



U.S. Citizenship  
and Immigration  
Services

D2

[REDACTED]

DATE: NOV 21 2012 OFFICE: CALIFORNIA 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)

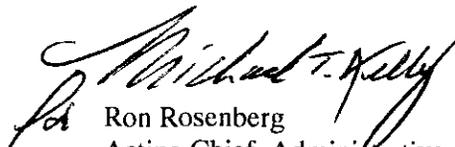
ON BEHALF OF PETITIONER:  
[REDACTED]

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,

  
Ron Rosenberg  
Acting 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 summarily dismissed. The petition will be denied.

The petitioner, which describes itself as a not-for-profit organization that provides physician and medical services to an underserved population, seeks to continue to employ the beneficiary as a technical writer. The petitioner, therefore, endeavors to continue 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, concluding that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21), because, by the time the petitioner filed the petition for extension that is the subject of this appeal, the I-140 petition upon which the petitioner based its claim of the beneficiary's eligibility to a one-year extension of H-1B status had been denied, and that denial had become the final action on that petition because no appeal had been filed within the period specified by regulation for filing an appeal.

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, as amended by the 21<sup>st</sup> Century Department of Justice Authorization Act (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) (emphasis added to identify sections amended by DOJ21).

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v). Here, counsel concedes that, in fact, the director committed no error in rendering her decision, as, at the time of the extension petition's filing, there was no pending I-140 action that would serve as a basis for invocation of section 106 of AC21, as amended.

On appeal, the petitioner expressly acknowledges that the director correctly applied section 106(a) of AC21, as amended, to evidence in the record of proceeding before her. Accordingly, as the petitioner does not specify any factual or legal error by the director in denying the extension petition, the appeal must be, and hereby is, summarily dismissed.

Counsel fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As neither the petitioner nor counsel presents additional evidence on appeal to overcome the grounds of the director's decision on the basis of evidence before her at the time she rendered her decision, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

For its potential instructive value, however, the AAO will briefly discuss counsel's claim on appeal that the petitioner should prevail on the basis of what counsel describes as "new evidence."

The record indicates that the beneficiary has resided in the United States in L-1A classification or in H-1B classification since September 3, 2004. On October 8, 2010, the petitioner applied for a one-year extension of H-1B status on behalf of the beneficiary which would have placed the beneficiary beyond the six-year limit.

The director noted that U.S. Citizenship and Immigration Services (USCIS) records indicated that the petitioner had filed two Form I-140s, Immigrant Petitions for Alien Worker, both of which had been denied. The first immigrant petition [REDACTED] was filed with the Texas Service Center on June 28, 2010, and it was denied on July 22, 2010. The second immigrant petition

██████████ was filed with the Texas Service Center on July 26, 2010, and it was denied on October 6, 2010. The petitioner did not file an appeal on either of the denied immigrant petitions. Both immigrant petitions were filed in connection with a certified labor certification, ETA case number ██████████, valid from May 17, 2010 to November 13, 2010.

In response to the director's request for additional evidence (RFE), counsel submitted what it entitled a "Request for Discretionary Review," in which counsel expressly acknowledged that counsel's law firm had failed to file an appeal on a denial of an I-140 immigration petition, the pendency of which appeal would have provided a basis for extension under section 106 of AC21. (Counsel stated that a former associate attorney who had been working on the case resigned from the firm, and that the firm took no action on the denied immigrant petitions due to an oversight.)

Also within the "Request for Discretionary Review," counsel explained that she filed a second PERM labor certification with the U.S. Department of Labor, ETA case number ██████████ valid from May 25, 2011 to November 21, 2011, and a third immigrant petition (██████████) filed on June 3, 2011 as a remedial measure. Additionally, counsel requested the Service to withhold a decision on the H-1B nonimmigrant extension that is the subject of this appeal until it would take action on the third immigrant petition. On April 14, 2011, the service denied the H-1B nonimmigrant extension which is the case on appeal here. Subsequent to that denial, USCIS approved the third immigrant petition.

Counsel filed this appeal on May 13, 2011, and submitted a supporting brief on June 13, 2011. On appeal, counsel acknowledges that USCIS correctly denied the extension petition because the beneficiary did not qualify for an extension beyond the six-year limit under AC21 § 106(a). On appeal, however, counsel contends, mistakenly, that the beneficiary remains eligible for the benefit sought beyond the six-year limit under AC21 § 104(c), in light of a set of new facts that did not exist at the time of the filing of this H-1B extension petition, namely, (1) that the Department of Labor has certified a new PERM labor certification; and (2) that USCIS approved a new immigrant petition, which, counsel argues, qualifies the beneficiary for an extension beyond the six-year limit.

As an aside, the AAO notes that a motion to reopen, not an appeal, is the regulatory avenue for requesting initial consideration of what a petitioner purports to be new evidence that justifies overturning a director's decision.

As will now be briefly discussed, however, even if the issue raised by counsel on appeal were properly before the AAO - and it is not - it would not merit relief in this matter.

Section 104(c) of AC21 allows for extensions of H-1B status beyond six years if the alien is a beneficiary of an approved immigrant petition, and also if there are no immigrant visa numbers available that would allow the alien to file an application to adjust status to permanent residence. In pertinent part, section 104(c) of AC21 reads:

(c) 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.

See Pub. L. No. 106-313, § 104(c), 114 Stat. 1251, 1253 (2000).

Counsel is incorrect in asserting that a beneficiary may be eligible for an extension of H-1B status beyond the six-year limit pursuant to AC21 § 104(c) by virtue of an approved immigrant visa petition that was not a factor at the time the extension petition was filed. USCIS regulations affirmatively 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 based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The AAO notes that the underlying labor certification and the immigrant visa petition argued on appeal as “new evidence” were both filed after the petition for extension of the H-1B nonimmigrant status had already been received by the California Service Center. Consequently, the petitioner here failed to establish eligibility for the benefit at the time of filing the H-1B extension request.

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 summarily dismissed. The petition is denied.