

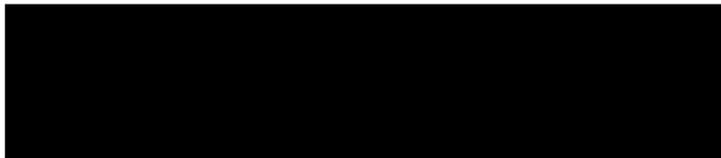
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



D2

Date: APR 18 2011 Office: VERMONT SERVICE CENTER FILE: EAC 07 160 54569

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.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 sustained. The petition will be approved.

The petitioner is a corporation doing business as an information technology (IT) firm specializing in software services. It seeks to continue to employ 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, concluding that the beneficiary is not eligible for an extension of stay in H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21), because the I-140 petition upon which the petitioner bases its claim had been denied by the time the director issued his decision on the present case.

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, as amended by the DOJ21, temporarily 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 record of proceeding reveals the following salient facts. On March 5, 2007, the petitioner filed an I-140 petition on behalf of the beneficiary with a priority date of November 23, 2004, and it subsequently filed the present H-1B petition on May 14, 2007, requesting a one-year extension period of July 1, 2007 to June 30, 2008. While the present petition was pending adjudication, USCIS denied the I-140 petition on July 11, 2007, and the petitioner filed a timely and otherwise properly filed appeal of that denial on July 30, 2007. Thereafter, the director denied the present H-1B petition, on August 21, 2007, stating in pertinent part:

The record of proceeding does establish that 365 days or more have elapsed since the filing of a labor certification application[;] however, the Immigration Petition (Form I-140) which was filed on behalf of the beneficiary was denied on July 11, 2007.

AC21 section 106 provides for an extension in one-year increments until such time as a final decision has been made on either the labor certification or a petition which is based on the underlying labor certification. Since the I-140 was denied, the beneficiary no longer qualifies for an extension of stay.

On appeal, the petitioner requests that the AAO delay its decision until the I-140 appeal has been decided, indicating that a decision on the petitioner's eligibility under the I-140 petition will not be final until the outcome of that appeal has been determined.

The AAO notes that regulations implementing the provisions of AC21 as amended have not yet been issued. In the absence of an agency regulation addressing when a decision to deny an I-140 petition would be "final" within the meaning of section 106(b) of AC21 as amended, the AAO concludes that a petition denial is not final as long as that decision may be reversed on direct appeal or certification. In other words, a denial is not a final decision for purposes of section 106(b) of AC21 until the petitioner waives the right to appeal, i.e., the 18 or 33-day appeal period expires without a properly filed appeal, or the AAO enters a decision on a properly filed appeal. Additionally, as the AAO may ultimately reverse a decision that is certified for review pursuant to 8 C.F.R. § 103.4, a certified decision is not final until the AAO enters a decision on the matter. See Immigration and Naturalization Service, General Counsel Op. No. 91-23,

“Determination Of Date Of Final Decision In Denied Cases” 1991 WL 1185134 (February 21, 1991).<sup>1</sup>

In this matter, as a “final decision” had not yet been issued at the time the director denied the present H-1B petition, the I-140 was still pending for purposes of the requested AC21 extension. Therefore, contrary to the director’s decision, the beneficiary was still entitled at that time to an AC21 extension of stay in H-1B nonimmigrant status. Accordingly, the appeal will be sustained, and the petition will be approved.

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 sustained that burden.

**ORDER:** The appeal is sustained. The petition is approved.

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<sup>1</sup> It is further noted, however, that there is a difference between the status of a petition and the finality of a decision. Although the filing of an appeal has the effect of staying the decision such that it is not considered to be a final agency action, once a service center, for example, has completed its adjudication of a matter, appealing the decision will not revert the petition into an “un-adjudicated” status. Moreover, motions, as opposed to appeals, do not stay the denial of a petition and, as such, an un-appealed service center denial or an AAO decision to dismiss an appeal will be considered the final agency action unless a motion to reopen or reconsider is granted. *See* 8 C.F.R. § 103.5(a)(1)(iv).