



**U.S. Citizenship  
and Immigration  
Services**

(b)(6)

DATE: **AUG 01 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:  
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:

[REDACTED]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
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.

## I. PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on October 9, 2012. On the Form I-129 visa petition, the petitioner describes itself as a newspaper and magazine publishing company established in 1991. In order to employ the beneficiary in what it designates as a business reporter position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation 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).

The director denied the petition on January 16, 2013, finding that the petitioner did not establish eligibility for the benefit sought. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

## II. BURDEN AND STANDARD OF PROOF

The petitioner must demonstrate by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. at 375-376, states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, the U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

### III. H-1B CLASSIFICATION – TIME LIMITS

On the Form I-129 petition, the petitioner was asked to provide the beneficiary's prior period of stay in H classification in the United States. The petitioner was notified that it should list only those periods in which the beneficiary was actually in the United States in an H classification. The petitioner provided the following information on the Form I-129 petition (page 11):

From: 11/19/2002 To: Present

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides: "In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant



may not exceed 6 years." Section 106(a) and 104(c) 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) temporarily removes the six-year limitation on the authorized period of stay in H-1B classification for aliens under certain conditions.

More specifically, an exemption is available under section 106(a) of AC21 for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays. *See* Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002). 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.

As amended by section 11030A(a) of DOJ21, 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 11030A(b) of DOJ21 amended section 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. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based immigrant petition under section 203(b) of the Act is considered "a lengthy adjudication delay" for purposes of this exemption. *See* Pub. Law No. 107-273, 116 Stat. at 1836.

With regard to the instant case, we note the following:

- The petitioner submitted an Immigrant Petition for Alien Worker (Form I-140) on behalf of the beneficiary, which was denied by USCIS on January 29, 2008.
- The petitioner filed an appeal of the denial of the Form I-140, which was dismissed on July 1, 2010.
- The petitioner submitted a motion to reopen, which was dismissed November 28, 2012.
- The petitioner filed a combined motion to reopen and motion to reconsider, which was dismissed on May 21, 2013.

The regulations indicate that "the filing of a motion to reopen or reconsider. . . does not stay the execution of any decision in a case or extend a previously set departure date." 8 C.F.R. § 103.5(a)(1)(iv). Thus, the mere filing of a motion to reopen or reconsider does not suspend the decision to deny the immigrant petition or authorize the beneficiary to remain in the United States.

An exemption from the six-year period is permitted for aliens only until such time as a final decision is made on the relevant application or petition. A final decision to deny an immigrant petition is evidence that USCIS has completed its process of adjudicating the petition and that the beneficiary's application process for obtaining lawful permanent resident status in the United States by way of that petition has ended. Thus, the final decision to deny the petition precludes USCIS from further processing a nonimmigrant extension of stay request based upon section 106(a) of AC21. To accept a contrary interpretation, USCIS would be required to indefinitely extend an individual's stay in the United States in one-year increments. Nothing in the AC21 or DOJ21 legislative history serves to suggest that Congress intended that petitioners on behalf of individual aliens retain the ability to have those aliens remain in the United States indefinitely, e.g., for twenty or thirty years, simply by submitting motion after motion. Rather, the legislative intent reflects only a desire to shield individual aliens from the inequities of government bureaucratic inefficiency and does not include a mandate for an infinite extension of stay in a nonimmigrant status.

Upon a complete review of the record of proceeding, the petitioner has not established that the beneficiary qualifies for an exemption from the six-year limit and is thereby eligible for an extension of stay under section 106(a) of AC21.

We now turn to section 104(c) of AC21 regarding the other exemption to the limited period of authorized admission under section 214(g)(4) of the Act. More specifically, section 104(c) of AC21 reads in, pertinent part, as follows:

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—

(1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,

may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253.

Section 104(c) of AC21 is applicable when an alien, who is the beneficiary of a Form I-140 petition, is eligible to be granted lawful permanent resident status but for the application of a per country limitation to which that alien is subject or, alternatively, if the immigrant preference category applicable to that alien is, as a whole, "unavailable." Thus, to establish eligibility under the exemption at 104(c) of AC21, the petitioner must establish that at the time of filing for the extension of H-1B nonimmigrant status, the beneficiary is not eligible to be granted lawful permanent resident status on the sole basis that he/she is subject to a per country or worldwide visa limitation in accordance with the his/her immigrant visa "priority date."

Here, the petitioner does not claim that the beneficiary qualifies for an exemption under 104(c) of AC21. Nevertheless, we note that the record of proceeding does not establish that the beneficiary is eligible to be granted lawful permanent resident status as the Form I-140 immigrant petition filed on his behalf was denied. Thus, he does not qualify for an exemption from the six-year limitation based upon 104(c) of AC21. Accordingly, we need not address this exemption further.

Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B nonimmigrant in the United States. Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay.



#### IV. CONCLUSION

The petitioner has not established eligibility for the benefit sought. 8 C.F.R. § 103.2(b)(1). In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.