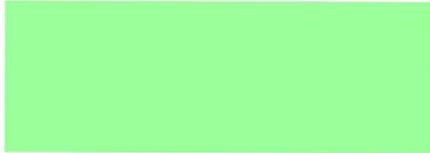




U.S. Citizenship  
and Immigration  
Services

(b)(6)



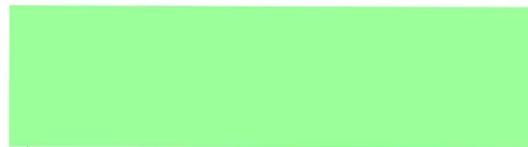
Date: **NOV 25 2013** Office: CALIFORNIA SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision.

**Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

for  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center (hereinafter "the director"), denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the record remanded for the entry of a new decision based upon all the evidence on the record.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking to continue to employ the beneficiary and to classify him 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, determining that the petitioner had not established the beneficiary's eligibility for an extension of stay in 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).

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) Form I-290B, Notice of Appeal or Motion; and (6) counsel's brief.

The AAO notes that, in general, section 214(g)(4) of the Act 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.

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.

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 at Part 2 that it was filing this request as a petition for "[c]hange in previously approved 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.

As amended by section 11030A(a) of DOJ21, section 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 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. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

The record indicates that the beneficiary has resided in the United States in H-1B classification since January 17, 2006. On January 23, 2013, the petitioner applied for an extension of H-1B status for the beneficiary which would have placed the beneficiary beyond his six-year limit.<sup>1</sup>

The director denied the petition on May 9, 2013, finding that the beneficiary was not eligible for the requested extension. Specifically, the director noted that the beneficiary's Immigrant Petition for Alien Worker, Form I-140 ( [REDACTED] filed with the Nebraska Service Center on November 17, 2010, was denied on August 20, 2011 and a subsequent appeal of that denial was dismissed on February 5, 2013.

As stated above, the petition in this matter was filed on January 23, 2013. A final decision denying the beneficiary's immigrant petition was not entered until February 5, 2013, thirteen days after the instant petition was filed. Under the pertinent sections quoted above, the beneficiary is eligible for extension of his H-1B status until February 5, 2013, the date the final decision was entered denying the immigrant petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. That burden has been satisfied in part. Accordingly, the director's decision will be withdrawn, and the matter will be remanded for entry of a new decision.

**ORDER:** The director's decision dated May 9, 2013 denying the petition shall be withdrawn. The matter is remanded to the director for action consistent with this decision.

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<sup>1</sup> The record indicates that the petition was originally filed on January 15, 2013, but was returned to the petitioner based on a finding that pages 17-19 were omitted from the submission. However, the petitioner contends that these pages were in fact submitted with the initial submission and that the petition was wrongfully returned to the petitioner.