

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

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: JUN 01 2010

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:

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 \$585. 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 on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a high-end wireless voice/data service provider that seeks to temporarily employ the beneficiary as a product marketing manager, and extend the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 requested extension would place the beneficiary beyond the six-year limit imposed by section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

The director denied the petition because the petitioner had not demonstrated eligibility to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. On appeal, counsel contends that the director erroneously denied the petition.

In general, section 214(g)(4) of the Act provides that "[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years." However, the amended "American Competitiveness in the Twenty-First Century Act" (AC21) removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by sections 11030(A)(a) and (b) of the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21), reads as follows:

- (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.
- (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 of proceeding before the AAO includes (1) Form I-129 and supporting documentation for a seventh year extension, filed on April 1, 2008; (2) the director's request for evidence (RFE); (3) counsel's response with additional documentation; (4) the notice of decision, dated June 18, 2008; and (5) Form I-290B and counsel's appeal brief.

The record indicates that the beneficiary has been in the United States in H-1B classification since May 1, 2002. On April 1, 2008, the petitioner applied for a three-year extension of H-1B status, valid from May 1, 2008 until April 30, 2011, for the beneficiary which would have placed the beneficiary beyond her six-year limit. In response to the director's request for evidence of eligibility for extension, the petitioner submitted evidence demonstrating that an Immigrant Petition for Alien Worker, Form I-140 (LIN 08 062 51715) was filed with the Nebraska Service Center on behalf of the beneficiary on December 18, 2007. The petitioner further submitted a copy of an approval notice, demonstrating that the petition was approved on July 16, 2008.

In denying the petition, the director noted that the I-140 petition was pending at the time of filing, and inserted language regarding the ability of an individual to adjust status with an approved I-140 petition. On appeal, counsel relies on this brief statement by the director as an erroneous basis for denying the petition. However, upon review, this language appears to be informative at best, and not the basis for the director's denial.

The director's decision correctly concludes that the petitioner has not demonstrated eligibility for extension of the beneficiary's H-1B nonimmigrant status under sections 104(c) or 106(a) of AC21, as amended. On appeal, counsel erroneously relies on the assumption that the mere filing of an employment-based petition constitutes eligibility for extension beyond the 6th year under AC21.

The extension request in this matter was filed on April 1, 2008. The I-140 employment-based petition was filed on behalf of the beneficiary on December 18, 2007. While the petitioner correctly asserts that an employment-based petition was pending at the time of filing, the petitioner overlooks the fact that the I-140 petition had not been pending at least than 365 days prior to the filing of the instant extension request.

The beneficiary is not eligible for a 7th year extension of status. The Form I-140 Immigrant Petition for Alien Worker that was filed on the beneficiary's behalf was filed on December 18, 2007, approximately three months before this application for extension of status was filed. Additionally, the beneficiary did not have a labor certification pending for at least 365 days when the current petition for H-1B extension was filed, since the labor certification in this matter was not filed until October 8, 2007, 174 days prior to the filing of the H-1B extension. Therefore, the beneficiary does not meet the requirement that (1) 365 days or more have passed since the filing of any application for labor certification that is required or used by the alien to obtain status as an employment based immigrant; or (2) 365 days or more have passed since the filing of the employment based immigrant petition (Form I-140). See § 106 of AC21, as amended by § 11030(A) of

DOJ21; *see generally* Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313)*. HQPRD 70/6.2.8-P (May 12, 2005). Moreover, as the beneficiary's employment-based immigrant petition was not approved until July 16, 2008, a date subsequent to the filing of the instant petition, it has not been established that the beneficiary was eligible for immigrant status, with or without regard to per-country limitations, at the time the H-1B petition was filed as required for an extension of H-1B status under section 104(c) of AC21. Eligibility for a benefit sought must be established at the time a petition is filed. *See* 8 C.F.R. § 103.2. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, the AAO shall not disturb the director's denial of the petition.

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.