U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: LIN 05 252 51350 Office: NEBRASKA SERVICE CENTER Date: NOV 22 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner provides corporate training and education programs. It seeks to employ the beneficiary as a senior market research analyst and extend for one year her stay in the United States as a nonimmigrant worker in a specialty occupation (H-1B classification) 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 on the ground that the beneficiary, who had already spent six years in the United States in H-1B status, did not qualify for an exemption from the statutory six-year limit because she was not in valid H-1B status, but rather in F-1 status, at the time the instant petition was filed.

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] may not exceed 6 years." However, the amended American Competitiveness in the Twenty-First Century Act ("AC21") removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by section 11030(A)(a) and (b) of the 21st Century Department of Justice Appropriations Act, reads as follows:

> (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.
>
> (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 record of proceeding before the AAO includes (1) Form I-129 and supporting documentation; (2) the director's decision; and (3) Form I-290B and an appeal brief.

In his decision the director indicated that the beneficiary had been in the United States in continuous H-1B status for six years – from January 30, 1998 to February 21, 2004. At that point in time the beneficiary changed status to F-1 and continued her stay in the United States as a student. The instant petition, filed on August 29, 2005, seeks to change the beneficiary's classification back to H-1B and to extend her stay for one year – from August 15, 2005 to August 14, 2006 – under the provisions of AC21. The director determined that AC21 required the beneficiary to be in valid H-1B status at the time the petition was filed. As the beneficiary was no longer in valid H-1B status at the time of filing, the director found that she was ineligible for the requested one-year extension of stay in H-1B status.

On appeal counsel states that the beneficiary qualifies for benefits under AC21 on the basis of a pending labor certification that was filed on her behalf by the petitioner on May 28, 2003, which is more than 365 days before the filing of the instant petition on August 29, 2005. Counsel states that AC21 does not require the beneficiary to maintain H-1B status to be eligible for a seventh-year extension of stay. According to counsel, a memorandum issued by [redacted] Associate Director for Operations,[1] indicates that H-4 status holders may be permitted to extend their own H-1B status if they are independently qualified. Thus, counsel asserts that by analogy the beneficiary in F-1 status should be eligible to change her status to the H-1B classification and extend her stay in that classification beyond the 6-year limit. Counsel references the following language from the memorandum to support his assertion:

> H-4 dependents are eligible for an extension of their H-4 status beyond the 6-year limit provided they meet the H-4 requirements and based on the principal (H-1B) alien's eligibility for an H-1B extension beyond the 6- year limit. This includes cases where the dependent may have held another status prior to becoming an H-4 dependent. However, in order to qualify for an H-1B extension beyond the 6 year limit year of their own H-1B status, the alien must meet all the requirements independently of their H-1B spouse's eligibility for a 7th year extension.

The AAO does not agree with counsel's interpretation of AC21. The requirement that the beneficiary be in valid H-1B status to be eligible for an exemption from the normal six-year limitation is clear in subsection (b) of section 106, which is entitled "extension of H-1B worker status" and provides for extensions of stay in one-year increments for qualified aliens. The beneficiary in the instant petition is not seeking an extension of H-1B worker status, since he was not in H-1B status at the time of filing. Rather, he is seeking a change of nonimmigrant status from F-1 to H-1B. The provisions of AC21 provide for an extension of stay in one-year increments based on an extension of existing H-1B status, not a change to H-1B status from another status.

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[1] *See* Memorandum from [redacted], Associate Director for Operations, *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), HQPRD 70/6.2.8-P (May 12, 2005).

Though no implementing regulations have been issued for AC21, the AAO notes that the regulation at 8 C.F.R. § 214.2(h)(14) provides in general with respect to H-1B workers that "[a] request for a petition extension may be filed only if the validity of the original petition has not expired."

This interpretation is supported by the memorandum of [redacted] Acting Associate Director for Operations, CIS, *Guidance for Processing H-1B petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273)*, HQBCIS 70/6.2.8-P, dated April 24, 2003. The memorandum states on page two: "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. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded [H-1B] status, or where such status expired before the application or petition was filed."

The passage in the May 12, 2005 memorandum cited by counsel on appeal does not state that the alien can change status from F-1 to H-1B and then extend for one year under AC21. The passage states that H-4 dependents eligibility for an extension of H-4 status beyond the six-year limit is based on H-4 dependents meeting the H-4 requirements and on the principal (H-1B) alien's eligibility for an H-1B extension beyond the 6- year limit. If the alien wants to independently seek an extension of stay as an H-1B beyond his or her six years, the alien must independently qualify for benefits under AC21. This passage reflects that an H-4 dependent's admission limitation is tied to that of the H-1B principal, only for so long as he or she maintains the H-4 status.

Based on the foregoing analysis, the AAO finds that the beneficiary is not eligible under AC21 for a one-year extension of stay in H-1B status.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.