



U.S. Citizenship
and Immigration
Services

*Administrative Appeals Office
U.S. Citizenship and Immigration Services
Washington, DC 20529-2090*

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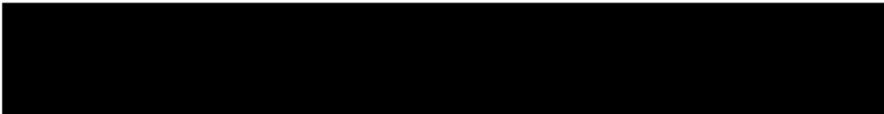
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Date: **JUN 08 2012**

Office: CALIFORNIA SERVICE CENTER



IN RE:



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,

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 dismissed as the matter is now moot.

The petitioner describes itself as a company engaged in selling, marketing, and distributing fine chemicals and pharmaceuticals. The petitioner seeks to employ the beneficiary as a manager of inventory control, and to classify him 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).

On September 27, 2010, the director denied the petition, finding that the petitioner failed to establish that the proffered position is a specialty occupation. On appeal, counsel asserts that the director's decision was erroneous and contends that the position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Although the director's denial was based on the petitioner's failure to establish the proffered position as a specialty occupation, a review of the record demonstrates a more critical issue pertaining to the beneficiary's eligibility for employment in H-1B status. Specifically, the AAO finds that the petition cannot be approved, because the petitioner failed to establish that the beneficiary is exempt from the six-year limitation contained in section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) pursuant to sections 104(c) and 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). *See* Pub. L. No. 106-313, §§ 104(c) and 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002).

The record shows that the beneficiary is currently an adjustment of status applicant, who filed the Form I-485 (LIN 08 003 53915), Application to Register Permanent Residence or Adjust Status (Form I-485), on August 16, 2007. Since filing the Form I-485, the beneficiary has not had his H-1B status extended, and the last H-1B petition (WAC 07 195 52988) expired on June 16, 2008.

The following is a list of the Forms I-129(H), Petition for a Nonimmigrant Worker, filed on behalf of the beneficiary and their validity dates:

- 1) WAC 01 137 55683 (06/01/2001 to 02/28/2004);
- 2) WAC 02 279 52309 (09/15/2003 to 09/15/2005);
- 3) WAC 06 070 50472 (02/24/2006 to 04/30/2007);
- 4) WAC 07 195 52988 (06/17/2007 to 06/16/2008).

Thus, the beneficiary was present in the United States in H-1B status for a period exceeding six years as of the date this petition was filed on September 22, 2010.

The AAO notes that in general section 214(g)(4) of the Act provides that: “[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years.” However, AC21, as amended by 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.

Counsel cites section 106(a) of AC21 to claim that the beneficiary is eligible for H-1B status beyond the sixth year in one year increments if 365 days or more have elapsed since filing of the labor certification or Form I-140, Immigrant Petition for Alien Worker (Form I-140).

As amended by section 11030A(a) of DOJ21, section 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 section 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. 106-313, § 106(a) and (b), 114 Stat. at 1253-54; Pub. L. No. 107-273, § 11030A, 116 Stat. at 1836-37 (emphasis added).

The record shows that the Form I-140 [REDACTED] was filed on behalf of the beneficiary on May 31, 2007, and approved on June 8, 2007 with priority date April 11, 2007 in third preference as a skilled worker or professional. Thus, 365 days or more have elapsed since filing the Form I-140. However, the beneficiary does not qualify for an exemption under section 106(a) of AC21. Specifically, the exemption applies only to a "nonimmigrant alien," and the beneficiary does not meet the definition of a "nonimmigrant." Section 101(a)(15) of the Act defines "immigrant" as "every alien except an alien who is within one of the following classes of nonimmigrant aliens," and lists different categories of nonimmigrants. Here, as the beneficiary is currently an applicant for adjustment of status and as he was not classified as a nonimmigrant under section 101(a)(15) of the Act at the time the instant petition was filed, he is considered to be an immigrant under the Act. Therefore, since the beneficiary is an "immigrant alien" under the Act, the beneficiary is ineligible for an exemption from the limitation contained in section 214(g)(14) of the Act pursuant to section 106(a) of AC21.

While counsel cited section 106(a) of AC21 as the basis for the beneficiary's exemption from section 214(g)(4) of the Act, the petitioner requested a three-year period of employment on the Form I-129, in Part 5, #8. Consequently, the AAO also examined the beneficiary's eligibility for an exemption under section 104(c) of AC21.

Section 104(c) of AC21 reads in pertinent part:

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—

(1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,

may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253.

The beneficiary is an alien whose adjustment of status remains pending because his priority date is not current as specified in section 104(c) of AC21. However, the beneficiary does not qualify for "an extension of such nonimmigrant status," because he does not have a nonimmigrant status to extend. Therefore, the beneficiary does not qualify for an extension of such status under section 104(c) of AC21.¹

¹ By its very terms, section 104(c) applies only in cases where a petitioner is seeking to extend the H-1B nonimmigrant status of the beneficiary. In such a situation, 8 C.F.R. § 214.2(h)(14) further mandates that this "request for a petition extension may be filed only if the validity of the original petition has not expired." In this matter, the petitioner clearly indicated on the Form I-129 that it was filing this request as a petition for new

This non-discretionary basis for denial renders the remaining issues in this proceeding moot. The petition will be denied and the appeal dismissed. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.

employment and *not* as a continuation of previously approved employment without change with the same employer, i.e., a petition extension. Even if it had filed such a request, as the beneficiary's most recently approved H-1B petition expired on June 16, 2008 and as the instant petition was filed on July 7, 2010, more than two years after that petition's expiration, 8 C.F.R. § 214.2(h)(14) would require that the extension petition be denied. As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension.