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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



DATE: FEB 03 2015

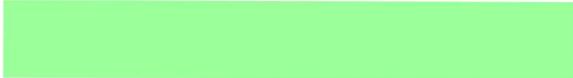
OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE:

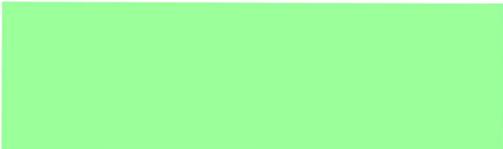
Petitioner:

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 (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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", is written over a circular stamp.

Ron Rosenberg
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.

I. PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as a gymnastics school that was established in [REDACTED]. In order to continue to employ the beneficiary in what it designates as an upper level gymnastics coach position, the petitioner seeks to extend his classification 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 reviewed the information and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition, finding that the petitioner did not establish that the beneficiary is eligible for an extension of stay beyond the six years under section 104(c) and section 106(a) 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). On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) the Form I-290B and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

II. LAW

A. Stay in H-1B Status Limited to Six Years

An alien who will perform services in a specialty occupation may be admitted to the United States as an H-1B nonimmigrant. *See* section 101(a)(15)(H)(i)(B) of the Act. A specialty occupation is defined as an occupation that requires (1) theoretical and practical application of a body of highly specialized knowledge, and (2) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. *See* section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). The total number of aliens who may be issued

¹ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

H-1B visas or otherwise accorded H-1B status in a fiscal year may not exceed 65,000. *See* section 214(g)(1)(A)(vii) of the Act, § 8 U.S.C. 1184(g)(1)(A)(vii).

Under the Act, H-1B admission is limited to six years. *See* section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B nonimmigrant in the United States, unless he/she has resided and been physically present outside the United States for the immediate prior year. *See* 8 C.F.R. § 214.2(h)(13)(iii)(A). Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay. However, as will be discussed, section 104(c) and section 106(a) 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) removes the six-year limitation on the authorized period of stay in H-1B classification for aliens under certain conditions.

B. Exemption for Beneficiaries with Approved Immigration Petition

More specifically, section 104(c) of AC21 reads in, pertinent part, as follows:

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.

Under 104(c) of AC21, an alien who is subject to a per-country limitation and who is the beneficiary of an approved immigrant petition under section 203(b)(1), (2), or (3) of the Act, 8 U.S.C. 1153(b)(1), (2), or (3), is eligible for H-1B approval beyond the statutory six-year maximum. *See* Pub. Law 106-313, 114 Stat. at 1252-1253. The H-1B petitioner must demonstrate that an immigrant visa is not available to the alien at the time the H-1B petition is filed.

C. Exemption for Beneficiaries with Pending Labor Certifications or Immigrant Petitions

Likewise, section 106(a) of 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. *See* Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002). According to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) 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). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based petition under section 203(b) of the Act is considered a lengthy adjudication delay for purposes of this exemption. *See* Pub. Law No. 107-273, 116 Stat. at 1836.

III. FACTUAL BACKGROUND

In this matter, the petitioner submitted the Form I-129 petition on January 27, 2014. The petitioner claimed that the beneficiary was exempt from the six year limitation in H-1B classification.

Upon review of the record of proceeding, we note the following:

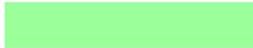
- The petitioner indicates that the beneficiary has been in the United States in H-1B classification from December 2002 to the present (without interruption).
- The petitioner filed an Application for Permanent Employment (Form ETA 9089) on December 13, 2006 (case number [REDACTED]). It was certified by the U.S. Department of Labor (DOL) on January 9, 2009.
- The petitioner filed a Form I-140 (Petition for Immigrant Worker) on February 24, 2009 (receipt number [REDACTED]). It was denied on September 1, 2009. The petitioner filed an appeal on September 28, 2009, which was dismissed on November 14, 2012. The petitioner then filed a motion to reconsider, which was dismissed on May 22, 2013.
- On June 10, 2013, the petitioner filed an Application for Permanent Employment (Form ETA 9089) (case number [REDACTED]).
- On January 27, 2014, the petitioner filed the instant H-1B petition.
- On January 31, 2014, an Application for Permanent Employment, ETA Case Number [REDACTED] was certified by DOL.
- On May 8, 2014, the petitioner filed a Form I-140 petition (receipt number [REDACTED]), which is pending.

IV. ANALYSIS

In this matter, the petitioner submitted the Form I-129 petition on January 27, 2014. The petitioner did not provide probative evidence that when the H-1B petition was filed, the beneficiary had an approved immigrant petition but was subject to per-country limitations. Thus, the beneficiary does not qualify for an extension of stay under section 104(c) of AC21.

Further, the petitioner has not demonstrated that, at the time of filing this H-1B petition, there had been a delay of 365 days or more in the final adjudication of a filed labor certification application or employment based petition. Therefore, the petitioner did not establish that the beneficiary is eligible to extend his H-1B classification based on 106(b) of AC21.

The petitioner and its counsel claim that according to the Adjudicator's Field Manual (AFM) at section 31.3(g)(8), "[w]here an LC is re-filed under PERM, the filing date of the original ETA 750/9089 will be used...(2) where DOL does not permit the original filing date to be used but the



petitioner demonstrates that the elements relating to the job opportunity and the alien beneficiary on the new LC are not 'materially different' from those specified on the former ETA-750/9089." Counsel continues by comparing the position as described in the Form ETA 9089 that was filed in 2006 (case number [REDACTED], and the position as described in the Form ETA 9089 that was filed in 2013 (case number [REDACTED]. We note, however, that the petitioner and its counsel have not provided an accurate quotation of the AFM, and their analysis is misapplied here.²

More specifically, the statement referenced above deals with labor certifications filed with DOL prior to March 28, 2005 using the Form ETA-750 (Application for Alien Employment Certification). On March 28, 2005, DOL implemented a new permanent labor certification system (PERM), and the labor certification application Form ETA-750 was replaced by the Form ETA-9089 on that date. 20 C.F.R. § 656.17.

The relevant section of the AFM was chapter 33.3(g)(8) and stated the following:

Effect of Withdrawn Form ETA-750 Labor Certifications and Re-Filing Under PERM During Transition: If a Form ETA-750 labor certification is withdrawn by DOL as part of the filing of a new Form ETA-9089, the filing date of the withdrawn Form ETA-750 labor certification may be deemed to be the filing date in order to determine if the labor certification was filed 365 days or more prior to the requested employment start date on the H-1B petition only in the following circumstances:

1. If the elements relating to the job opportunity and the alien beneficiary on the newly filed Form ETA-9089 labor certification application are identical to the data elements specified on the previously filed Form ETA-750 (with the exception of the prevailing wage determination), then DOL will allow the employer to retain the original priority date which will be reflected in Section "O." of the Form ETA-9089.
2. If DOL does not allow the employer to retain the priority date on the Form ETA-750 or if the Form ETA-9089 is still pending at the time of filing the H-1B extension petition, if the elements relating to the job opportunity and the alien beneficiary on the new labor certification application are not materially different from the data elements specified on the previously filed Form ETA-750 (with the exception of the prevailing wage determination).

* * *

[I]f the Form ETA-750 indicated that the minimum education requirement for entry

² It appears that the actual quotation states (emphasis added): "Where an LC is re-filed under PERM, the filing date of the original **ETA-750** will be used: (1) where DOL allows the original filing date to be maintained by noting it in Section 'O' of the ETA 9089; or (2) where DOL does not permit the original filing date to be used but the petitioner demonstrates that the elements relating to the job opportunity and the alien beneficiary on the new LC are not 'materially different' from those specified on the former **ETA-750**." Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook*, 948 (14th ed. 2014-2015).

into the position was a Bachelor's degree in Computer Science, but the Form ETA-9089 indicated that the minimum education requirement for the position was a Master's degree in Computer Science, then the elements of the job opportunity would not be materially the same. In this instance, the filing date of the Form ETA-750 could not be used to determine if the labor certification was filed 365 days or more prior to the requested employment start date as reflected on the Form I-129 petition.

There is no evidence in the record that the petitioner submitted a Form ETA 750 prior to March 28, 2005, and then withdrew the form in order to refile under DOL's PERM system. Thus, the information cited by the petitioner and its counsel is not relevant to the issue here. We further note that section 106(b)(1) of AC21 specifically states that the one-year extension of stay should not be granted once a final decision is made to deny the Form I-140 immigrant petition filed pursuant to a labor certification.

Neither the plain language of the statute nor the pertinent legislative history indicate that Congress intended to permit a beneficiary to extend his or her H-1B status indefinitely based on a prior, approved labor certification once the Form I-140 petition filed using that labor certification is denied. Upon review, the petitioner has not established that the beneficiary is eligible for H-1B classification.

V. BEYOND THE DIRECTOR'S DECISION

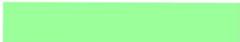
Beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(h)(14) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the prior H-1B petition expired on January 20, 2014. However, the instant petition extension was filed on January 27, 2014, seven days after the expiration of the petition it sought to extend. As the extension petition was not timely filed during the validity period of the prior petition, it must be denied for this additional reason.³

VI. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1037 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

³ As the identified ground of ineligibility is dispositive of the petitioner's appeal, we need not address any the additional issues we have identified in the record of proceeding.



The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.