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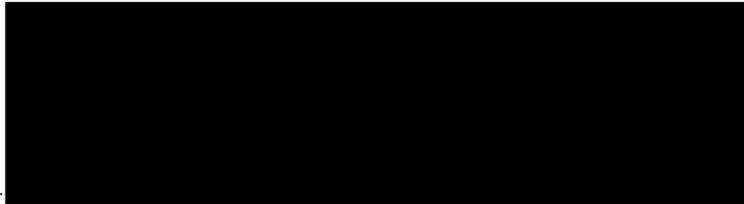
SEP 26 2007

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:



RECEIVED

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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the 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 - no longer in business – was a construction business that sought to extend its authorization to employ the beneficiary as an assistant project superintendent. Before it went out of business, the petitioner filed an extension petition for continuation of the H-1B classification of 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 director denied the petition because the petitioner is no longer in operation and thus is no longer the employer on the petition.

Pursuant to 8 C.F.R. § 214.1(c)(5), there is no provision for an appeal from the denial of an application for extension of stay filed on Form I-129 or I-539. As this office does not have jurisdiction over the portion of the director's decision regarding the beneficiary's request for an extension of stay, this issue will not be reviewed.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation, including the submission from counsel entitled "Letter Brief in Support of Appeal of Decision Dated November 30, 2005." The AAO reviewed the record in its entirety before issuing its decision.

The director found that business entity that filed the petition - Reliance, Inc. – ceased operations on April 5, 2005, after which time its manager and employees formed a new company. The director found further that the new business, Relyco, Inc., must file a new petition. The director stated:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

...Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, fire, supervise, or otherwise control the work of such employee; ...

In response to a Request for Evidence dated August 12, 2005, [persons named] submitted a letter stating that the petitioner went into receivership and ceased operations on April 5, 2005. The management team and the employees of Reliance Inc. formed a completely new company and the beneficiary has been working for the new company since May 2005.

In view of the above, it appears that Relyco, Inc. is the employer as defined in the regulations. The employer must file the petition. Since Reliance Inc. is no longer in operation and no longer the employer in this case, the petition can not be approved.

On appeal, counsel states, in part, that, based on a telephone conversation with and correspondence from Citizenship and Immigration Services (CIS), the petitioner was under the impression that its name had been properly amended to '██████████'. Counsel states further that ██████████ was not required to file a new petition or labor condition application "as it was assuming [the petitioner's] obligations and undertakings arising from and under the attestations made in the LCA filed by [the petitioner] and there was no material change in [the beneficiary's] employment."

The petitioner's Letter Brief in Support of Appeal indicates the following salient facts relevant to this appeal. The beneficiary began working for Reliance, Inc. as an assistant project superintendent for its highway construction business pursuant to the approval of an earlier H-1B petition filed by Reliance, Inc. to employ the beneficiary in that position. In order to continue its employment of the beneficiary as an H-1B temporary worker, Reliance, Inc. filed the Form I-129 and associated documentation that is the subject of this appeal. These documents constituted a petition to extend the beneficiary's H-1B classification and extend his stay. Reliance, Inc. filed this petition on February 7, 2005, while still in business. Shortly after filing the extension petition, Reliance went out of business. The petitioner states:

On April 1, 2005, Reliance entered into a receivership due to the financial difficulties it was encountering. As a result, Reliance had ceased its operations and terminated all of its employees, including [the beneficiary].

[Letter Brief in Support of Appeal, at page 2].

Shortly after Reliance, Inc. went out of business (i.e., "ceased its operations and terminated all of its employees"), its former management team "formed a new company" - Relyco, Inc. - which was established through "negotiations with Reliance and the bankruptcy receiver to purchase the business and assets of Reliance." (Letter Brief in Support of Appeal, at page 2). According to the letter brief, "[the beneficiary] commenced employment with Relyco in May 2005, as soon as Relyco was able to start up the former operations of Reliance." (Letter Brief in Support of Appeal, at page 6).

In the letter brief on appeal, counsel asserts that, on April 1, 2005, a co-owner of the new entity that is the petitioner was informed by an unnamed CIS representative that the change of business names would be annotated on the extension petition's Form I-129 and that, in the words of the letter brief, the petitioner "would not be required to file a new petition or any paperwork to affect [sic] the name change of the petitioner." The letter brief also asserts that, in its later inquiries about the status of the extension petition the petitioner "was never informed by USCIS that it had to submit a new I-129 for [the beneficiary]."

According to the regulation at 8 C.F.R. § 214.2(h)(2)(i)(A), the filer of an H-1B petition must be "[a] United States employer" seeking to classify an alien as an H-1B temporary employee.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii), defines "United States employer" as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The regulation at 8 C.F.R. § 214.2(h)(11)(ii), *Automatic revocation*, states:

The approval of any petition is automatically revoked if the petitioner goes out of business or files a written withdrawal of the petition.

The regulation at 8 C.F.R. § 214.2(h)(12)(ii), states that automatic revocations are not subject to appeal.

An employer must file a new petition in order to hire as an H-1B temporary worker an alien who has been working in that classification for a different employer. With regard to change of employers, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(D) states:

Change of employers. If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay shall conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. The alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H-1C nonimmigrant alien may not change employers.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) requires a new petition and labor condition application whenever there is any material change in the terms and conditions of employment. It states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

The AAO notes the following Department of Labor (DOL) regulatory provisions related to H-1B employment.

The regulation at 20 C.F.R. § 655.715 includes the following definitions:

Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Employer means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B or H-1B1 nonimmigrants and/or U.S. worker(s). In the case of an H-1B nonimmigrant (not including an H-1B1 nonimmigrant), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant. In the case of an H-1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.

The following DOL provisions, at 20 C.F.R. § 655.730(e), govern changes in an employer's corporate structure or identity in the H-1B context:

Change in employer's corporate structure or identity. (1) Where an employer corporation changes its corporate structure as the result of an acquisition, merger, "spin-off," or other such action, the new employing entity is not required to file new LCAs and H-1B petitions with respect to the H-1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the Federal Employer Identification Number (FEIN)), provided that the new employing entity maintains in its records a list of the H-1B nonimmigrants transferred to the employ of the new employing entity, and maintains in the public access file(s) (see Sec. 655.760) a document containing all of the following:

- (i) Each affected LCA number and its date of certification;
- (ii) A description of the new employing entity's actual wage system applicable to H-1B nonimmigrant(s) who become employees of the new employing entity;
- (iii) The Federal Employer Identification Number (FEIN) of the new employing entity (whether or not different from that of the predecessor entity); and
- (iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H-1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

- (A) Abide by the DOL's H-1B regulations applicable to the LCAs;
- (B) Maintain a copy of the statement in the public access file (see Sec. 655.760); and
- (C) Make the document available to any member of the public or the Department upon request.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, the new employing entity must file new LCA(s) and H-1B petition(s) when it hires any new H-1B nonimmigrant(s) or seeks extension(s) of H-1B status for existing H-1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H-1B nonimmigrant after the change in corporate structure.

(3) A change in an employer's H-1B-dependency status which results from the change in the corporate structure has no effect on the employer's obligations with respect to its current H-1B nonimmigrant employees. However, the new employing entity shall comply with Sec. 655.736 concerning H-1B-dependency and/or willful-violator status and Sec. 655.737 concerning exempt H-1B nonimmigrants, in the event that such entity seeks to hire new H-1B nonimmigrant(s) or to extend the H-1B status of existing H-1B nonimmigrants. (See Sec. 655.736(d)(6).)

Furthermore, CIS regulations affirmatively require a petitioner to establish H-1B eligibility as of the date the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

Application of the above regulations to the facts in this case compel the AAO to uphold the director's decision. The director was correct in determining that the fact that the entity that filed the petition went out of business and thus ceased its employer status required that Relyco, Inc. file a new petition. Generally, the prospective employer must file a new H-1B petition whenever it seeks to newly employ an alien who attained H-1B classification by a petition filed by another employer. *See* 8 C.F.R. §§ 214.2(h)(2)(i)(D) and (E), quoted above. At the time the present petition was filed, Relyco, Inc. did not exist. Although not related in the director's decision, the fact that the entity that filed the present petition - Reliance, Inc. - went out of business automatically revoked the approval of the petition that Reliance, Inc. sought to extend by filing the present petition; and that revocation is not subject to appeal. *See* 8 C.F.R. §§ 214.2(h)(11)(ii) and (12)(ii), quoted above. Therefore, the extension sought by Relyco, Inc. is not possible: the approval of the beneficiary's H-1B classification ceased to exist, by automatic revocation, on the date that Reliance, Inc. went out of business; there is no classification to extend. Further, though also not mentioned in the director's decision, even if Reliance, Inc. had not gone out of business but merely restructured itself into Relyco, Inc, a new petition filed by Relyco, Inc. would have been required by the DOL regulation at 20 C.F.R. § 655.730(e)(2), quoted above. This regulation requires that a new corporate entity arising from the restructuring of a corporation that employed H-1B beneficiaries must file a new labor condition application and a new petition in order to extend the status of any H-1B employees of the corporation from which the new entity arose. For all these reasons, the appeal must be dismissed, and the petition must be denied.

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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.