

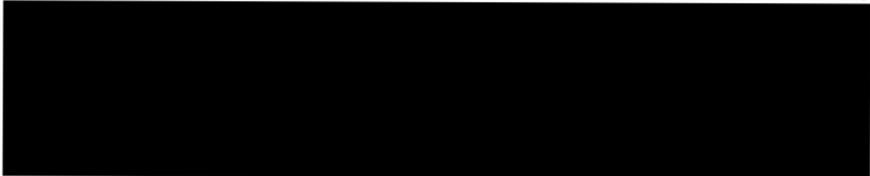


U.S. Citizenship
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FILE: EAC 06 105 52881 Office: VERMONT SERVICE CENTER Date: **AUG 01 2008**

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 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 pharmaceutical technology development and manufacturing company that seeks to continue its employment of the beneficiary as a pharmaceutical scientist. The petitioner, therefore, endeavors to extend the beneficiary's classification 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.¹

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, the American Competitiveness in the Twenty-First Century Act² (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 the Twenty-First Century Department of Justice Appropriations Authorization Act³ (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.

¹ The record for the petitioner's prior petition for this beneficiary, EAC 05 008 50668, is also a part of the record of proceeding.

² American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

³ Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

Section 11030(A)(b) of DOJ-21 amended section 106(b) of AC-21 to state 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.

Before adjudicating the instant petition, the AAO finds useful a review of the procedural history of the previous petition the petitioner filed on behalf of the beneficiary. That petition, EAC 05 008 50668, was filed by previous counsel, [REDACTED] on October 4, 2004 and approved on December 10, 2004. Although the period of requested employment in that petition was from August 27, 2004 through March 21, 2006,⁴ the director granted approval only through March 21, 2005. The record indicates that an approval notice was mailed to the petitioner's address of record.

Current counsel contends that the petitioner did not receive a copy of the H-1B approval notice. The record contains a November 30, 2005 letter from CIS to the petitioner confirming a telephone call to CIS⁵ on October 25, 2005, requesting a copy of the approval notice, in which CIS stated that a duplicate approval notice was mailed on September 13, 2005. Counsel contends that the petitioner did not receive this approval notice, either. The petitioner then filed Form I-824, Application for Action on an Approved Application or Petition, in order to receive a copy of the approval notice.⁶ The Form I-824 was approved and another duplicate approval notice was issued on February 15, 2006.

According to counsel, the February 15, 2006 duplicate approval notice, obtained via the Form I-824, was the first approval notice received by either counsel or the petitioner, and was the first time the petitioner learned that the petition had only been approved through March 21, 2005. As a result, counsel filed the instant petition as a motion on February 26, 2006, and requested that the beneficiary's H-1B status be extended through March 21, 2006, the end date requested in the previous petition.

In his February 24, 2006 letter in support of the current petition, counsel stated that the previous petition should have been granted through March 21, 2006 because, although the beneficiary's six-year limitation on H-1B status ended on March 21, 2005, a labor certification on the beneficiary's behalf was filed on April 7, 2003, which previous counsel had neglected to mention. Counsel also referenced the telephone calls and Form I-824 filings.

⁴ See the Forms I-129 and ETA 9035E.

⁵ It is not clear whether the petitioner or the beneficiary placed the telephone call.
See the Form I-824, EAC 06 057 50680, filed December 16, 2005.

In her March 10, 2006 denial, the director stated, in pertinent part, the following:

The Service acknowledges the petitioner's attempts to extend the beneficiary's stay beyond March 21, 2005, via telephone calls and the filing of two I-824's, however; each time it was determined that the correct validity dates were granted with the prior I-129 petition.

Evidence that the beneficiary would have previously qualified for AC21 benefits (Labor Certification filed on his behalf (April 7, 2003)) was not submitted until the present, nearly one year after the beneficiary's H1B1 status had expired.

The evidence of record does not establish that the Service erroneously approved Receipt # EAC-05-008-50668 for a validity period of October 16, 2004 to March 21, 2005. Furthermore, your letter dated February 24, 2006 confirms that there was no request for an extension pursuant to AC21, nor was a copy of the proof of labor certification submitted with the original petition.

As a result, the Service will not grant an extension of stay nunc pro tunc. In addition, because the alien was not maintaining H1B1 status at the time of filing the present petition, an AC21 extension is not warranted.

On appeal, reiterates his contention that, until February 2006, the petitioner was under the impression that the earlier petition had been approved for the period of employment requested in the petition—through March 21, 2006. It was only upon receiving the February 15, 2006 duplicate approval notice (via the Form I-824) that the petitioner learned that the previous petition had only been approved through March 21, 2005. Upon receiving the approval notice, the petitioner filed the instant petition. Also of record are two August 27, 2004 letters from previous counsel to CIS. One of these has a date imprinted by a fax machine of September 27, 2005. This letter appears to support counsel's contention that previous counsel failed to request an extension of stay under AC-21 when he filed the previous petition. The second letter from previous counsel, also dated August 27, 2004, with a fax machine imprint of March 13, 2006, indicates that previous counsel requested CIS to consider the previous petition under AC-21.

The AAO will accord no weight to either of previous counsel's August 27, 2004 letters. While previous counsel indicates that the letter faxed to counsel on March 13, 2006 was submitted to CIS at the time the previous petition was filed, the record does not support this assertion. First, the AAO notes that this second letter does not appear in that record which, as noted previously, is also a part of the current record of proceeding. Neither is the first letter signed by [REDACTED], submitted by current counsel at the time the current petition was filed, of record in the record of proceeding for the previous petition, EAC 05 008 50668. As the letters contain conflicting information, and neither of them appear in EAC 05 008 50668, the AAO finds that the director did not err in deciding that the beneficiary was not eligible for benefits under AC-21 at the time the first petition was filed. The record of proceeding in EAC 05 008 50668 does not contain a copy of the labor certification filed on April 7, 2003, and the petitioner did not request a one-year extension. The record does not reflect that the petitioner requested consideration under AC-21 when it filed the previous petition. It is unclear why previous counsel would have submitted two letters of support in one filing. The AAO also notes that previous counsel does not state directly that he never received the approval notice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject

that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petition filed by previous counsel, EAC 05 008 50668, made no mention of a pending labor certification. Accordingly, the director properly approved it only for the period of time for which the beneficiary was eligible.

The question of whether or which of previous counsel's August 27, 2004 letters appeared in EAC 05 008 50668's initial filing is not dispositive in the adjudication of the current petition on its merits. The issue before the AAO in this proceeding is whether the beneficiary is entitled to H-1B status from March 1, 2006 through March 21, 2006.

Given the questionable nature of the evidence of record, the AAO finds that the beneficiary was not in valid nonimmigrant status at the time the petition was filed, and that the director properly declined to extend the beneficiary's stay *nunc pro tunc*. As the beneficiary was not in valid nonimmigrant status, he is not eligible for benefits under AC-21.

CIS addressed this issue in an April 24, 2003 memorandum. *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)⁷. This memorandum, at page 2, states the following:

The request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the petition (Form I-129) is filed with the BCIS [now CIS]. 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.

AC-21 and DOJ-21 provide that CIS shall extend the stay of an alien who qualifies for the exemption in one-year increments; however, this does not waive the extension requirements at 8 C.F.R. § 214.1(c)(4), which state that 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 (none of those exceptions have been established here).

If the alien is not otherwise eligible for an extension of stay, then CIS will not approve a request for extension of H-1B 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 regulation at 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." As the

⁷ *See also* 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's (DOL) 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: Adjudicator's Field Manual Update AD05-15*. HQPRD70/6.2.8 (September 23, 2005).

beneficiary was out of status and the validity of the previous petition had expired as of the filing date, the extension of status may not be granted.

The AAO declines to find that the petitioner's delay in filing the current petition until February 2006 is based on CIS error. The petitioner did not file the current petition for a one-year extension until after the beneficiary had been out of status for nearly a year. The record reflects that the previous approval notice was sent to the petitioner; however, even if the petitioner did not receive notice of the previous approval; the record does not reflect that CIS erred when it adjudicated the previous petition which failed to request a one-year extension under AC-21. As such, the director properly declined to extend the beneficiary's stay *nunc pro tunc*. Again, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho* at 591.

In accordance with the preceding discussion, the AAO finds the beneficiary is ineligible for an extension of his H-1B status for the entire period of requested stay. The director's decision is affirmed.

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.