identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

D2

Date: MAY 31 2012 Office: VERMONT SERVICE CENTER File: [redacted]

IN RE: Employer: [redacted]
Alien:

REQUEST: Free Trade Extension Request for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b1) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b1)

ON BEHALF OF EMPLOYER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. Please note that all documents have been returned to the office that originally decided your case. Please also note that any further inquiry must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the H-1B1 nonimmigrant extension of Free Trade status request. The matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner submitted a request for an extension of H-1B1 Free Trade status on behalf of the alien to the Vermont Service Center on June 6, 2011. The employer stated that it is a manufacturer. It seeks to employ the alien, a citizen of Chile, as a mechanical engineer. The employer submitted the Form I-129 in an endeavor to extend the Free Trade status of the alien as a H-1B1 nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b1).

The director denied the request on August 12, 2011, finding that the employer failed to submit a valid Labor Condition Application (LCA) at the time the Form I-129 was filed in accordance with the controlling statutory and regulatory provisions. The employer submitted a timely appeal of the decision.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception - petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement (ICE). The regulations limit the AAO's jurisdiction over petitions for temporary workers to those described under 8 C.F.R. §§ 214.2 and 214.6. *See* 8 C.F.R. § 103.1(f)(3)(iii)(J) (2003). An H-1B1 nonimmigrant is not a temporary worker classification described in either 8 C.F.R. §§ 214.2 or 214.6. *See generally id.* As H-1B1 decisions are not listed as a matter over which the AAO has jurisdiction, the appeal must be rejected.

Moreover, the employer of an H-1B1 specialty occupation employee is not required to submit a petition to U.S. Citizenship and Immigration Services (USCIS) as a prerequisite for classification or visa issuance. Since there is no petition requirement for H-1B1 nonimmigrants, there is no petition determination that may be appealed.

More specifically, the regulations state, in pertinent part, the following regarding the H-1B1 nonimmigrant classification:

> Steps for receiving an H-1B1 visa and entering the U.S. on an H-1B1 visa after the attestation process is completed with the Department of Labor, which differ in some respects from the steps for H-1B visas, are the responsibility of the Department of State and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS) and are identified in regulations and procedures of those agencies.

20 C.F.R. § 655.700; 69 Fed. Reg. 68222-01 (Nov. 23, 2004).

Because an H-1B1 specialty occupation worker under the United States-Chile Free Trade Agreement does not require a separate petition, H-1B1 status may be obtained by an alien either directly through the Department of State (by applying abroad for an H-1B1 visa) or, in the case of an alien already in the United States, by an employer submitting a Form I-129 to USCIS on behalf of the alien for a change of status or extension of status. However, the Form 1-129 in the context of a request for H-1B1 classification for an alien is merely the vehicle by which information is collected to make a determination on the request and is not a petition for status within the meaning of section 214(c)(1) of the Act. Section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1), specifically excludes H-1B1 nonimmigrants from this importing employer petition requirement stating, in pertinent part, the following (emphasis added):

> The question of importing any alien as a nonimmigrant under subparagraph (H), (L), (O), or (P)(i) of section 101(a)(15) **(excluding nonimmigrants under section 101(a)(15)(H)(i)(b1) [which refers to H-1B1 nonimmigrants])** in any specific case or specific cases shall be determined by the [Secretary of Homeland Security], after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted.

As there is no petition requirement for H-1B1 nonimmigrants, there is no petition determination that may be appealed. Accordingly, for this reason as well the appeal must be rejected.

Furthermore, under 8 C.F.R. § 214.1(c)(5), there is no appeal of a denial of an application for extension of stay. The regulation at 8 C.F.R. § 214.1(c)(5) states the following:

> *Decision in Form I–129 or I–539 extension proceedings.* Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. There is no appeal from the denial of an application for extension of stay filed on Form I–129 or I–539.

Thus, the appeal must be rejected for this additional reason.

As the appeal must be rejected as detailed *supra*, the AAO does not need to examine the record further. However, the AAO will note that, in any event it reviewed the record of proceeding and, based upon that review, determined that even if the appeal were not rejected, the request for H-1B1 classification for the alien could not have been approved.

More speficially, the Department of Labor (DOL) may certify an LCA for the period of employment requested by the employer, up to a maximum three-year period. By statute, H-1B1 nonimmigrants may be granted status for a period of one year, with extensions of status granted in one-year increments. *See* 214(g)(8)(C) of the Act; 8 U.S.C. § 1184(g)(8)(C).

Requests for H-1B1 status beyond three years require the filing of a new labor attestation with DOL. *See* 214(g)(8)(C) of the Act; 8 U.S.C. 1184(g)(8)(C). Specifically, the Act states, in pertinent part, the following:

> After every second extension, the next following extension shall not be granted unless the Secretary of Labor had determined and certified to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 212(t)(1) for the purpose of permitting the nonimmigrant to obtain such extension.

Section 212(t)(1) of the Act affirms that an alien may not be granted H-1B1 status unless the employer has filed with DOL an attestation stating that it will comply with its wage obligations to the alien *during the period of authorized employment. See* Section 212(t)(1) of the Act. Additionally, the Form I-129 instructions state that "[i]f requesting an extension of H-1B status (including H-1B1 Chile/Singapore), [submit] evidence that a labor condition application for the specialty occupation *valid for the period of time requested has been certified by the Department of Labor.*" [Emphasis added.]

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part, the following:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

In the instant case, the employer requested the alien be granted an extension of status from 06/03/2011 to 06/03/2012. With the Form I-129, the employer submitted an LCA, which indicated on page 5 that it was valid from 06/03/2010 to 06/03/2011 – a one-year period no longer within its validity dates. Thus, the LCA that was submitted by the employer to USCIS was not valid for the period of employment requested on the Form I-129.

In response to the RFE, the petitioner provided an LCA that had been submitted to DOL and certified *after* the filing date of the Form I-129 with USCIS. As noted above, eligibility for the benefit sought must be established at the time the application or petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). In this case, the employer failed to establish eligibility at the time of filing. Accordingly, the Form I-129 could not be approved.

As previously discussed, the appeal must be rejected. Regardless, there is no evidence that the director erred in denying the Form I-129, because the petitioner failed to establish eligibility at the time of filing.

ORDER: The appeal is rejected.