



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **MAR 27 2014** OFFICE: VERMONT SERVICE CENTER [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:

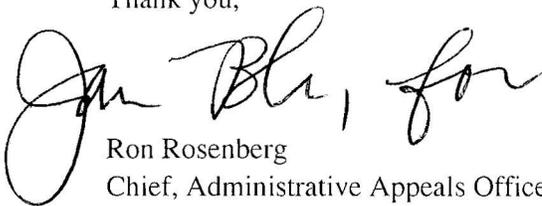
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,


Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a parochial school. It seeks to extend the employment of the beneficiary as an Elementary Teacher from November 16, 2012 to November 15, 2013. Accordingly, the petitioner seeks 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 approval of an H-1B petition for the beneficiary is prohibited because the beneficiary: (1) has spent more than six years H status; and (2) has not been physically present outside the United States, beyond 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 under sections 104 or 106 of the American Competitiveness in the Twenty-First Century Act¹ (AC-21) as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act² (DOJ-21).

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC-21 removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays, and DOJ-21 broadened the class of H-1B nonimmigrants eligible to avail themselves of this provision.

The evidence of record and USCIS records indicate that the beneficiary was approved for H-1B visa status from March 13, 2001 through November 15, 2012, a period of more than six years. As such, the six-year limit contained at section 214(g)(4) of the Act has been triggered, and the question before the AAO is whether sections 104 or 106 of AC-21, as amended by DOJ-21, afford the beneficiary relief from that limit.

The petitioner filed a Form I-140, Immigrant Petition for Alien Worker (SRC 08 077 52985) on behalf of the beneficiary on January 7, 2008, and the director denied the petition on October 30, 2008. The AAO dismissed the petitioner's appeal of that decision on March 31, 2011. The petitioner filed two subsequent motions to reopen and reconsider, and on both occasions (via decisions issued on February 5, 2013 and October 29, 2013) the AAO affirmed its March 31, 2011

¹ American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

² Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

decision dismissing the appeal. As the filing of a motion to reopen or reconsider does not stay the execution of a prior decision, the AAO's March 31, 2011 decision dismissing the appeal was the final administrative decision on the Form I-140. *See* 8 C.F.R. § 103.5(a)(1)(iv).

The petitioner filed the instant H-1B visa petition on November 13, 2012, and claimed benefits under AC-21 as amended by DOJ-21 based on the assertion that the Form I-140 filed on behalf of the beneficiary (SRC 08 077 52985) had been pending for longer than one year. The director denied the H-1B petition on March 13, 2013.

Upon review, the AAO finds that neither section 104 nor section 106 of AC-21 as amended by DOJ-21 afford the beneficiary relief from the six-year limit on H-1B admission.

As amended by DOJ-21, section 104(c) of AC-21 states, in pertinent part, the following:

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.

As there is currently no Form I-140 pending on behalf of the beneficiary, section 104 affords no relief to the beneficiary. While counsel's argument that I-140 petition remained pending due to the filing of the motions to reopen and reconsider is acknowledged, as noted above the filing of a motion does not stay the execution of a prior decision, and the AAO's March 31, 2011 decision dismissing the appeal was the final administrative decision on the Form I-140.

Having made that determination, the AAO turns next to section 106 of AC-21 as amended by DOJ-21. As discussed below, the AAO finds that this section of law does not provide any relief to the beneficiary, either.

As amended by DOJ-21, section 106(a) of AC-21 states the following:

- (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.

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states the following:

- (b) **EXTENSION OF H-1B WORKER STATUS**—The Attorney General 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.

As indicated, section 106(b) permits USCIS to extend the beneficiary's H-1B stay in one-year increments "until such time as a final decision is made" to deny the I-140 petition. As discussed above, USCIS made a final decision to deny the Form I-140 on March 31, 2011 when the AAO dismissed the petitioner's appeal of the director's decision denying the petition. As such, an I-140 petition had not been pending for at least 365 days when the petitioner filed the instant H-1B petition on November 13, 2012. Consequently, section 106(b) affords no relief to the beneficiary.

In summation, as the I-140 petition is no longer pending, the beneficiary is no longer eligible for an additional year of H-1B visa status pursuant to AC-21. The beneficiary is therefore not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants under section 214(g)(4) of the Act, and the instant visa petition may not be approved.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.