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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: EAC 08 133 51628 Office: VERMONT SERVICE CENTER Date: **FEB 25 2010**

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

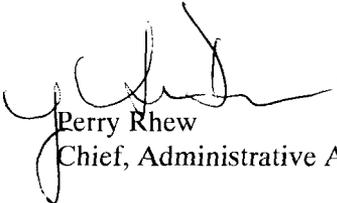
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 is a seafood importer and wholesaler that seeks to continue its employment of the beneficiary as a purchasing supervisor. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record indicates that the beneficiary entered into H classification on May 1, 2002, and that such status ended on April 30, 2008. The issue before the AAO is whether the beneficiary is eligible for additional time in H-1B status based upon the American Competitiveness in the Twenty-First Century Act (AC-21)¹, as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ-21).²

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC-21 removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays, and DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

- (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

¹ American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

² Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

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.

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states the following:

- (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.

As was noted previously, the record indicates that the beneficiary entered into H classification on May 1, 2002. The record also indicates that the petitioner filed an application for labor certification on behalf of the beneficiary on January 14, 2008, and that that application was certified on June 6, 2008, with validity through December 3, 2008. On the basis of that certification, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary, on August 28, 2006.³ However, as the instant petition was filed on April 3, 2008, neither the application for labor certification nor the Form I-140 were filed more than 365 days before the instant H-1B petition was filed and, therefore, neither filing affords the beneficiary benefits under AC-21 as amended by DOJ-21.

The record indicates further that the petitioner had filed an earlier application for labor certification on behalf of the beneficiary on October 16, 2003, and that that application was certified on March 9, 2006. On the basis of that certification, the petitioner filed a Form I-140 on behalf of the beneficiary, on May 11, 2006.⁴ However, that Form I-140 was denied on April 17, 2007. Accordingly, this petition affords no benefits to the beneficiary under AC-21 as amended by DOJ-21, as section 106(b)(1) of AC-21, as amended by DOJ-21 specifically indicates that the one-year extension of stay should not be granted once a final decision is made to deny the I-140 immigrant petition that was filed pursuant to the granted labor certification. Since the Form I-140 was

³ See Form I-140, SRC 08 261 51137, filed August 28, 2008.

⁴ See Form I-140, LIN 06 164 5f2404, filed May 11, 2006, and denied April 17, 2007.

denied based upon the labor certification that was certified on March 9, 2006, the petitioner may not use that labor certification for the current H-1B extension petition. Neither the plain language of the statute nor the pertinent legislative history indicate that Congress intended to permit an alien beneficiary to have his or her stay indefinitely extended in a temporary, nonimmigrant classification based on a prior, approved labor certification once the I-140 petition filed using that labor certification is denied. To otherwise permit a petitioner to thereafter repeatedly file I-140 petitions, whether frivolous or not, based upon that same labor certification in order to permit the indefinite extension of stay in a temporary H-1B nonimmigrant status of the alien beneficiary would be demonstrably at odds with the Act as a whole, with regard to immigrant versus nonimmigrant classification, as well as with the plain language of Section 106 of AC-21, as amended by DOJ-21.

The director did not err as a matter of law or policy in concluding that the beneficiary is not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants under section 214(g)(4) of the Act. Therefore, the beneficiary is ineligible for additional time in H-1B status on that basis, and this petition was properly 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.