



U.S. Citizenship
and Immigration
Services

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

PUBLIC COPY



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JUN 12 2012

Date:

Office: VERMONT SERVICE CENTER

FILE:



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:

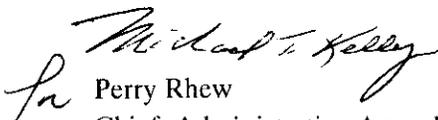


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on December 28, 2010, the AAO dismissed the appeal. On January 31, 2011, the petitioner filed a motion to reopen the AAO's decision. The motion will be granted and the matter reopened. The appeal will be dismissed and the visa petition denied.

On the Form I-129 visa petition the petitioner stated that it is a telecommunication services firm. It seeks to extend the employment of the beneficiary as a synchronous optical network systems engineer analyst from June 20, 2008 to June 19, 2009. 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 bases that the beneficiary had been in H or L nonimmigrant status for the maximum six years and did not qualify for an extension of his visa status.

On June 19, 2008, the same date that the beneficiary's H-1B status expired, the petitioner filed the instant petition, requesting another one-year extension of previously approved employment without change with the same employer and requesting the extension of the beneficiary's stay. The petitioner requested the continuation of the beneficiary's employment in H-1B status from June 20, 2008 to June 19, 2009.

The record shows that the beneficiary was present in the United States in H-1B status for a total of more than six years from March 14, 2001 through June 19, 2008. During this time, an Application for Alien Employment Certification (Form ETA 750) was filed on behalf of the beneficiary. The petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on May 21, 2008 (SRC 08 185 53009). That immigrant petition was approved on June 24, 2008, with a priority date of February 1, 2008. This priority date indicates that the Form ETA 750 had been filed on that assigned date, per the regulation at 8 C.F.R. § 204.5(d).

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 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). See Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002).

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. Section 106(a) of AC21, as amended by § 11030A(a) of DOJ21, for instance, provides for extension for 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 February 1, 2008 priority date indicates that the Form 750 application for labor certification was filed on that date. The instant visa petition was filed on June 19, 2008. Thus, the application for labor certification had not been pending for 365 days when the petitioner filed the instant Form I-129 visa petition, and the beneficiary is not entitled to an extension pursuant to 106(a)(1) of AC21.

As was noted above, the immigrant petition was filed on May 21, 2008, and the instant nonimmigrant visa petition was filed on June 19, 2008. The immigrant petition was not filed 365 days prior to the instant nonimmigrant petition. Thus, the beneficiary is not entitled to an extension pursuant to section 106(a)(2) of AC21.

In response to the RFE, counsel provided the notice of approval of the immigrant petition on June 24, 2008, apparently asserting that the beneficiary is eligible for an extension pursuant to section 104(c) of AC21, which states:

ONE-TIME PROTECTION UNDER PER COUNTRY CEILING- 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 for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act; 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.

If, at the time of the extension petition's filing, the beneficiary of the instant petition had been the beneficiary of an approved Form I-140 immigrant visa petition, the petitioner would have been entitled to file the instant nonimmigrant visa petition pursuant to section 104(c) of AC21, and the petition would be approvable. However, as was noted above, the instant visa petition was filed on June 19, 2008, and the Form I-140 immigrant petition was approved subsequently, on June 24, 2008. Therefore, at the time the petitioner filed the instant visa petition for an extension, the one-time protection provision at section 104(c) of AC21 did not extend any protection to this beneficiary.

Further, that the immigrant petition was subsequently approved is of no relevance to the approvability of the instant nonimmigrant visa petition. United States Citizenship and Immigration Services (USCIS) regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). 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).

The beneficiary had been in the United States pursuant to H-1B status for more than six years and no extension was available to the beneficiary when the petitioner filed the instant visa petition. Therefore, the instant visa petition may not be approved. Therefore, the appeal will be dismissed and the petition will be denied.

It must be noted for the record that, as the authority of the AAO is limited to that specifically granted or delegated to it by the Act, its implementing regulations, and the Secretary of the U.S. Department of Homeland Security pursuant to 8 C.F.R. § 2.1, the AAO cannot grant counsel's *nunc pro tunc* request.

Specifically, as discussed above, *infra*, the pertinent sections of AC21 do not provide for the extension sought by the petitioner. Further, as also noted above, a petitioner must establish eligibility for the benefit sought at the time the petition is filed. Accordingly, as the law does not provide a discretionary basis to do so, the AAO has no authority to grant counsel's *nunc pro tunc* request in this matter.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 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