

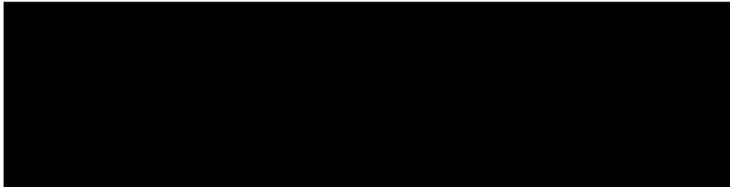
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U.S. Department of Homeland Security  
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U.S. Citizenship  
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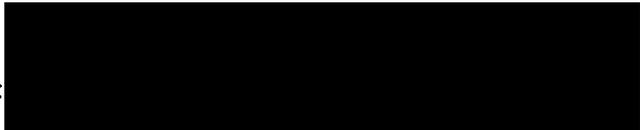
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FEB 26 2007

FILE: LIN 06 020 51122 Office: NEBRASKA 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 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 state university. It seeks to employ the beneficiary as an associate professor and endeavors to extend the stay and 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 exhausted her period of stay in the United States, having been in this country in H1B status from April 29, 1998 until March 29, 2004. On appeal, counsel states that the beneficiary is entitled to extend her period of stay because she presently has pending an appeal from the denial of her Form I-140 petition. Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year. In accordance with the regulation at 8 C.F.R. § 214.2(h)(13)(ii)(B), when an alien has spent the maximum allowable period of stay in the United States, a new petition may not be approved, with certain exceptions.

Section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. As the above statute indicates, the beneficiary must be eligible to adjust status except for the per-country limitations.

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 21<sup>st</sup> Century DOJ Appropriations Authorization Act amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment-based immigrant; or (2) 365 days or more have passed since the filing of the employment-based immigrant petition (Form I-140).

The petitioner's labor certification was filed on November 24, 1999. On November 11, 2003, the petitioner filed an I-140 petition on behalf of the beneficiary. That petition was denied on August 23, 2005. The petitioner appealed the denial of the I-140 petition on September 20, 2005, and that appeal is still pending. The petitioner contends that the beneficiary is entitled to an extension of her H1B status until her I-140 appeal is adjudicated.

The petitioner filed the Form I-129 petition on October 26, 2005, a date subsequent to the enactment of the 21<sup>st</sup> Century DOJ Appropriations Act on November 2, 2002. Accordingly, the pending labor certification application and the I-140 petition filed on the beneficiary's behalf can be the basis for extending her authorized period of stay in the United States in H-1B status beyond the maximum six-year limit as long as all other requirements for an extension of stay are met.

Pursuant to 8 C.F.R. § 214.1(c)(4), 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, with certain exceptions. In this case, the beneficiary had been awarded H-1B status from April 29, 1998 until March 29, 2004.<sup>1</sup> The petition in this instance was filed on October 26, 2005, subsequent to the end of the beneficiary's H-1B status which expired on March 29, 2004. Thus, the beneficiary had reached the maximum allowable period of time in H-1B status before the instant petition/application for extension of stay was filed. The petitioner has not demonstrated that the failure to timely file the application for extension of stay meets the requirements for any of the exceptions.

CIS may not extend the beneficiary's status under the provisions of AC21 if she is no longer in status. 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). Further, the

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<sup>1</sup> The director erroneously indicates in his decision that the petitioner spent 21 days outside the United States, which he was entitled to recapture, and that the beneficiary was previously granted a one-year extension under AC21. As noted by counsel in his appeal brief, the beneficiary is not entitled to recapture any time spent outside the United States, and the instant petition is the first extension sought under the provisions of AC21.

petitioner is seeking an extension of status and continuation of previously approved employment without change on the Form I-129 petition. 8 C.F.R. § 214.2(h)(14) provides that a request for a petition extension may be filed only if the validity of the original petition has not expired. 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). See also Memorandum from William R. Yates, Associate Director for Operations, 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 Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*; and Memorandum from Michael Aytes, Acting Director of Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing I-140 employment-based Immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*. In this case, the beneficiary has reached the 6-year maximum allowable period of stay as an H-1B nonimmigrant, the petition was filed after the alien's previous H-1B status expired, and therefore the alien is not eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4), 8 C.F.R. § 214.2(h)(14), and section 106(b) of AC21.

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.