

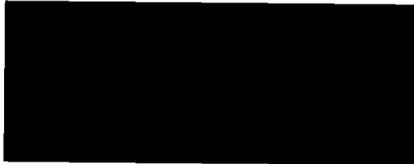
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 06 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: SELF-REPRESENTED

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in IT consulting, that it was established in 1998, that it employs five persons, and that it has a projected gross annual income of \$800,000. It seeks to extend the employment of the beneficiary as a senior programmer analyst from December 18, 2008 to December 17, 2009. Accordingly, the petitioner 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 record shows that the beneficiary was present in the United States in H-1B status for more than six years as of the date this petition was filed. An initial Application for Alien Employment Certification (Form ETA 750) was filed by the petitioner on behalf of the beneficiary on October 27, 2003. This Alien Employment Certification application was certified on October 6, 2006.

The petitioner then filed a Form I-140, Immigrant Petition for Alien Worker, on November 30, 2006. However, USCIS records show that this I-140 petition was denied on February 16, 2008.

On December 17, 2008, approximately ten months after the I-140 petition was denied, the petitioner filed the instant petition, requesting a continuation of previously approved employment without change with the same employer and requesting the extension of the beneficiary's stay since the beneficiary held this status at the time the petition was filed.

The director denied the petition on February 18, 2009, finding that the beneficiary is not entitled to another H-1B extension pursuant to section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) because the I-140 petition was denied and the petitioner did not appeal the decision.

On appeal, the petitioner alleges that the I-140 petition was not appealed because the petitioner was away due to a death in the family between February 29, 2008 and March 20, 2008. The petitioner submitted evidence that it filed a Motion to Reopen and Reconsider the I-140 petition on March 11, 2009, over one year after the I-140 petition was denied and nearly one year after the petitioner claims to have returned to the office. However, USCIS dismissed this Motion to Reopen and Reconsider the I-140 petition on April 8, 2009.

The petitioner has also presented evidence that on May 2, 2009 it filed another I-140 petition on behalf of the beneficiary based on a second certified labor certification application that was filed on October 16, 2008, only two months prior to the present H-1B petition and request for extension. USCIS records show that this later I-140 petition was approved on May 21, 2009. However, the approved I-140 petition was not based on the same application for labor certification as the first I-140 petition.

Therefore, as the petitioner's motion to reopen and reconsider the first I-140 petition was dismissed and as the May 2, 2009 I-140 petition was not based on the same labor certification application as the first I-140 petition, the decision to deny the first I-140 petition became final on February 16, 2008.

On appeal, the petitioner has submitted a letter from [REDACTED] dated March 11, 2009. However, no Form G-28 is on file from [REDACTED] with respect to the present petition and [REDACTED] did not prepare or sign the Form I-290B. Therefore, [REDACTED] is not an authorized representative of the petitioner. Nevertheless, the AAO will consider [REDACTED] letter to be part of the record. [REDACTED] argues that because the present H-1B petition is a request for the beneficiary to obtain an eleventh year extension, and not a seventh year extension, "[t]he provisions concerning seventh-year H1B extensions cited in the Notice of Decision should not apply to [the beneficiary's] case." [REDACTED] does not cite to any provisions or provide any basis for this argument.

The primary issue for consideration by the AAO is whether the beneficiary was entitled to an additional year of H-1B time under AC21.

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 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 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.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990).

Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

Contrary to the argument of [REDACTED] this language under AC21 is not limited to H-1B petitions requesting a seventh year extension of stay, but may be applied to any petition for an additional year in H-1B status beyond the sixth year limitation under section 214(g)(4). There is no mention anywhere in the statutory language that AC21 is not intended to apply to eighth year H-1B extensions and beyond. To interpret AC21 accordingly is contrary to the plain language of the statute.

As discussed previously, the petitioner's first I-140 petition was denied on February 16, 2008. This is also the date that the decision to deny the first I-140 petition became final as the petitioner's motion to reopen and reconsider the I-140 petition was dismissed. An additional I-140 petition filed on May 2, 2009 was ultimately approved on May 21, 2009. However, this approved I-140 petition was based on a different certified labor certification application with a priority date of October 16, 2008, which had not been pending for 365 days at the time the present H-1B petition was filed.

It is clear under § 106(b) of AC21 that the denial of the first I-140 petition on February 16, 2008 constituted a final decision rendering the beneficiary ineligible to extend her stay for an additional year in H-1B status. Additionally, the petitioner has not established that any other petition or application filed for the beneficiary qualifies her for an additional year in H-1B status under AC21.

Accordingly, the director did not err as a matter of law in concluding that the beneficiary is not eligible for an H-1B extension of stay under section 214(g)(4) of the Act. Therefore, the appeal is dismissed. The petition is denied.

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