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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: **MAY 01 2012**

VERMONT SERVICE CENTER

FILE: 

IN RE:

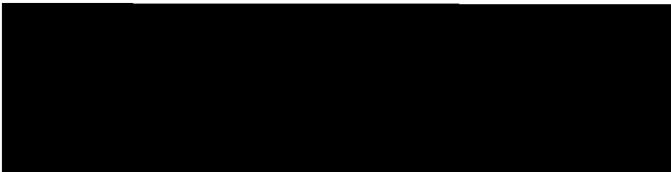
Petitioner:

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.

Thank you,

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 sustained in part. The visa petition will be approved, but for a lesser period of time than was requested.

The petitioner is a Texas public school district. It seeks to extend the employment of the beneficiary as an elementary school teacher. 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, finding that the beneficiary had been in H or L nonimmigrant status for the maximum six years permitted and did not otherwise qualify for an extension of H-1B nonimmigrant classification.

The record shows that the beneficiary was present in the United States in H-1B status for a total of more than six years, beginning on July 1, 2002. An Application for Alien Employment Certification (Form ETA 750) on behalf of the beneficiary was approved on July 24, 2007. The petitioner attempted to file a Form I-140, Immigrant Petition for Alien Worker, on several occasions. On each occasion, the petition was rejected. The Form I-140 was finally rejected on February 14, 2008 because the Form ETA 750 had been approved on July 27, 2007, more than 180 days prior to the attempted filing of the Form I-140, and the Form ETA 750 was, therefore, no longer valid.

On June 2, 2008, the petitioner filed the instant petition, requesting a continuation of previously approved employment without change with the same employer. The petitioner requested the continuation of the beneficiary's employment in H-1B status from June 1, 2008 to June 1, 2009.

In response to a request for further evidence (RFE) regarding an H-1B extension beyond the six-year limit, counsel asserted that the rejections of the Form I-140 were improper, and argued that the extension requested in the instant petition should therefore be approved pursuant to the exception to the six-year limit contained in section 106 of the "American Competitiveness in the Twenty-First Century Act" (AC21).

On January 6, 2009, the director denied the instant petition. Citing to 8 C.F.R. § 214.2(h)(13)(iii), the director observed 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 that the petitioner and beneficiary were not entitled to any exception to that limit.

On appeal, counsel again argued that the instant Form I-129 petition should be approved because the rejection of the Form I-140 was improper.

The propriety of the rejections of the Form I-140 is not before the AAO as it is not the matter appealed. The AAO will adjudicate the denial of the Form I-129 petition pursuant to the governing law and regulations, including AC21, as amended by the "Twenty-First Century Department of Justice Appropriations Act" (DOJ21).

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 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.

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).

Subsequent to the enactment and effective date of AC21 as amended by DOJ21 (hereinafter referenced as AC21), the Department of Labor (DOL) issued the “Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,” [69 Fed. Reg. 77326], (Perm Rule) (published on December 27, 2004, and effective as of March 28, 2005).

The DOL Perm rule, in general, provides for the revocation of approved labor certifications if a subsequent finding is made that the certification was not justified. It is codified at 20 C.F.R. § 656.32.

DOL issued a second rule, the "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," published on May 17, 2007, (72 Fed. Reg. 27904), which took effect on July 16, 2007 (Perm Fraud rule). The DOL Perm Fraud rule, now found at 20 C.F.R. § 656.30(b), provides for a 180-day validity period for labor certifications that are approved on or after July 16, 2007. Petitioning employers have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS.

In this matter, the AAO finds that more than 365 days elapsed from January 22, 2004, the date the petitioner filed the labor certification application, to June 2, 2008, the date the petitioner filed the Form I-129 request to extend the employment of the beneficiary. However, the labor certification application filed by the petitioner was approved on July 27, 2007. The petitioner's labor certification application therefore expired or ceased to be valid on January 24, 2008, the 181st day after its approval.

Accordingly, the director did not err as a matter of law or policy in concluding that the beneficiary is not exempt from the maximum six-year period of authorized admission permitted for H-1B nonimmigrants under section 214(g)(4) of the Act. For that reason, the approval of the visa petition cannot be extended beyond the six-year limit.

The record, however, contains an issue that was not addressed in the decision of denial, and which renders the instant petition approvable, though for a shorter period of time than the petitioner requested. The record shows that the two previous H-1B visas issued to the beneficiary were valid from July 1, 2002 to July 1, 2005 and from July 2, 2005 to June 1, 2008. Those two periods, taken together, equal six years less approximately one month. In order to accord the beneficiary the full amount of her permissible six years, the visa petition in this case should have been approved for nearly one additional month.

Therefore, the appeal will be sustained in part. The petition will be approved, valid from June 2, 2008 through June 30, 2008.

ORDER: The appeal is sustained in part. The petition is approved for the period from June 2, 2008 through June 30, 2008.