

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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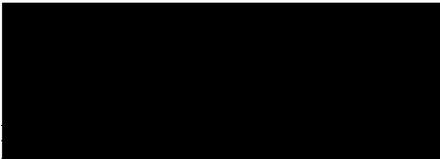


Date: **NOV 03 2012** Office: VERMONT SERVICE CENTER FILE:

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 in accordance with the instructions on 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

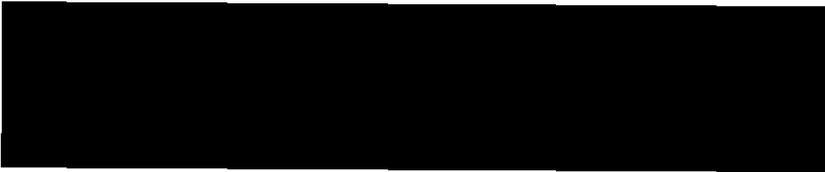
**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "DISTRIBUTOR OF CONSUMER GOODS – RETAIL STORES" with 2 employees. It seeks to employ the beneficiary in what it designates as an accountant position and to classify her 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, based upon her interpretation of 8 C.F.R. § 214.2(h)(13)(iii), determined that approval of a new H-1B petition for the beneficiary was prohibited because the beneficiary had already spent more than six years in L and/or H status and the beneficiary had not been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year. The director further determined that the beneficiary is ineligible for an extension of stay, beyond the six-year limitation, under sections 104(c) or 106 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).

According to counsel for the petitioner, the beneficiary spent seven years in the United States as a nonimmigrant L-1A, intracompany transferee executive or manager. United States Citizenship and Immigration Services (USCIS) records show the following Forms I-129, Petition for a Nonimmigrant Worker, filed on behalf of the beneficiary and their respective L-1A classification validity dates:

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Thus, the beneficiary was present in the United States in L-1A status for a period exceeding six years as of the date this petition was filed on January 12, 2010.

On appeal, counsel contends that the restriction on limitation of stay at 8 C.F.R. § 214.2(h)(13)(iii) "does not apply" because the "beneficiary is seeking a change of status [, not readmission,] from L to H classification, which is not subject to same restriction as for applicants seeking H classification from L classification." Counsel further contends that AC21 is only relevant to "H visa/status" and therefore, section 106 of AC21 "is not applicable to the beneficiary." Counsel also asserts that the proffered position qualifies for classification as a specialty occupation and that the beneficiary is "fully qualified." Thus, counsel contends, the petition is "otherwise approvable and must be granted."

The only issue before the AAO is whether the beneficiary is eligible for an extension of stay beyond the six year limitation set out in the regulation at 8 C.F.R. § 214.2(h)(13)(iii).

Section 214(g)(4) of the Act provides that: “[T]he period of authorized admission of [an H-1B nonimmigrant] may not exceed 6 years.”

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii):

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

The AAO notes that the regulation at 8 C.F.R. § 214.2(l)(12)(i) states in pertinent part:

An alien who has spent . . . seven years in the United States in a managerial or executive capacity under section 101(a)(15) (L) and/or (H) of the Act may not be readmitted to the United States under section 101(a)(15) (L) or (H) of the Act unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year . . . . In view of this restriction, a new individual petition may not be approved for an alien who has spent the maximum time period in the United States under section 101(a)(15) (L) and/or (H) of the Act[.]

Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition. It is important to note that in evaluating eligibility for H-1B nonimmigrant classification, the AAO looks to the regulations applying to H-1B petitions. Therefore, contrary to counsel's contention, while the beneficiary was formally in L-1A nonimmigrant status, she is seeking an extension of stay as a new H-1B nonimmigrant; therefore, the director was correct in determining the beneficiary's eligibility based on the regulation set forth in 8 C.F.R. § 214.2(h)(13)(iii). In any event, the regulation at 8 C.F.R. § 214.2(l)(12)(i) clearly states that a new petition "may not be approved" for someone, such as the beneficiary, "who has spent the maximum time period in the United States under section 101(a)(15)(L) [and who has not] resided and been physically present outside the United States, except for brief visit for business or pleasure, for the immediate prior year."

The AAO finds that the approval of a new H-1B petition for the beneficiary is prohibited because the beneficiary has already spent seven years in L status and there is insufficient evidence that the beneficiary has been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year. Thus, the petition cannot be approved.

The AAO also disagrees with counsel's contention that AC21 is "irrelevant" to the instant matter because the beneficiary has "never applied for nor had H classification granted in the past." AC21, as amended by DOJ21, removes the six-year limitation on the authorized period of stay for certain aliens.

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.

By its very terms, section 104 applies in cases where a petitioner is seeking to extend the current 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 employment and *not* as a continuation of previously approved employment without change with the same employer, i.e., a petition extension. Therefore, the beneficiary does not qualify for an extension of such status beyond the maximum period permitted under section 104(c) of AC21.

Section 106(a) of AC21, as amended by section 11030A(a) of DOJ21, 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.

In this matter, the AAO finds that there is insufficient evidence in the record that 365 days or more have elapsed from either (1) the filing of a labor certification application or (2) the filing of an employment-based immigrant petition (Form I-140) prior to the employment start date requested in the petition. Therefore, the beneficiary is ineligible for a one-year period of stay beyond the maximum period permitted in H-1B status under AC21. Thus, while AC21 is relevant to matters in which a beneficiary has spent the maximum period permitted in the United States in H-1B status, the beneficiary in this matter is ineligible for an extension of stay as a result of the provisions of AC21.<sup>1</sup>

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 contained in section 214(g)(4) of the Act. Therefore, the appeal is dismissed. The petition is denied.

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.

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<sup>1</sup> Until or unless regulations to the contrary are promulgated, the plain language of section 106 of AC21, as amended by DOJ21, does not require an alien to be in H-1B status when seeking an extension of stay under this provision. Instead, all that is required by the statute is that the alien be a nonimmigrant alien and that his or her petitioner be seeking H-1B status on their behalf.