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FILE: EAC 03 202 53034 Office: VERMONT SERVICE CENTER

Date: OCT 04 2005

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, Director
Administrative Appeals Office

DISCUSSION: The acting director of the Vermont Service Center 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 school serving visually impaired students, with 30 employees. It seeks to extend its employment of the beneficiary as a teacher under 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 acting director denied the petition because the beneficiary is not eligible for extension of H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). The acting director determined that, at the time of filing, the beneficiary was not in valid H-1B status.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B, with additional supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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, AC21, as amended by the 21st Century DOJ Appropriations Act, removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant visa 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 section 11030(A)(a) of the 21st Century DOJ Appropriations Act, section 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 the 21st Century DOJ Appropriations 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 beneficiary has resided in the United States in H-1B classification since November 1, 1996, having once previously had his authorized period of stay extended by CIS. Subsequently, the petitioner has twice applied to extend the beneficiary's H-1B stay beyond the six-year limit. CIS denied the first petition, filed October 31, 2002, on July 29, 2003. The second petition, which is now before the AAO, was filed on June 26, 2003 and denied on December 3, 2003. CIS records reflect that a Form I-140 employment-based immigrant visa petition was filed on behalf of the beneficiary on October 28, 2002 and denied on September 16, 2004.

On appeal, counsel does not address the basis for the acting director's denial, but, instead, asserts that the beneficiary qualifies for a one-year extension of stay under AC21 as the Form I-140 just noted had been pending more than one year. He states that a Form I-797 showing CIS receipt of the Form I-140 accompanies the appeal.

The AAO first turns to the basis for the acting director's denial – the beneficiary was not in lawful H-1B status at the time the instant petition was filed. As previously indicated, the instant petition is the second to be filed by the petitioner seeking to extend the beneficiary's stay beyond the six-year limit, which ended on October 31, 2002. While the first extension request appears to have been filed within the beneficiary's period of authorized stay, that period had expired at the time the petitioner filed the instant petition on June 26, 2003.

If an alien is not otherwise eligible for an extension of H-1B status, then CIS will not approve a request for extension of H-1B status. The request for an extension of status must establish that the beneficiary is in valid H-1B status at the time the Form I-129 is filed. 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). "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). There are exceptions to this rule, but none of them apply to the instant petition. The regulations also state, "A request for a petition extension may be filed only if the validity of the original petition has not expired." 8 C.F.R. § 214.2(h)(14). The petition in this case was filed approximately eight months following the expiration of the original petition and, therefore, cannot be approved.

The AAO now turns to counsel's assertions regarding the Form I-140 pending at the time the petitioner filed

the instant petition. As previously noted, statutory language allows for the extension of an H-1B worker's maximum period of stay in cases where a petitioner establishes that the worker is the beneficiary of a labor certification or an employment-based immigrant visa petition pending for at least 365 days at the time of filing. Regulations governing applications and petitions filed with CIS require that eligibility for an immigration benefit be established at the time of filing. *See* 8 C.F.R. § 103.2(b)(12).

As previously noted, CIS records indicate a Form I-140 for the beneficiary was filed on October 28, 2002, approximately eight months prior to the June 26, 2003 filing of the Form I-129. While counsel states that he is submitting a copy of the CIS receipt for this petition as proof of the length of time it has been pending, the documentation submitted by counsel is not the receipt notice for the Form I-140, but for the Form I-129 filed by the petitioner on October 31, 2002. Accordingly, neither the record, nor CIS databases, establish that the Form I-140 filed on behalf of the beneficiary had been pending for more than 365 days at the time the instant petition was filed. For this reason, as well, the beneficiary is ineligible for a further extension of his H-1B stay in the United States. *See* 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 American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313)*. HQPRD 70/6.2.8-P (May 12, 2005).

For the reasons previously discussed, the petitioner has failed to establish that the beneficiary meets the requirements of section 106(a) of AC21, as amended, for an extension of his H-1B stay. Accordingly, the AAO will not disturb the acting director's denial of the petition.

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.