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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**

D2

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2010

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

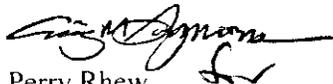
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

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,  
  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a for-profit enterprise engaged in software and services that seeks to employ the beneficiary as a computer software engineer. 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 director denied the petition, finding that the beneficiary was not exempt from section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) pursuant to section 106(a) 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) the because a final decision was made on the alien’s employment-based petition. *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).

In general, section 214(g)(4) of the Act 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 § 11030(A)(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 11030(A)(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The Attorney General 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.

The record indicates that the beneficiary's prior H-1B status expired on March 27, 2008. On March 27, 2009, the petitioner applied for an extension of H-1B status for the beneficiary which would have placed the beneficiary beyond her six-year limit. The director noted that U.S. Citizenship and Immigration Services (USCIS) records indicate that a Form I-140 Immigrant Petition for Alien Worker [REDACTED] filed with the Nebraska Service Center was denied on January 14, 2009. The director further noted that an appeal of that denial [REDACTED] filed on February 17, 2009 was dismissed on April 14, 2009.

On appeal, counsel states that because the beneficiary meets the terms of AC21 and DOJ21, i.e., the beneficiary is the beneficiary of an employment-based immigrant petition or an application for adjustment of status and the application for labor certification was filed more than 365 days prior to filing for the seventh-year extension, the director's decision was in error.

As a preliminary matter, the AAO concurs with counsel's contention that the director erred in not evaluating the petitioner's eligibility under AC21.<sup>1</sup> Specifically, the record demonstrates that at the time this extension request was filed on March 27, 2009, the appeal of the denied I-140 petition filed on February 17, 2009 had not been adjudicated. Counsel correctly asserts that USCIS will not consider a decision to be final for purposes of this analysis when a timely and non-frivolous I-140 appeal is pending. However, for the reason set forth below, the petition may not be approved.

If the alien is not otherwise eligible for an extension of H-1B status, then USCIS will not approve a request for extension of H-1B status. The regulations state in pertinent part, "A request for a petition extension may be filed *only if the validity of the original petition has not expired.*" 8 C.F.R. § 214.2(h)(14) (Emphasis added). In part two of the Form I-129, the petitioner marked box b, "Continuation of previously approved employment without

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<sup>1</sup> The director's error is harmless, however, because the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

change with the same employer.” In other words, the petitioner filed the instant petition as a petition extension, as opposed to a petition for new employment. Moreover, the petition was filed in this case one year following the expiration of the original petition. The regulations, therefore, are clear, and do not allow for a petition extension to be granted when the prior H-1B petition it seeks to extend is no longer valid. As such, the instant petition must be denied on this basis.

Moreover, even if the petition were filed as a petition for new employment, section 106(a) of AC21, as amended, clearly requires the alien seeking exemption from the limitation in section 214(g)(4) of the Act to be a “nonimmigrant.” As the beneficiary was not at the time an alien who was within one of the classes of aliens under section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15), she must be deemed an immigrant and thus ineligible for the claimed exemption under section 106(a) of AC21. For this additional reason, the petition must be 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.