



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

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

MATTER OF E-B-R-P-S-S-

DATE: OCT. 6, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a nonprofit public school system, seeks to continue to employ the Beneficiary as an elementary teacher and to classify him as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director reviewed the record of proceeding and determined that the Petitioner did not establish eligibility for the benefit sought. Specifically, the Director stated that the Petitioner had not established that the Beneficiary is entitled to a seventh-year H-1B extension in accordance with the applicable statutory and regulatory provisions. The Director denied the petition.

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, Notice of Appeal or Motion and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

For the reasons that will be discussed below, we agree with the Director's decision 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.

**I. H-1B CLASSIFICATION – TIME LIMITS**

On the Form I-129, the Petitioner was asked to provide the Beneficiary's prior period of stay in H classification in the United States. The Petitioner was notified that it should list only those periods in which the Beneficiary was actually in the United States in an H classification. However, the Petitioner did not provide this information on the Form I-129. U.S. Citizenship and Immigration Services (USCIS) records indicate that the Beneficiary entered the United States in H-1B on July 14, 2008.

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

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides: “In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years.” Section 106(a) and 104(c) 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) temporarily removes the six-year limitation on the authorized period of stay in H-1B classification for foreign nationals under certain conditions.

More specifically, an exemption is available under section 106(a) of AC21 for certain foreign nationals whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays. *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, foreign nationals 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 immigrant 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.

The record shows that the ETA Form 9089, Application for Permanent Employment Certification, was filed on May 17, 2014. However, the instant H-1B extension petition was filed on August 4, 2014, approximately 79 days after the ETA Form 9089 was filed. Therefore, 365 days or more had not elapsed since the filing of the ETA Form 9089 when the current H-1B petition extension was filed on August 4, 2014.

On appeal, the Petitioner claims that the date it began the mandatory recruitment period for the labor certification process should be considered the filing date. The Petitioner further claims that since it began recruiting on February 10, 2014, 365 days had passed when USCIS made its decision. As discussed above, 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 applicants if 365 days or more have elapsed since *the filing* of an application of labor certification.

Upon a complete review of the record of proceeding, the Petitioner has not established that the Beneficiary qualifies for an exemption from the six-year limit and is thereby eligible for an extension of stay under section 106(a) of AC21.

We now turn to section 104(c) of AC21 regarding the other exemption to the limited period of authorized admission under section 214(g)(4) of the Act. 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.

Section 104(c) of AC21 is applicable when a foreign national, who is the beneficiary of a Form I-140 petition, is eligible to be granted lawful permanent resident status but for the application of a per country limitation to which that foreign national is subject or, alternatively, if the immigrant preference category applicable to that foreign national is, as a whole, "unavailable." Thus, to establish eligibility under the exemption at 104(c) of AC21, the Petitioner must establish that at the time of filing for the extension of H-1B nonimmigrant status, the Beneficiary is not eligible to be granted lawful permanent resident status on the sole basis that he/she is subject to a per country or worldwide visa limitation in accordance with the his/her immigrant visa "priority date." However, the petitioner does not assert and there is no evidence to support an assertion that the Beneficiary here qualifies for an exemption under 104(c) of AC21.

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. 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.

## II. CONCLUSION

The Petitioner has not established eligibility for the benefit sought. 8 C.F.R. § 103.2(b)(1). In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of E-B-R-P-S-S-*, ID# 14212 (AAO Oct. 6, 2015)