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
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

b2

Date: JUN 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it is an accounting firm, that it was established in 1985, that it employs two people, and that it has a gross annual income of $143,000. It seeks to extend the employment of the beneficiary from January 18, 2009 to January 18, 2012. 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 record shows that the beneficiary was present in the United States in H-1B status for more than six years as of the date this petition was filed. An Application for Alien Employment Certification (Form ETA 750) was filed by the petitioner on behalf of the beneficiary on September 10, 2008. Counsel for the petitioner states that the Form ETA 750 is still pending.

On January 16, 2009, prior to the expiration of the beneficiary's H-1B status on January 18, 2009, the petitioner filed the instant petition, requesting a continuation of previously approved employment without change with the same employer and requesting the extension of the beneficiary's stay since the beneficiary held this status at the time the petition was filed.

Counsel admits both in response to the RFE and on appeal that the Form ETA 750 had only been pending approximately five months at the time the present petition was filed. However, counsel argues that the beneficiary should still be able to extend her H-1B status under AC21 beyond six years because the U.S. Department of Labor is taking longer than 60 to 90 days to process PERM applications.

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, section 106(a) 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), 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.

Pub. L. No. 107-273, § 11030A, 116 Stat. 1836 (2002) (emphasis added.)

In this matter, the AAO finds that less than 365 days elapsed from the date the petitioner filed the labor certification application to the date the petitioner filed the present Form I-129, request to extend the employment of the beneficiary. Therefore, the beneficiary is ineligible for the AC21-based exemption from the limitation on H-1B status contained in section 214(g)(4) of the Act. Whether or not the U.S. Department of Labor is processing PERM applications within a certain timeframe is irrelevant because, under the plain meaning of AC21, USCIS does not have authorization to extend the beneficiary's stay in H-1B status beyond six years under § 106 of AC21, as amended, where 365 days have not elapsed between the date the labor certification application was filed and the date the present H-1B petition and request for extension was filed. *See* 8 C.F.R. § 103.2(b)(1) (requiring eligibility to be established at the time of filing).

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