



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

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

MATTER OF O-S-, INC.

DATE: SEPT. 25, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a healthcare management group, seeks to employ the Beneficiary as a software engineering manager, under the classification of a nonimmigrant worker in a specialty occupation. *See* 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, Vermont Service Center denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

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, the Petitioner asserts that the Director's basis for denial of the petition was erroneous.

The record of proceeding contains: (1) the Petitioner's Form I-129, Petition for a Nonimmigrant Worker, 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.<sup>1</sup>

## I. 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

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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). Also, in light of the petitioner's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the “preponderance of the evidence” standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we apply the “preponderance of evidence” standard of review as articulated in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

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 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.

(b)(6)

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## II. FACTUAL BACKGROUND

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

- The Petitioner filed the Form I-129 on September 8, 2014, and requested a three-year extension of H-1B status. The Petitioner claimed that the Beneficiary was exempt from the six-year limitation pursuant to section 104(c) of AC21 based on an approved Form I-140, Immigration Petition for Alien Worker.
- The Petitioner indicated that the Beneficiary was in the United States in L-1 status from December 5, 2005 to September 30, 2009. The Beneficiary has been in the United States in H-1B classification from October 1, 2009 to the present (without interruption).<sup>2</sup>
- The Petitioner submitted a printout which appears to be a screenshot from another employer's immigration case management system. It names the Beneficiary as the employee. It further indicates that a "Labor Cert PERM" was filed on September 28, 2007; approved on May 4, 2009; and was valid until October 31, 2009.<sup>3</sup>
- The Petitioner submitted another printout from the same immigration case management system which indicates that "I-140 EB-2/EB-3" with a receipt number [REDACTED] was filed on June 8, 2009, and approved on June 29, 2009.<sup>4</sup>
- The Director issued an RFE on September 17, 2014. The Director noted that the evidence submitted was not sufficient to establish that the Beneficiary is eligible for an extension under AC21. Specifically, the Director noted that the receipt number for the Form I-140 indicates that the petition was revoked on May 23, 2014.<sup>5</sup>

## III. ANALYSIS

### A. Eligibility under section 104(c) of AC21

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<sup>2</sup> The Petitioner submitted H-1B approval notices for the Beneficiary valid from October 1, 2009 to June 3, 2012; June 4, 2012 to January 20, 2015; and November 26, 2013 to November 15, 2016.

<sup>3</sup> The service records indicate that another employer, [REDACTED] filed the Form ETA 9089, Application for Permanent Employment Certification, on behalf of the Beneficiary on September 28, 2007. It was certified by the U.S. Department of Labor (DOL) on May 4, 2009, and was valid until October 31, 2009.

<sup>4</sup> The service records indicate that [REDACTED] filed the Form I-140 on behalf of the Beneficiary on June 8, 2009. It was approved on June 29, 2009.

<sup>5</sup> The service records indicate that the Form I-140 with receipt number [REDACTED] was automatically revoked upon the request from the employer to withdraw the approval of the petition.

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.

In this case, the Beneficiary did not have an approved Form I-140 on September 8, 2014 (the date the instant Form I-129 was filed), as the Form I-140 approval had been revoked on May 23, 2014. On appeal, the Petitioner asserts “[s]ince [the Beneficiary]’s I-140 petition was approvable when filed, subsequently approved and has not been revoked for fraud, misrepresentation or cause, he is eligible to retain the previous priority date and obtain an H-1B extension.” The Petitioner cited a document titled “Unofficial Q & As from the NSC Liaison Committee.”

We note that the document states, in part, “USCIS will make sure that the previous petition was not revoked for fraud, misrepresentation or cause, and the petition must have been approvable to begin with. If the employer withdrew the previous petition because the beneficiary no longer works for the petitioner, then the beneficiary can still receive the original priority date.” We further note that the statement was provided as a response to a question, in part, whether USCIS will recapture the priority date when the beneficiary can only provide a receipt number and not the actual copy of the approved I-140 petition. We find that the information cited by the Petitioner pertains to the retention of priority dates in the immigrant visa context and is not applicable to the discussion at hand. Further, the Petitioner has not established that the document reflects official USCIS policy and is authoritative evidence. The statute clearly requires that for section 104(c) of AC21 to apply, the Beneficiary must have an *approved immigrant petition at the time the H-1B petition was filed*; here, the Beneficiary did not.

The Petitioner also states that USCIS can “continue to grant an extension even if the I-140 petition has been denied” and cites to a memorandum from William R. Yates, Associate Director for Operations, United States Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P (May 12, 2005), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archive\\_s%201998-2008/2005/ac21intrm051205.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archive_s%201998-2008/2005/ac21intrm051205.pdf).

We note that the section the Petitioner is referring to, states:

Question 5: Does a timely and non-frivolous I-140 appeal pending at the AAO allow an alien to request an H-1B extension beyond the 6-year limit?

Answer: Subject to regulatory modification, as long as a decision may be reversed on direct appeal or certification to the Administrative

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Appeals Office (AAO), USCIS will not consider that decision final for this purpose.

*Id.*

However, the Petitioner did not submit evidence to establish that the revocation of the applicable Form I-140 was not a final decision at the time the H-1B petition was filed. We further note that automatic revocation triggered by a petitioner's withdrawal of the Form I-140 is not an appealable decision. See 8 C.F.R. § 214.2(h)(11)(ii) and (12)(ii).

The Petitioner noted that USCIS approved other petitions under similar circumstances. The director's decision does not indicate whether the service center reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the Director. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center Director had approved the nonimmigrant petitions on behalf of the Beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the Petitioner has not established that the Beneficiary had an approved immigrant petition but was subject to per-country limitations, the Petitioner has not established that the Beneficiary qualifies for an extension of stay under section 104(c) of AC21.

#### B. Eligibility under section 106 of AC21 as amended by DOJ21

As noted, 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.

In this case, the Beneficiary's labor certification was filed on September 28, 2007 and certified on May 4, 2009. That labor certification was filed in support of the Form I-140, filed on June 8, 2009,

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which was initially approved on June 29, 2009, but was subsequently revoked on May 23, 2014. As noted earlier, this revocation is the final decision made on the Form I-140.

Further, the Beneficiary has not applied for an immigrant visa or filed an application to adjust status in the United States. Therefore, the Petitioner has not established that the Beneficiary is eligible for extension of his H-1B status beyond the six-year limitation under section 106 of AC21

#### IV. CONCLUSION AND ORDER

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.<sup>6</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of O-S-, Inc.*, ID# 13660 (AAO Sept. 25, 2015)

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<sup>6</sup> Since the identified basis for denial is dispositive of the Petitioner's appeal, we will not address other grounds of ineligibility we observe in the record of proceeding.