

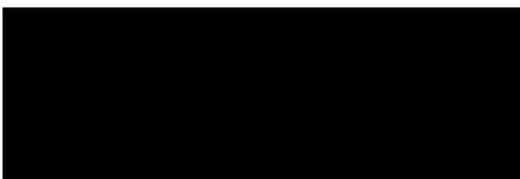


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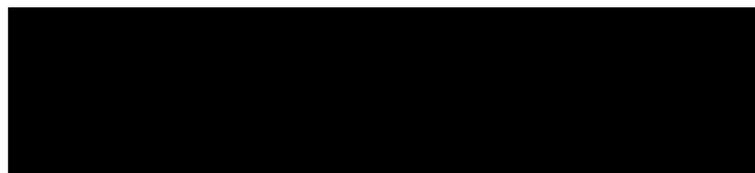


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2010

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:



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,

*Per Michael T. Kelly*  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director 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 an insurance company. It seeks to extend the employment of the beneficiary as an actuary from December 30, 2008 to December 29, 2011. 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 basis that the beneficiary had been in H or L nonimmigrant status for the maximum time permitted and that no exception to that general rule qualifies him for an extension of his visa status. On appeal, counsel asserted that the beneficiary qualifies for an extension of his visa status pursuant to section 106(a) of the American Competitiveness in the Twenty-First Century Act (AC21).

Counsel admitted on appeal that the beneficiary began working in H-1B status on December 29, 2002, and that six years expired on December 29, 2008.<sup>1</sup> Counsel asserted that while the beneficiary was in H-1B status a Form ETA 750 Application for Alien Employment Certification was filed on behalf of the beneficiary's wife and certified, and that a subsequent Form I-140, Immigrant Petition for Alien Worker was also filed and approved for her. Counsel further asserted that the beneficiary of the instant petition is also a derivative beneficiary of his wife's Form I-140 petition; that the only impediment to the beneficiary's wife receiving her EB-3 immigrant visa is the per country limitation imposed by section 202(a)(2) of the Act; and that the Form ETA 750 was filed more than 365 ago, and prior to the filing of the instant Form I-129 petition.<sup>2</sup>

The petitioner filed the instant petition, requesting extension of previously approved employment without change with the same employer. Counsel argued that because the beneficiary is a derivative beneficiary of a petition filed pursuant to section 203(b) of the Act, an extension of his H-1B status is available to him pursuant to section 106(a) of AC21.

On December 22, 2008, the director denied the petition, noting that the petitioner's current request to employ the beneficiary as an H-1B nonimmigrant would place the beneficiary beyond the six-year limit, and stating that the exception to the six year limit contained in AC21 does not extend to derivative beneficiaries.

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<sup>1</sup> Although counsel stated in a footnote to his appeal brief that the beneficiary would have been eligible for approximately 30 days of recapture time, counsel provided no evidence in support of that assertion, and it is beyond the scope of this appeal, as it was not presented as an issue for the service center director's consideration before her decision.

<sup>2</sup> Although few of counsel's assertions are substantiated in the record, they are taken as true, *arguendo*, for the limited purpose of addressing counsel's argument.

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 the “Twenty-First Century Department of Justice Appropriations Authorization Act” (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).

The clear language of the statute does not support counsel’s assertion in the instant case. Section 106(a) of AC21 states that the six-year limitation shall not apply to an alien who has had a labor certification pending in a case in which certification is required or used by that alien to obtain status under section 203(b) of the Act. The beneficiary in the instant case is not seeking status under

section 203(b) of the Act. The beneficiary is attempting to obtain derivative status under section 203(d) of the Act as a qualifying family member. The exception to the six-year limit is not available to this beneficiary.

The director correctly found that the beneficiary has been in H nonimmigrant status for the maximum six years permitted and that no exception qualifies him for an extension of his visa status beyond that six year limit. The petition was correctly denied on that basis, which has not been overcome on appeal. The appeal will be dismissed and the petition denied.<sup>3</sup>

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

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<sup>3</sup> As an administrative matter unrelated to the merits of the appeal, the AAO denies counsel's request to consolidate this and another appeal, as there is no statutory or regulatory basis for the AAO to honor the request.