



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

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

MATTER OF R- LLC

DATE: AUG. 10, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software services company, seeks to temporarily employ the Beneficiary as a “technical project manager” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner did not demonstrate that the petition was exempt from the H-1B numerical limitation.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Beneficiary is eligible for an extension of H-1B classification pursuant to the “American Competitiveness in the Twenty First Century Act” (AC21). Upon *de novo* review, we will dismiss the appeal.

I. H-1B CLASSIFICATION – TIME LIMITS

Upon review, we find that the record does not establish that the Beneficiary is exempt from the six-year limitation contained in section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) pursuant to section 106(a) and 104(c) of AC21 as amended by the “Twenty-First Century Department of Justice Appropriations Authorization Act” (DOJ21).

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 AC21 as amended by 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.

U.S. Citizenship and Immigration Services (USCIS) records show that the Beneficiary reached the six-year limitation for H-1B classification. According to the Petitioner, the Beneficiary was in H-1B classification until May 22, 2008.

The Petitioner submitted a receipt notice for a Form I-140, Immigrant Petition for Alien Worker, filed on behalf of the Beneficiary. USCIS records show that this Form I-140 was approved less than six months after it was filed. USCIS record further indicate that the Beneficiary subsequently filed a Form I-485, Application for Permanent Residence or Adjust Status, which was denied on September 2, 2009 (approximately six years before the instant H-1B petition was filed).

An exemption from the six-year period is permitted for individuals until such time as a final decision is made on the relevant application or petition. As a final decision was made to deny the adjustment of status application prior to the filing of the instant H-1B petition, the Beneficiary does not qualify for an exemption under section 106(a) of AC21.

We now turn to section 104(c) of AC21 regarding the 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 a beneficiary of a Form I-140, 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."

Upon review, we find that the Petitioner has not established that the Beneficiary qualifies for an exemption under 104(c) of AC21 as the record of proceedings does not establish that the Beneficiary is eligible to be granted lawful permanent resident status but is subject to a per country or worldwide

visa limitation in accordance with his immigrant visa “priority date.” Rather, the Beneficiary applied to adjust his status but the application was denied. The denial of his application for adjustment of status is evidence that USCIS has completed its process. Nothing in the AC21 or DOJ21 legislative history serves to suggest that Congress intended that petitioners on behalf of individuals retain the ability to have those individuals remain in the United States indefinitely, e.g., for twenty or thirty years, on the basis of a denied application. The legislative intent reflects a desire to shield individuals from the inequities of government bureaucratic inefficiency, and does not include a mandate for an infinite extension of stay in a nonimmigrant status.

II. CONCLUSION

The burden is on the Petitioner to show 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.

Cite as *Matter of R- LLC*, ID# 17456 (AAO Aug. 10, 2016)