

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 18 2010**

IN RE: Petitioner: [REDACTED]
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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,
[REDACTED]

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a hospital and research center that seeks to extend its authorization to employ the beneficiary as a Dedicated Lab Sonographer I (Research) from June 28, 2010 to June 27, 2011. The petitioner, therefore, endeavors to classify 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 petitioner requests an extension beyond the normal six-year time limit based on sections 106(a) and (b) 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"). Pub. L. No. 107-273, §11030A (2002).

The director denied the petition without issuing a request for additional evidence because the beneficiary had already been employed in the United States in "H" or "L" status for more than six years, since September 28, 2003.¹ The director determined that the beneficiary is not entitled to an H-1B extension. Counsel timely filed an appeal on July 9, 2010.

On appeal, counsel for the petitioner asserts that the beneficiary's I-140 petition remained pending because the petitioner appealed the decision to the Administrative Appeals Office (AAO) on November 11, 2009. Due to the complex procedural posture and the possibility of U.S. Citizenship and Immigration Services (USCIS) error, the AAO made a determination to review on certification the director's denial of the I-140 petition. Accordingly, the AAO issued notice of the certification and granted the petitioner time to submit a brief pursuant to 8 C.F.R. § 103.4(a)(2). That matter is currently pending before the AAO.

The issue now before the AAO is whether USCIS has entered a final decision on the petitioner's I-140 petition, rendering the beneficiary ineligible for H-1B status beyond the normal six-year limit pursuant to sections 106(a) and (b) of AC21, as amended.

The AAO notes that 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 DOJ21, removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant 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 § 11030A(a) of DOJ21, § 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

¹ The AAO notes that the director also denied the corresponding I-539 application for extension of stay that had been filed on behalf of the beneficiary's husband. Although the AAO has no jurisdiction over the Form I-539, the application accompanies the appellate record and will be returned to the director for action consistent with this decision.

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 § 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.

(Emphasis added.)

On the question of finality, the AAO finds that a petition denial is not final as long as that decision may be reversed on direct appeal or certification. In other words, a denial is not a final decision for purposes of section 106(b) of AC21 until the petitioner waives the right to appeal, i.e., the 33-day appeal period expires without a properly filed appeal, or the AAO enters a decision on a properly filed appeal. Additionally, as the AAO may ultimately reverse a decision that is certified for review pursuant to 8 C.F.R. § 103.4, a certified decision is not final until the AAO enters a decision on the matter. *See* Immigration and Naturalization Service, General Counsel Op. No. 91-23, "Determination Of Date Of Final Decision In Denied Cases" 1991 WL 1185134 (February 21, 1991).

Therefore, as the petitioner's I-140 petition is currently pending before the AAO on certification, a final decision on the I-140 petition has not been made and the beneficiary is entitled to an extension of stay in H-1B status for an additional year under section 106(b) of AC21, as amended.

The facts support approval of the present petition. Thus, the beneficiary is eligible for a one-year extension pursuant to sections 11030A(a) and (b) of DOJ21 as it amended sections 106(a) and (b) of AC21, and the