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APR 30 2007

FILE: EAC 05 104 52992 Office: VERMONT SERVICE CENTER Date:

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 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 denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a hospital that seeks to employ the beneficiary as a physician in a post-graduate training program. The petitioner, therefore, 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (4) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record establishes that the beneficiary was in the United States, in H status, from June 15, 1999 through March 3, 2005 (the date the petition was filed). During this period, he held H-1B status from October 16, 2001 through October 31, 2002. He held H-4 status from June 15, 1999 through October 15, 2001 and November 9, 2002 through March 3, 2005.

The petitioner filed the instant petition on March 3, 2005 and requested that the beneficiary be granted an additional year of H-1B status (July 1, 2005 through June 30, 2006), pursuant to the American Competitiveness in the Twenty-First Century Act (AC-21), as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21). The director denied the petition, finding the beneficiary ineligible for additional time in H-1B status.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC-21 removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays, and DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

- (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.

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states the following:

- (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.

On appeal, counsel contends that the beneficiary qualifies for an additional year of H-1B status. Counsel contends that the beneficiary is entitled to an additional year in H-1B status because an application for labor certification was filed on behalf of the beneficiary's wife, which entitled her to additional time in H-1B status. Counsel therefore contends that since the beneficiary's wife is entitled to additional time in H-1B status, the beneficiary is also entitled to such an extension.

Counsel submits a copy of a letter from the United States Department of Labor, dated March 17, 2005, which states that an application for labor certification was filed on behalf of the beneficiary's wife on August 4, 2003. Counsel also submits evidence regarding the beneficiary's wife's current nonimmigrant status, as well as evidence regarding the validity of their marriage.

The AAO disagrees with counsel's analysis. Section 106(a)(1), the section of AC-21 at issue here, exempts from the six-year limitation aliens on whose behalf "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))" has been pending for 365 days.

The AAO notes that the record does not reflect the filing of any application for labor certification on behalf of the beneficiary, so no certification required or used by the beneficiary to obtain status under section 203(b) of the Act (8 U.S.C. § 1153(b)) has been pending for at least 365 days. Neither AC-21 nor DOJ-21 provide for the granting of additional time in H-1B status for the spouses of aliens entitled to benefits under those statutes. The beneficiary is, therefore, ineligible for additional time in H-1B status on the basis of his wife's pending application for labor certification.

However, the AAO finds the beneficiary eligible for additional time in H-1B status as the result of a policy memorandum regarding seventh-year extensions of H-1B status that was issued subsequent to the filing of this appeal. That memorandum,<sup>1</sup> at page 2, states the following:

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<sup>1</sup> Memorandum from Michael Aytes, Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance on Determining Admission for Aliens*

A. Decoupling H-4 and L-2 Time from H-1B and L-1 Time

USCIS, therefore, is now clarifying that any time spent in H-4 status will not count against the six-year maximum period of admission applicable to H-1B aliens. Thus, an alien who was previously an H-4 dependent and subsequently becomes an H-1B principal will be entitled to the maximum period of stay applicable to the classification.

Accordingly, CIS does not consider the time the beneficiary spent in H-4 status against his six-year maximum period of stay in H-1B status. As he was in H-1B status for a period of only one year (October 16, 2001 through October 31, 2002), the provisions of the Act regarding the maximum allowable period of stay in H-1B status are now inapplicable. As such, he is now eligible for H-1B status for the entire period of requested stay, and the AAO will withdraw the director's decision to the contrary.

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 sustained that burden.

**ORDER:** The appeal is sustained. The petition is approved.

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*Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year HQPRD 70/6.2.8, HQPRD 70/6.2.12, AD 06-29 (December 5, 2006).*