



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

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

MATTER OF S-C-M-, INC.

DATE: OCT. 9, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a hotel, seeks to employ the Beneficiary as a hotel general manager 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.

I. ISSUE

The issue before us is whether the Petitioner has established that the Beneficiary is entitled to a seventh-year H-1B extension in accordance with the applicable statutory and regulatory provisions.¹

II. 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. The Petitioner provided the following information on the Form I-129 (page 11):

From: 09/13/2002 To: 04/30/2005

From: 05/01/2005 To: present

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

¹ We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

Appropriations Authorization Act” (DOJ21) temporarily removes the six-year limitation on the authorized period of stay in H-1B classification for individuals under certain conditions.

More specifically, an exemption is available under section 106(a) of AC21 for certain individuals 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, individuals 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.

(b)(4)

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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.

With the initial petition, the Petitioner submitted a receipt notice for the Form I-140, Immigrant Petition for Alien Worker [REDACTED] filed on behalf of the Beneficiary. The Form I-140 was denied on November 13, 2013, approximately three months prior to the filing of the H-1B extension petition.

It must be noted that an exemption from the six-year period is permitted for individuals only until such time as a final decision is made on the relevant application or petition. A final decision to deny an immigrant petition is evidence that the U.S. Citizenship and Immigration Services (USCIS) has completed its process of adjudicating the petition and that the Beneficiary’s application process for obtaining lawful permanent resident status in the United States by way of that petition has ended. Thus, the final decision to deny the petition precludes USCIS from further processing a nonimmigrant extension of stay request based upon section 106(a) of AC21.

In response to the RFE, the Petitioner provided a receipt notice for a second Form I-140 [REDACTED] filed on behalf the Beneficiary, which was received by USCIS on April 24, 2014.² Thus, the Petitioner did not have a Form I-140 pending for more than 365 days when the current petition for H-1B extension was filed on February 7, 2014. 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

² USCIS records show that the Form I-140 was denied on January 22, 2015. A subsequently filed appeal was dismissed on June 25, 2015.

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 an individual, 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 individual is subject or, alternatively, if the immigrant preference category applicable to that individual is, as a whole, "unavailable." Thus, to establish eligibility under the exemption at 104(c) of AC21, a petitioner must establish that at the time of filing for the extension of H-1B nonimmigrant status, a 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."

Here, the Petitioner does not claim that the Beneficiary qualifies for an exemption under 104(c) of AC21, and the record of proceeding does not establish that the Beneficiary is eligible to be granted lawful permanent resident status as the Forms I-140 filed on his behalf were denied. Thus, he does not qualify for an exemption from the six-year limitation based upon 104(c) of AC21. Accordingly, we need not address this exemption further.

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.

III. 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 S-C-M-, Inc.*, ID# 13949 (AAO Oct. 9, 2015)