



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I-I-, INC.

DATE: DEC. 7, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a business advisory, information technology, and advanced engineering firm, seeks to temporarily employ the Beneficiary as a “Recruiter” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUE

The Director denied the petition on the basis that the Beneficiary had been in H or L nonimmigrant status for the maximum time permitted and that no exception to that general rule qualifies her for an extension of her visa status. On appeal, the Petitioner asserted that the Beneficiary qualifies for an extension of her visa status pursuant to section 104(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Pub. L. No. 106-313 (Oct. 17, 2000).

II. EXTENSION OF H-1B STATUS PURSUANT TO 104(C) OF AC21

A. Legal Framework

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 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 [Secretary of Homeland Security] 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. 1251, 1253 (2000).

B. Analysis

The Petitioner does not dispute that the Beneficiary was in H-1B status for a period of more than six years. Further, the record shows that her husband is the beneficiary of a Form I-140, Immigrant Petition for Alien Worker, filed by a different petitioner on September 15, 2010, and approved on April 18, 2011. The Petitioner filed the instant petition, requesting extension of the Beneficiary's stay and continuation of previously approved employment without change with the same employer. The Petitioner asserts that because the Beneficiary of the instant petition is a derivative Beneficiary of her husband's Form I-140 petition, the Beneficiary is entitled to an extension of her H-1B status pursuant to section 104(c) of AC21. The Petitioner cites section 104(c) for the proposition that the Beneficiary is eligible for H-1B status beyond the sixth year in three-year increments if 365 days or more have elapsed since filing of the labor certification or Form I-140.

The language of that statute, however, does not support the Petitioner's assertion in the instant case. Section 104(c) of AC21 states that the six-year limitation shall not apply to an alien who has had a labor certification pending in a case in which certification is required or used by that alien to obtain status under section 203(b) of the Act. However, the Beneficiary in the instant case is not seeking status under section 203(b) of the Act. The Beneficiary is attempting to obtain derivative status under section 203(d) of the Act as a qualifying family member. The Form I-140 lists only the Beneficiary's husband in Part 3, "Information about the person [the petitioner is] filing for," as the person for whom the Form I-140 was filed. Furthermore, the Form I-140 approval notice only lists the Beneficiary's husband as the beneficiary of the Form I-140. That the I-140 petitioner sought derivative status for the instant Beneficiary on the Form I-140 filed on behalf of her husband is evidenced by her name appearing only in Part 7, Information on spouse and all children of the person for whom [the petitioner is] filing." Thus, as the Beneficiary is seeking status as a derivative beneficiary under 203(d) of the Act as a qualifying member, the exception to the six-year limit is not available to this Beneficiary.¹

¹ However, as was noted above, USCIS records indicate that the Beneficiary's husband is the beneficiary of an approved I-140 immigrant visa petition. USCIS records further indicate that the Beneficiary's husband is also the beneficiary of an approved H-1B visa petition. We wish to draw the attention of the Petitioner and the Beneficiary to a recent change in the law pertinent to spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident (LPR) status. As of May 26, 2015, certain H-4 dependent spouses of certain H-1B nonimmigrants who have already started the process of seeking employment-based LPR status may apply for employment authorization. See 8 C.F.R. § 214.2(h)(9)(iv) ("An H-4 nonimmigrant spouse of an H-1B nonimmigrant may be eligible for employment

III. CONCLUSION

The Director correctly found that the Beneficiary has been in H nonimmigrant status for the maximum six years permitted and that no exception qualifies her for an extension of her H-1B visa status beyond that six year limit. The petition was correctly denied on that basis, which has not been overcome on appeal. The appeal will be dismissed and the petition denied.

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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of I-I, Inc.*, ID# 14810 (AAO Dec. 7, 2015)

authorization only if the H-1B nonimmigrant is the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or the H-1B nonimmigrant's period of stay in H-1B status is authorized in the United States under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273 (2002)").