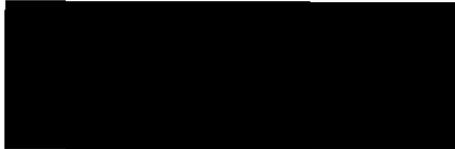


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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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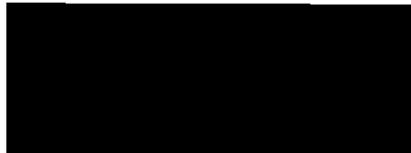
Date: JUN 13 2012 Office: VERMONT SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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,

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

DISCUSSION: The service center director 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 visa petition the petitioner stated that it is a custom home building firm. It seeks to extend the employment of the beneficiary as an electrical engineer from May 19, 2009 to May 19, 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 director denied the petition on the basis that the beneficiary had been in H or L nonimmigrant status for the maximum time permitted and that no exception to that general rule qualifies him for an extension of his visa status.

On appeal, counsel asserted that the beneficiary qualifies for an extension of his visa status pursuant to section 104(c) of the American Competitiveness in the Twenty-First Century Act (AC21). Counsel did not contest the director's finding that the beneficiary is not eligible for an extension pursuant to section 106 of AC21.

Evidence in the record shows, and counsel does not contest, that the beneficiary was in the United States in H or L nonimmigrant status from May 29, 2002 to January 9, 2009. The visa petition in this matter was filed on July 9, 2009. The beneficiary had not then been physically absent from the United States for a year since the expiration of his nonimmigrant status.

On September 16, 2009, the director denied the instant visa petition, noting that the petitioner's current request to employ the beneficiary as an H-1B nonimmigrant would place the beneficiary beyond the six-year limit, and stating that the exceptions to the six-year limit contained in AC21 do not extend to the beneficiary in the instant case, who is a derivative beneficiary of his wife's approved Form I-140 Immigrant Petition for Alien Worker.

On appeal, counsel reiterated that while the beneficiary was in H-1B status a Form ETA 750 Application for Alien Employment Certification was filed on behalf of the beneficiary's wife and certified, and that a subsequent Form I-140 petition was also filed on her behalf and approved. The record contains a notice of approval of his wife's Form I-140 petition, dated January 9, 2009.

Counsel further asserted that the beneficiary of the instant petition is also a derivative beneficiary of his wife's Form I-140 petition; and that the only impediment to the beneficiary's wife receiving her EB-3 immigrant visa is the per-country limitation. Counsel argued that because the beneficiary is a derivative beneficiary of a petition filed pursuant to section 204(a) of the Act, an extension of his H-1B status is available to him pursuant to section 104(c) of AC21.

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.

Section 104(c) of AC21 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.

The clear language of the statute does not support counsel's position in the instant case. Section 104(c) of AC21 states that the six-year limitation shall not apply to an alien who is the beneficiary of a petition filed under section 204(a) for a preference status under paragraph (1), (2), or (3) of section 203(b). The instant beneficiary, however, is not seeking to be accorded preference status under any paragraph of section 203(b) through his wife's approved Form I-140. Rather, the beneficiary is attempting to obtain derivative status under section 203(d) of the Act as a qualifying family member. AC21 does not accord any extensions past the general six-year limitation for aliens seeking derivative status pursuant to 203(d). The exception to the six-year limit is not available to this beneficiary.

The director correctly found that the beneficiary has been in H nonimmigrant status for the maximum six years permitted and that no exception qualifies him for an extension of his visa status beyond that six-year limit. The petition was correctly denied on that basis, which has not been overcome on appeal. The appeal will be dismissed and the petition denied.¹

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

¹ The AAO further notes that even if counsel were correct that the instant visa petition should be approved pursuant to AC21, it would be approvable for only one year, rather than the requested three-year period of employment.