad. . . .

On May 19, 2006, the Service Center issued a request for evidence, asking for proof that the beneficiary is exempt from the usual 6-year time limits because he does not reside continuously in the United States. In response, the petitioner clarified that the basis for claiming an exemption from the usual 6-year time limits on stay was pursuant to AC21, as a result of the petitioner having filed an application for labor certification on behalf of the beneficiary that remained pending more than 365 days. The petition was denied on June 16, 2006, in pertinent part because:

"In order to be eligible for an extension under the provisions of AC21 the beneficiary must be in the United States and maintaining their [sic] status. Because the beneficiary is not in [the] United States he is not eligible for an extension under AC21."

The record reflects the following facts. The beneficiary has reached his six years of authorized stay in H status by virtue of previous H-1B petitions approved for the periods March 18, 1999 to December 7, 2001; December 8, 2001 to December 7, 2004; and December 8, 2004 to May 9, 2005 (a total approved time-in-stay of 7 years, 1 month, and 21 days). For the most recent approved petition, CIS applied section 106 of AC21 to continue the beneficiary's H-1B classification and extend his stay in H-status for the one-year period May 10, 2005 to May 9, 2006, because an application for labor certification had been pending for 365 days or more at the date the petition was filed.

It is undisputed that the beneficiary departed the United States on December 12, 2005, approximately five months before the expiration of the period approved for his extended stay in H-1B status under section 106 (according to the addendum to part 3 of the Form I-129 Supplement H, "to visit family and apply for a new H-1B visa"). The beneficiary was outside the United States when the instant petition was filed on May 8, 2006, and he was still outside the United States when the director issued his decision to deny the petition.

On appeal, counsel contends that the presence-in-country requirement upon which the director based his decision does not appear in AC21, and that it is inconsistent with and frustrates the purpose of section 106 of that act. Counsel notes that the purpose of section 106 is “to continue the employment relationship beyond the 6-year limit . . . while applications for permanent residence are being adjudicated.” (Brief on appeal, page 2.) Counsel argues, “The Service’s narrow reading of AC21 leads to a result inconsistent with this purpose because it forecloses an H-1B beneficiary’s ability to travel abroad if AC21 is construed only to allow extensions beyond the 6<sup>th</sup> year for H-1B beneficiaries physically present in the United States.” (Brief on appeal, page 2.) Counsel also asserts that the director’s reading of AC21 is “in direct derogation of the relief that AC21 was enacted to provide to companies and H-1B workers,” namely, “to provide for continuity of the employment relationship in cases of lengthy adjudications of applications for labor certification and immigrant petitions, on the road to lawful permanent resident status.” (Brief on appeal, page 6).

According to counsel, the petition should be granted because the beneficiary fits within the two classes of aliens explicitly identified at section 106(a) of AC21 for the relief specified at section 106(b). The classes are: (1) “any nonimmigrant alien” who was “previously issued a[n] H-1B visa,” and (2) “any nonimmigrant alien” who was “otherwise provided non-immigrant status under section 101(a)(15)(H)(i)(b) of the [INA], 8 U.S.C. § 1101(a)(15)(H)(i)(b).” According to counsel’s interpretation, with regard to nonimmigrant aliens described in section 106(a), section 106 provides an H-1B petitioner the option to either (1) file a petition for a one-year continuation of H-1B status and extension of stay for such covered person that remains in the United States, or (2) file a petition for approval of one-year H-1B status for such covered person that has left the United States during a period of approved H-1B status, and to do so without regard to the 365-day out-of-country delay of eligibility for H-1B status imposed by regulation upon persons who have reached the statutory maximum stay in H or L status.

Counsel also asserts that the applicability of section 106 to the circumstances of the instant petition is supported by a May 2005 memorandum from William R. Yates, Associate Director for Operations, United States Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the 21<sup>st</sup> Century Act of 2000 (AC21)(Public Law 106-313)*. HQPRD 70/6.2.8-P (May 12, 2005) (hereinafter referred to as the May 2005 Yates memorandum). Counsel cites this Question and Answer excerpt from the memorandum’s section II, “Q & A on Processing of H-1B Petitions under the Extension Provision of § 106(A) Allowing Extension Past the H-1B 6 Year Limit”:

Question 8: Should service centers or district offices deny a request for an H-1B extension beyond the six-year limit where the labor certification or the immigrant petition was filed over 365 days ago, but the H-1B nonimmigrant intends to consular process rather than adjust status?

Answer : No.

Counsel misconstrues section 106(a) of AC21 by failing to read it in conjunction with its companion provision, section 106(b), which implements the exemption stated in section 106(a). Section 106(b) clearly

limits the implementation of the exemption at section 106(a) exclusively to aliens who are eligible for an extension of stay (“The Attorney General shall extend the stay of an alien who qualifies for an exemption in one-year increments . . .”) Because the beneficiary was outside the United States and therefore not in a stay situation when the petition was filed, he is not entitled to an extension of stay. As the mechanism of implementing the section 106 exemption – stay extension – is not available to the beneficiary, he falls outside the coverage of section 106 of AC21.

Contrary to counsel’s view, the May 2005 Yates memorandum’s Q & A number 8 does not address the situation of an H-1B petition to employ a person covered by section 106(a) of AC21 that was filed while that person was outside the United States. The options that Question 8 describes for the beneficiary – consular processing or adjustment of status – indicate that an extension petition may be approved for one year in circumstances where the beneficiary intends to consular process for his immigrant visa rather than adjust status to permanent residence in the United States. Question 8 does not state that a beneficiary may obtain a one-year extension of his or her visa, under section 106(a) of AC21, from a consular post abroad.

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.