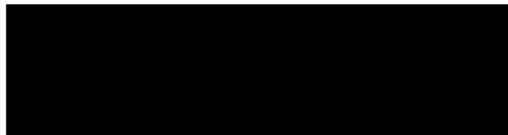


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



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FILE: WAC 08 248 51357 Office: CALIFORNIA SERVICE CENTER Date:

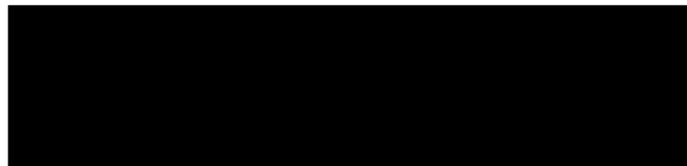
APR 04 2011

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 \$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,

Michael F. Kelly
Perry Rhew
for Chief, Administrative Appeals Office

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

The petitioner is a wholesale long distance phone service provider with 35 employees that seeks to extend its authorization to employ the beneficiary in a specialty occupation from September 19, 2008 to September 19, 2009. The petitioner, therefore, endeavors to continue to classify the beneficiary as a nonimmigrant worker 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 petitioner requests an extension beyond the normal six-year time limit based on sections 106(a) and (b) 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"). Pub. L. No. 107-273, §11030A (2002).

The director determined that the beneficiary had already been employed in the United States in "H" or "L" status for more than six years, that is, since September 20, 2001, and that the beneficiary is not entitled to an H-1B extension under sections 106(a) and (b) of AC21, as amended.

As will be discussed below, the AAO finds that the director's decision to deny the extension petition was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

The petitioner's permanent labor certification application was certified on June 8, 2007. The petitioner initially filed an I-140 petition (SRC-07-800-23358) on the basis of the certified labor certification application on July 26, 2007, but this I-140 petition was denied. On appeal the petitioner has provided a copy of a second Form I-140 petition that was ultimately approved (SRC-08-800-36623). The petitioner and counsel argue that because the initial I-140 petition was denied without prejudice so that the petitioner could re-file the petition with the appropriate filing fee, the beneficiary is eligible for another H-1B extension under AC21 based on the second I-140 petition. This second I-140 petition was submitted by the petitioner on September 12, 2008, and was based on the same certified labor certification application on which the first I-140 petition was based. The AAO notes that all of the I-140 petitions filed by the petitioner on behalf of the beneficiary have been consolidated by USCIS into the beneficiary's A file (A88 679 861) and, as such, they are part of the record. The record also indicates that the petitioner submitted a third I-140 petition (LIN 10 156 50449) on behalf of the beneficiary on May 17, 2010, which was approved on June 30, 2010. This third I-140 petition was based on a new labor certification application that was filed by the petitioner for the beneficiary on January 21, 2009 and was certified on November 19, 2009.

As of the date of the director's decision on February 18, 2009, the second I-140 petition was still pending, but had not yet been approved. The director determined that because the first I-140 petition had been denied and the petitioner did not file an appeal of the denial of this first petition, the final decision to deny the initial I-140 petition rendered the beneficiary ineligible for an extension of H-1B nonimmigrant status under section 106(a) of AC21 as amended by DOJ21. Counsel timely filed an appeal of the director's decision regarding the present H-1B petition on March 3, 2009.

The second I-140 petition, which was approved on March 26, 2009, was filed on September 12, 2008. However, the director did not mention or otherwise acknowledge the existence of the second I-140 petition in her decision.

On appeal, counsel for the petitioner asserts that the director did not address the petitioner's second I-140 petition in her decision, even though the petitioner attached confirmation of filing the second I-140 petition along with a copy of the certified labor certification application. The AAO notes that the second I-140 petition's file number was referenced in an addendum to the Form I-129, however the first I-140 petition, which was denied, was not referenced by the petitioner. Counsel argues that the second I-140 petition, which was approved, qualifies the beneficiary for an H-1B extension under AC21.

The AAO notes that, as discussed above, the initial I-140 petition filed by the petitioner on behalf of the beneficiary is part of the record. Counsel neglects to mention on appeal that the basis of this denial is that the petitioner failed to demonstrate an ability to pay the proffered wage. Even though the director states in the denial that the decision is issued without prejudice to the filing of a new petition with an appropriate fee, this decision was based on the merits, and therefore constitutes a final decision as an appeal was not filed.

Here is a general chronological summation of the relevant processing history related above:

- May 17, 2002: Permanent labor certification application #1 filed.
- June 8, 2007: Permanent labor certification application #1 certified.
- July 26, 2007: First I-140 petition filed, on basis of permanent labor certification application #1.
- April 28, 2008: First I-140 petition denied, without prejudice.
- Denied I-140 petition became final when no appeal was filed within the allotted time.
- September 12, 2008: Second I-140 petition filed, based upon the same labor certification (#1) as the first petition.
- September 18, 2008: The present I-129 H-1B petition filed.
- February 18, 2009: The present I-129 H-1B petition denied.
- March 3, 2009: Appeal filed on denial of the present I-129

petition.

- March 26, 2009: Second I-140 petition approved.

The issue now before the AAO is whether the beneficiary is eligible for H-1B status beyond the normal six-year limit pursuant to sections 106(a) and (b) of AC21, as amended.

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:

(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) (emphasis added to identify sections amended by DOJ21).

The AAO finds that because the first I-140 petition was denied due to the failure of the petitioner to demonstrate an ability to pay the proffered wage, even though the second I-140 petition, which was based on the same certified labor certification application as the first I-140 petition, was ultimately approved, the denial of the first I-140 petition constitutes a final decision to deny the petition under § 106(b) of AC21 because the petitioner failed to appeal the initial I-140 decision.

The director's statement that the first I-140 petition was denied without prejudice does not mitigate the finality of the director's decision to deny the I-140 petition once the petitioner chose not to appeal this decision. Moreover, at the time the present petition was filed, the petitioner's request for the H-1B petition to be approved under AC21 was based solely on the petitioner's second I-140 petition that had not yet been adjudicated. As stated previously, the first I-140 petition had been denied prior to this H-1B extension petition being filed and constituted a final decision as the petitioner failed to file an appeal. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Therefore, as only a final decision to deny the petitioner's I-140 petition on behalf of the beneficiary existed at the time the present H-1B petition and request for extension were filed, the director was correct to deny the present petition.

Accordingly, the director did not err 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 appeal is dismissed. The petition is 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.