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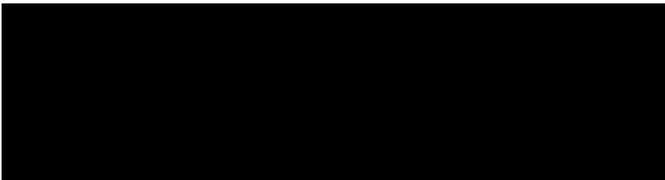
U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
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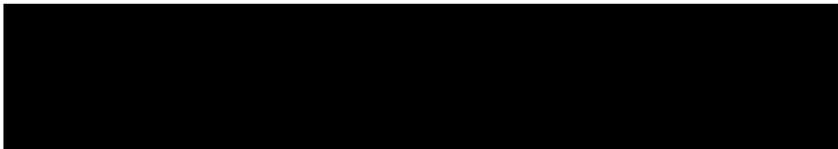


FILE: LIN 03 100 54160 Office: NEBRASKA SERVICE CENTER Date: JUN - 7 2007

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, Nebraska Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the decision of the director and approve the petition.

The petitioner is an IT consulting and staffing firm. It seeks to employ the beneficiary as a programmer/analyst. The petitioner 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 petitioner claims that the beneficiary was present in the United States in H-1B status for a total of six years from January 12, 1996 through February 26, 2002. During this time, the petitioner filed an Application for Alien Employment Certification (ETA 750) for the beneficiary on January 14, 2002.<sup>1</sup> On February 1, 2002, prior to the expiration of her H-1B status, the beneficiary filed an Application to Extend/Change Nonimmigrant Status (I-539), which was approved from February 28, 2002 until August 26, 2002. The beneficiary left the United States in July 2002, obtained a B visitor's visa in Canada, and reentered as a B-2 visitor for pleasure on July 31, 2002. The beneficiary then departed the United States again in September 2002 and reentered on October 19, 2002.

The petitioner filed the instant petition on February 6, 2003, requesting that the beneficiary's status be changed from B-2 visitor status to H-1B nonimmigrant classification and that her stay in the United States be extended until February 3, 2004. The petitioner claimed that the beneficiary was exempt from the six-year limitation in H-1B status pursuant to section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) and was thereby eligible for a one-year extension of stay under section 106(b) of AC21.

The director denied the petition, holding that, as the beneficiary was no longer in H-1B status at the time the petition was filed, she did not meet the requirements of section 106 of AC21 and did not establish otherwise that she was eligible for an extension of H-1B status. In addition, the director found that the photocopy of the ETA 750 application packet, the basis for the beneficiary's claimed exemption under 106(a) of AC21, was insufficient evidence that a labor certification application had actually been filed and accepted for processing by the New Jersey Department of Labor.

On appeal, counsel provides evidence that the petitioner filed an ETA 750 on behalf of the beneficiary on January 14, 2002 and contends that the beneficiary is thereby exempt from the six-year limit contained in section 214(g)(4) of the Act.

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 as [an H-1B] nonimmigrant may not exceed 6 years." However, section 106(a) of AC21, as amended, removed the six-year limitation on the authorized duration of stay in H-1B visa status once 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien.

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<sup>1</sup> It is noted for the record that the petitioner later filed and obtained approval of an immigrant petition (I-140) on behalf of the beneficiary in February 2005 (EAC 05 088 52618). According to the U.S. Department of State's National Visa Center (NVC), however, the beneficiary's immigrant visa application is still pending.

As amended by § 11030A(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 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] 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.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

The first issue in this matter is whether the petitioner's ETA 750 had been pending 365 days or more prior to the date the petition was filed.<sup>2</sup>

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<sup>2</sup> As a petition may be filed up to six months prior to the expiration of an alien's authorized stay in the United States, the employment/extension start-date requested should normally be used instead of the petition receipt date for purposes of determining whether an alien qualifies for an exemption under 106(a) of AC21. However, as the instant petition was received after the employment start-date requested by the petitioner, the director was correct in focusing on the date the petition was filed.

Although the director did not issue a request for evidence (RFE) in this matter, he concluded that, as the record lacked evidence that the petitioner's ETA 750 had been filed with and accepted by the New Jersey Department of Labor, the petitioner failed to show that either a labor certification or an immigrant petition had been pending 365 days or more by the date the instant petition was filed. While the AAO generally agrees with the director that a photocopy of an ETA 750 application packet alone is insufficient evidence that a labor certification has been filed, the petitioner in this case submitted additional corroborating evidence on appeal to prove that it had filed a labor certification application on the beneficiary's behalf on January 14, 2002, at least 365 days prior to the filing of the present petition. In a case such as this where the petitioner was not put on notice of a deficiency in the evidence and was not given an opportunity to respond to that deficiency, the AAO may and in this instance will accept this evidence for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Given the additional evidence submitted on appeal and given that the petitioner filed the I-129 petition subsequent to the enactment of DOJ21, the labor certification application 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 provided all other requirements for an extension of stay and H-1B classification are met. Therefore, the director's decision with regard to this issue is hereby withdrawn.

The second issue in this matter is whether the director properly denied the petition on the basis that the beneficiary was ineligible for an extension of status.

The AAO notes that an "extension of stay" must be distinguished from an extension of H-1B status, which occurs through a "petition extension." Although those seeking H-1B status are currently permitted to file one form to request a petition extension, extension of stay, and change of status, they are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). In addition, 8 C.F.R. § 214.2(h)(15)(i) specifically states that, "[e]ven though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each." Thus, 8 C.F.R. § 214.1(c) relates solely to extension of stay requests, 8 C.F.R. § 214.2(h)(14) deals only with H-1B petition extensions, and 8 C.F.R. § 248.3(a) addresses change of status requests to H-1B classification.

The director stated that "the beneficiary does not qualify for an extension of status because she is not currently in valid H[-]1B nonimmigrant status." The director's concern is misplaced, as the petition does not request an extension of status.<sup>3</sup> Rather, the petitioner is filing a petition for new employment combined with a change of status as well as an extension of stay request.

Notwithstanding the director's inaccurate statement regarding the petitioner's eligibility for an "extension of status," it is possible that the director meant that, in order to be eligible for an exemption from the six-year limitation under section 106(a) of AC21 and to thereby be eligible for an extension of stay in the United States, the beneficiary must be in H-1B status at the time the petition is filed. If section 106 of AC21 required

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<sup>3</sup> It should also be noted that the director's statement is not completely accurate. Title 8 C.F.R. § 214.2(h)(14) states that a "petition extension," not an extension of stay, must be filed prior to the expiration of "the original [H-1B] petition." Thus, while an H-1B extension of status/petition extension request must be filed prior to the expiration of the prior petition, it does not technically require the beneficiary of such a petition to be physically present in the United States at the time it is filed. *See* 8 C.F.R. § 214.2(h)(14).

the beneficiary to be in H-1B status at the time the petition were filed, the beneficiary's B-2 status would then have precluded her from qualifying for an extension of stay beyond six years in H-1B status under section 106 of AC21. Based on this reasoning, the director's decision to deny the petition for new employment would have been required under 8 C.F.R. § 214.2(h)(13)(i)(B).<sup>4</sup>

Therefore, the underlying issue that must be addressed is whether the beneficiary, a B-2 nonimmigrant, qualifies for an exemption under section 106(a) of AC21, thereby permitting a change of status to H-1B classification and a one-year extension of stay under section 106(b) of AC21.<sup>5</sup>

As previously noted, the director found that insufficient evidence had been submitted to show that a labor certification application or immigrant petition had been filed on behalf of the beneficiary at least one year prior to when the instant petition was filed. Counsel submitted additional evidence on appeal that has overcome this basis for the petition's denial. Therefore, as required by section 106(a)(1), the petitioner has established that at least 365 days have passed since the filing of a labor certification application. Furthermore, the record also shows that the beneficiary had previously been in the United States in H-1B status for six years, and an NVC database shows that her immigrant visa application is still pending.

The remaining question then is whether sections 106(a) and/or (b) of AC21 also require the beneficiary to be in H-1B status to qualify for an extension of stay beyond the six-year limit imposed by section 214(g)(4) of the Act.

Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is

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<sup>4</sup> Title 8 C.F.R. § 214.2(h)(13)(i)(B) states that H petitions for new employment shall not be approved for aliens who have reached their maximum allowable period of stay in the United States unless the aliens have remained outside of the United States for the period prescribed for the specific H classification. Therefore, in order for the instant petition for new employment to be approved, the beneficiary must be eligible for an exemption from the limitation on the allowable period of stay in the United States in H-1B status.

<sup>5</sup> It is noted for the record that, at the time the instant petition was filed, there was no evidence that the beneficiary had been present outside the United States for the immediate prior year. In addition, there was no indication that the beneficiary qualified under one of the limited exemptions from the six-year limit in 8 C.F.R. § 214.2(h)(13)(iii). Therefore, it appears that the only basis for the beneficiary to have been exempt from the six-year limit imposed by section 214(g)(4) of the Act at that time was to establish her eligibility for an exemption from this limit under section 106(a) of AC21.

preferred); *see also* *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

In examining the statute itself, section 106(b) of AC21 will first be reviewed to determine if it restricts the eligibility of an alien in B-2 status for an exemption under section 106(a) of AC21. In general, according to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21. On the other hand, the title of section 106(b) of AC21 reads "Extension of H-1B Worker Status." In this situation, where the title uses the word "[s]tatus" and the text uses the word "stay," the text of the statute prevails. The title of a statutory section is not controlling, and where it is contrary to the text of the statute, the text is controlling. *Immig. and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 308-309 (2001).

In addition, even if the title and text of a statute were given even weight, in evaluating the overall purpose of sections 106(a) and (b) of AC21, section 106(a) states that the limitation contained in section 214(g)(4) of the Act shall not apply to an alien previously granted an H-1B visa or H-1B status where 365 days or more have passed since the filing of either a labor certification application or an employment-based immigrant petition. In referring to this section of the Act, section 106(a) specifically states "the [six-year] limitation . . . with respect to the duration of authorized stay shall not apply" to the alien. Thus, based on the use of the phrase "duration of authorized stay" in section 106(a) in interpreting "authorized admission" in section 214(g)(4) of the Act, it would appear on its face that Congress intended the phrase "extend the stay" in section 106(b) to mean "extension of stay" and not "petition extension" or extension of status. In other words, as section 214(g)(4) of the Act only limits the admission period or *stay* of the alien in H-1B status, not directly the classification period itself, sections 106(a) and (b) must thereby lift the restriction on the alien's stay in H-1B status for these sections of AC21 to have any effect. *See also* 56 Fed. Reg. 31553, 31557 (July 11, 1991) (interpreting Public Law 101-649 as limiting the "period of stay" for H-1B aliens to six years).

Moreover, as indicated previously, the H-1B regulations as they existed prior to AC21 clearly distinguished an H-1B "petition extension" from an "extension of stay" request. 8 C.F.R. § 214.2(h)(15)(i) (2000). The regulations also equated the word "status" to the word "classification" and not to the period of authorized stay in the United States. *See* 8 C.F.R. § 248.3(b) (2000); *see also* 8 C.F.R. §§ 214.1(c)(2), 245.2(a)(4)(ii)(C), and 103.6(c)(2) (2000). If Congress wanted to change these regulations and have the word stay mean status or to create some other medium, it could have done so through AC21 or later in 2002 when it amended section 106 of AC21. As Congress chose not to redefine the term "stay" in passing AC21 or in revisiting this law and as the pertinent congressional record related to AC21 fails to provide any guidance as to its meaning in H-1B extension cases, it thereby follows that use of the word stay by the prior and current regulations comports with Congressional intent. It is presumed that Congress is aware of U.S. Citizenship and Immigration Services (CIS) regulations at the time it passes a law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

Based on this reasoning, it is concluded that section 106(b) of AC21 deals strictly with an alien's extension of stay in the United States in H-1B status, not with an extension of the H-1B petition. In other words, based on the plain language of the text of section 106(b) of AC21, there is no requirement that the alien be in H-1B status to qualify for an extension of stay under this provision. Therefore, even if the prior H-1B petition had expired, provided (1) the beneficiary qualified for an exemption under section 106(a) of AC21, (2) he or she

was physically present in the United States in a nonimmigrant status at the time of filing,<sup>6</sup> and (3) his or her labor certification, immigrant petition, immigrant visa application, or adjustment of status application was still pending, an alien would then be eligible for a one-year extension of stay under section 106(b) of AC21.

This conclusion regarding section 106(b) of AC21 does not in itself, however, mean that an alien not in H-1B status at the time of filing is eligible for an exemption under section 106(a) of AC21. To determine this, section 106(a) must also be examined. Under the plain language of section 106(a) of AC21, as amended, it is clear that the six-year limit imposed by section 214(g)(4) of the Act "shall not apply to *any* nonimmigrant alien previously issued a[n H-1B] visa or otherwise provided [H-1B] nonimmigrant status" as long as the required 365 days have passed since a labor certification or immigrant petition had been filed. Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added). Congress specifically states that "any nonimmigrant alien" would be eligible for the exemption, provided the other requirements were met. If

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<sup>6</sup> While 8 C.F.R. § 214.2(h)(14) states that a "petition extension" must be filed prior to the expiration of "the original [H-1B] petition," 8 C.F.R. § 214.2(h)(15)(i) only requires that the beneficiary "be physically present in the United States at the time of the filing of the extension of stay," not that the beneficiary be in valid H-1B status at the time it is filed. The additional requirement of 8 C.F.R. § 214.1(c)(4) that the alien, with certain exceptions, must "maintain the previously accorded status" has previously been interpreted by CIS as meaning the same prior status. However, 8 C.F.R. § 248.1(b), regarding general eligibility for change of status, states in part that "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed." In the change of status context, "previously accorded status" means the status previously held by the alien and not the same prior status. As the phrase "previously accorded status" is not defined in the regulations and as its use in 8 C.F.R. § 214.1(c)(4) is not distinguished from its use in 8 C.F.R. § 248.1(b), it shall be interpreted as having the same meaning – the status previously held by the alien, not the same prior status held by the alien.

In addition, if the same meaning of "previously accorded status" as it is used in 8 C.F.R. § 248.1(b) were not applied to 8 C.F.R. § 214.1(c)(4), it would create the situation where an alien could change status and be approved for a specific classification but be unable to extend his or her stay. As an example, an employer files an initial I-129 requesting H-1B classification, change of status, and extension of stay on behalf of an alien in B-2 visitor status whose authorized stay is about to expire but who has not previously spent time in the United States in H or L status. If otherwise qualified and if "previously accorded status" in 8 C.F.R. § 214.1(c)(4) meant the same prior status, CIS would be permitted to grant the H-1B petition approval and change of status but be prohibited from granting the extension of stay request, solely because the alien was not in H-1B status at the time the petition was filed, even though the alien had never held H-1B status at any time in the past. Not only is this result contrary to current and past practices, it would be contrary to logic and the intent of the relevant sections of the Act.

Moreover, 8 C.F.R. § 214.1(c)(3) – classes ineligible for extension of stay – does not list H-1B classification as being an ineligible class. Instead, the limitation on extensions of stay in H-1B status are addressed solely by 8 C.F.R. § 214.2(h)(13)(iii), which is based on section 214(g)(4) of the Act. Additionally, 8 C.F.R. § 248.2 – classes ineligible for change of status – only prohibits certain classes from changing to H-1B classification, not all classes.

Congress had meant section 106(a) of AC21 to apply exclusively to those aliens currently in H-1B status, they could have used the article 'a' instead of "any" and used the words 'currently in' instead of "provided."

As section 106(a) plainly reads, there is no requirement that a nonimmigrant alien be in H-1B status at the time the exemption to the six-year limit is sought; it requires only that the alien had been issued an H-1B visa or had otherwise been in H-1B status at some point in the past. As the statutory language is clear, there is no need to consider the legislative history of the applicable law or the related floor statements. Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *Immig. and Naturalization Serv. v. Phinpathya*, 464 U.S. 183.

Therefore, until and unless regulations to the contrary are issued on this subject, section 106(a) of AC21 shall be interpreted by CIS as applying to aliens presently in the United States in any nonimmigrant classification. In the instant matter, as the beneficiary has established eligibility for an exemption under section 106(a) of AC21, she is exempt from the limitation in section 214(g)(4) of the Act and is thereby eligible for a one-year extension of stay under section 106(b) of AC21, *supra*.

The AAO has reviewed the merits of the petition and determines that the position offered is a specialty occupation and that the beneficiary is qualified to perform the services of the specialty occupation. Therefore, as the beneficiary is eligible for an extension of stay under sections 106(a) and (b) of AC21 and as the petition is otherwise approvable, the decision of the director will be withdrawn and the petition approved.

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 decision of the director is withdrawn and the petition is approved.

**FURTHER ORDERED:** The director shall reopen and re-adjudicate the change of status request, as it was denied on the sole basis that the instant petition for new employment and extension of stay had been denied.