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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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Date: APR 12 2012

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

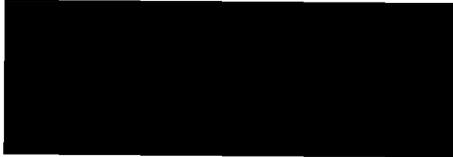
Petitioner:

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:



Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 sustained in part, and dismissed in part. The petition will be approved through August 12, 2008.

The petitioner is a computer board design services company that seeks to continue the employment of the beneficiary as a design engineer. The petitioner, therefore, endeavors to continue 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, finding that the petitioner had failed to demonstrate that it qualified to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. On appeal, counsel contends that the director erroneously denied the petition, and submits a brief and additional evidence in support of the beneficiary's eligibility for a 7th year extension.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the beneficiary is eligible for an extension of H-1B status and an extension of his stay in H-1B nonimmigrant classification beyond the maximum six-year period of stay in the United States normally permitted for H-1B nonimmigrants.

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, the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21), 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 DOJ21, § 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 DOJ21 amended § 106(b) 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.

The director noted that the beneficiary has resided in the United States in H-1B classification since July 17, 2001. On February 8, 2008, the petitioner applied for an extension of H-1B status for the beneficiary for the period from April 11, 2008 to April 10, 2009, which would have placed the beneficiary beyond his six-year limit.

In her decision, the director noted that the Form I-140 petition filed on behalf of the beneficiary on November 16, 2005 [REDACTED] was denied on May 2, 2008, and an appeal to the AAO was dismissed on August 12, 2008 (SRC 08 193 53870). The director concluded that the AAO's dismissal of the appeal constituted a final decision to deny the beneficiary's application for an immigrant visa under section 106(a) of AC21 as modified by DOJ21, and denied the instant petition.

On appeal, counsel contends that the director's findings were erroneous, and asserts that the beneficiary is entitled to an additional one-year extension. Specifically, counsel claims that because the final decision to deny the beneficiary's immigrant petition was not issued until May

28, 2008,¹ the beneficiary is entitled to an additional one-year extension under the plain meaning of the statute. However, section 106(b)(1) of AC21, as amended, specifically indicates that the one-year extension of stay should not be granted once a final decision is made to deny the I-140 immigrant petition that was filed pursuant to the granted labor certification.

In this matter, the petitioner requests extension of the beneficiary's stay from April 11, 2008 to April 10, 2009. A final decision on the beneficiary's immigrant petition, upon which the request for extension was based, was entered by the AAO on August 12, 2008. Contrary to counsel's assertions, the AAO does not interpret the plain meaning of the statute as entitling a beneficiary to an entire one-year extension of stay when an immigrant petition for that beneficiary is pending at the time of filing. Rather, the AAO finds that a beneficiary may be entitled to an extension of stay for a one-year period or up *until* a final decision to deny the immigrant petition is entered, whichever is less.²

At the time the instant petition was pending before USCIS, a final decision had not been entered on the I-140 petition upon which the request for extension was based. Contrary to the findings of the director, the AAO finds that that the beneficiary is eligible for an exemption from the six-year limitation on his admission in H-1B nonimmigrant classification under AC21, section 106(a), and to an extension of his stay in H-1B status until August 12, 2008, the date on which the AAO entered a final decision denying the beneficiary's immigrant petition.

The AAO also notes counsel's claim on appeal for the application of the doctrine of equitable estoppel should the AAO fail to approve the requested one-year period of stay for the beneficiary. The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

¹ The AAO notes that the repetition of the date 05/28/08 in counsel's appeal brief appears to be a typographical error.

² Congressional intent with regard to AC21 was only to provide H-1B nonimmigrant status for an alien during the lengthy process for employment-based permanent residence. As such, if the AAO were to interpret this provision as asserted by counsel, it would result in H-1B nonimmigrants being granted status during periods of time for which an application or petition leading to lawful permanent residence was no longer pending, a result directly contrary to that intended by that act.

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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 in part and dismissed in part. In accordance with the above discussion, the petition is approved through August 12, 2008.