



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

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

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

DATE: MAR. 29, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a non-profit public school system, seeks to temporarily employ the Beneficiary as an “elementary school teacher” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 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 Beneficiary was not eligible for an extension in accordance with the applicable provisions.

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.

Upon *de novo* review, we will dismiss the appeal.

I. H-1B CLASSIFICATION – TIME LIMITS

On the Form I-129, Petition for Nonimmigrant Worker, 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 13):

From: 07/14/2008	To: 05/16/2010
From: 07/12/2010	To: 05/25/2011
From: 08/02/2011	To: 05/19/2012
From: 07/31/2012	To: 02/05/2015

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 with the U.S. Department of Labor (DOL) on May 17, 2014. However, the instant H-1B extension petition was filed on March 2, 2015, approximately 289 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.

In response to the Director’s request for evidence, the Petitioner claimed that the date it began the mandatory recruitment period for the labor certification process should be considered the filing date. The Petitioner further stated that since it began recruiting on February 10, 2014, 365 days had passed when it filed the H-1B petition.

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. The DOL regulations describe the basic labor certification process. An employer who wants to apply for a labor certification on behalf of an individual must file a completed ETA Form 9089. 20 C.F.R. § 656.17(a)(1). The date of filing is when the ETA Form 9089 is electronically submitted to the ETA application processing center. 20 C.F.R. § 656.17. The Petitioner has not provided any legal basis to support its assertion that the submission of an ETA Form 9141, Application for Prevailing Wage Determination, is sufficient for an extension of H-1B classification beyond the normal six years. Thus, 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 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, Immigrant Petition for Alien Worker, 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 was not eligible to be granted lawful permanent resident status on the basis that she was subject to a per country or worldwide visa limitation in accordance with the her immigrant visa "priority date." However, the Petitioner does not assert and there is no evidence to support a claim 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

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# 16880 (AAO Mar. 29, 2016)