

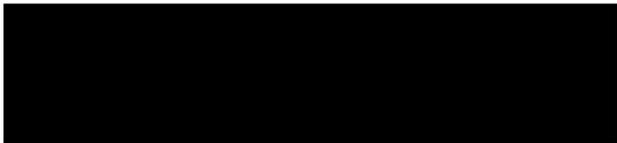
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

D2



FILE:



Office: VERMONT 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: 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 \$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 service center director denied the nonimmigrant visa petition. The matter is now before the AAO on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that it is a grocery wholesaler and that it seeks to extend its employment of the beneficiary. 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 director denied the petition on the bases that the beneficiary had been in H or L nonimmigrant status for the maximum six years permitted and did not otherwise qualify for an extension of his visa status.

United States Citizenship and Immigration Service records show that the beneficiary has been present in the United States in H-1B status since November 10, 1999. The beneficiary has since been approved for H-1B status from that date until May 20, 2008. The petitioner filed the instant petition, requesting an extension of the beneficiary's stay in H-1B status from July 9, 2001 to July 9, 2020 without change and with the same employer.

On September 25, 2008 the service center issued a request for additional evidence in this matter. The service center requested that the petitioner demonstrate either (1) that 365 days or more have passed since the filing of an application for labor certification for the beneficiary, or (2) that 365 days or more have passed since the filing of a Form I-140 immigrant petition for alien worker.

In response, the petitioner's director of human resources submitted a letter dated November 12, 2008. In it, she asserted that the petitioner has been seeking permanent resident status for the beneficiary since 2003, but that due to a series of missteps a series of labor certifications submitted on the beneficiary's behalf had been withdrawn. She did not provide evidence to demonstrate, nor did she even assert, either (1) that 365 days or more have passed since the filing of a pending application for labor certification for the beneficiary, or (2) that 365 days or more have passed since the filing of a Form I-140 immigrant petition for alien worker based on an approved labor certification. The petitioner's human resources director requested, nevertheless, that the instant nonimmigrant visa petition be approved.

On January 6, 2009, the director denied the visa petition. The director observed that the petitioner's current request to employ the beneficiary as an H-1B nonimmigrant would place the beneficiary beyond the six-year limit. The director noted that the only pending application for permanent labor certification had been filed on May 18, 2008 and had not, therefore, been pending for 365 or more days when the instant visa petition was filed on June 10, 2008. The director determined that the petitioner also had not filed a Form I-140 immigrant visa petition to obtain lawful permanent resident status for the beneficiary. Thus, the director determined that the beneficiary was ineligible for an extension of H-1B nonimmigrant status under either section 106 of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First

Century Department of Justice Appropriations Authorization Act” (DOJ 21) or section 104(c) of 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:

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<sup>1</sup> 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

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<sup>1</sup> The petitioner requested a 19-year extension of the beneficiary’s H-1B status. The instant petition is a request for an extension past the general six-year limit on H-1B visas. The maximum period permissible for such extensions, pursuant to § 106(b) of AC21, is one year. Thus, even if the instant petition were approvable it would be approvable for a maximum of one year.

(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).

In this case, as the petitioner filed the instant petition within one month of when it filed its pending application for labor certification, 365 days had not elapsed from the date the petitioner filed the labor certification application to the date the petitioner filed the Form I-129 request to extend the employment of the beneficiary. Further, the petitioner does not have a pending Form I-140 immigrant petition in which it seeks permanent resident status for the beneficiary.

Accordingly, the director did not err in concluding that the beneficiary was not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants under section 214(g)(4) of the Act under either sections 104(c) or 106 of AC21, as amended. Therefore, the appeal will be dismissed and the petition will be denied on this basis.

The record suggests other issues that were not raised in the decision of denial. The approved labor certification application (LCA) submitted to support the visa petition was issued for employment of a warehouse clerk. The Form I-129 visa petition stipulates that the petitioner wishes to hire the beneficiary as a transportation clerk. The petitioner has failed to establish that those job titles describe the same job. Therefore, whether the approved LCA corresponds to the visa petition is unclear. *See* 20 C.F.R. § 655.705(b). Without evidence establishing this as fact, the instant petition could not be approved. However, in view of the finding, set out in detail above, that the petition must be denied because the beneficiary is not eligible for an extension beyond the six-year limit, the AAO will not further address this additional ground for denial.

Further still, as was noted above, the petitioner seeks to hire the beneficiary as either a warehouse clerk or a transportation clerk. The evidence submitted is insufficient to show that either position qualifies as a specialty occupation within the meaning of section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1); and 8 C.F.R. § 214.2(h)(4)(iii)(A). Because the beneficiary's ineligibility for an extension beyond the six-year limitation on H-1B visas is dispositive, however, the AAO will not engage in any additional analysis of the specialty occupation issue.

Finally, beyond the decision of the director, the instant extension petition was filed on June 10, 2008, 21 days after the prior H-1B petition validity period had ended. As a request to extend an H-1B petition "may only be filed if the validity period of the original petition has not expired," the instant petition must be denied on this additional basis. 8 C.F.R. § 214.2(h)(14).

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