

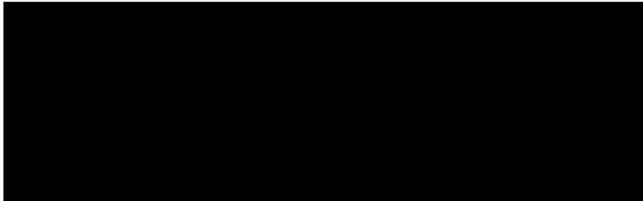
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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U.S. Citizenship
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Services

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FILE: WAC 07 079 52403 Office: CALIFORNIA SERVICE CENTER Date: **SEP 12 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a law firm that seeks to extend beyond the six-year limitation the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) pursuant to 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 determined that the beneficiary was not entitled to be employed for an additional year under the provisions of the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (21st Century DOJ Appropriations Authorization Act) because the petitioner had not submitted verification from the Department of Labor (DOL) that the beneficiary has a pending labor certification. The director also found that the instant petition was untimely filed, and that the record contains no evidence that the delay was due to an extraordinary circumstance beyond the control of the petitioner and/or the beneficiary. In addition, the director found that the petitioner did not submit a certified labor condition application (LCA) that was valid for the period of requested employment from June 1, 2006 to May 31, 2007, and that the petitioner presented a false statement by claiming that its clerk failed to keep "a copy of the LCA and the entire I-129 Package when she sent the package out on or about May 27, 2006."

On appeal, the petitioner states, in part, that the previous petition for an extension (WAC-06-225-52989) was improperly denied, as the petitioner did not "refuse" to pay the \$750.00 ACWIA fee that was requested in the director's request for evidence (RFE); rather, it only inquired whether the ACWIA fee was necessary. The petitioner states further that the untimely filing of the instant petition is due to the director's improper denial of the previous petition for an extension. The petitioner further maintains that the LCA that was filed with the original petition "got lost at the USCIS office," and that the new LCA (certified after the instant petition was filed) should be accepted as a *nunc pro tunc* filing. The petitioner states that the beneficiary's two previous employers "did file valid and approvable labor certification applications (ETA 750s) respectively in 2001 and 2003 that are still pending with the [DOL]" and that "[a]t least one of such former employers had previously clearly indicated that he would continue to support and sponsor the labor certification application and subsequent I-140 petition."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(I) provides that the request for extension must be accompanied by either a new or photocopy of the prior certification from the DOL that the petitioner continues to have on file an LCA valid for the period of time requested for the extension.

As discussed above, the director denied the petition because the petitioner did not submit a certified LCA that was valid for the period of requested employment from June 1, 2006 to May 31, 2007, and the LCA that was submitted by the petitioner in the instant proceedings was certified by the DOL after the filing of the petition. The petitioner's assertion that there was an LCA that was filed with the original petition that "got lost at the USCIS office," is noted. The record contains no evidence that such LCA was filed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In this matter, the Form I-797, Notice of Action, reflects that the beneficiary's H-1B was valid until May 31, 2006. The petitioner, therefore, should have obtained the certification from the DOL that was valid for the period of requested employment from June 1, 2006 to May 31, 2007. Moreover, the LCA submitted into the record in the course of the present proceedings was certified on April 30, 2007, a date subsequent to January 12, 2007, the filing date of the visa petition. Regulations at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) provide that *before filing a petition for H-1B classification in a specialty occupation*, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. (Emphasis added.) Since this has not occurred, the petition may not be approved.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." However, section 106(a) of AC21, as amended, removed the six-year limitation on the authorized duration of stay in H-1B visa status once 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien.

As amended by § 11030A(a) of DOJ21, § 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 § 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. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

As found by the director, the beneficiary has been employed in the United States in H-1B status since October 12, 2000, and the request for an additional year will place the beneficiary beyond the six-year limit.

The petitioner's assertion on appeal that the petitioner's two former employers filed labor certification applications that are still pending before the DOL, is noted. The record contains an ETA-750, Application for Alien Employment Certification, signed on April 20, 2001 by the beneficiary's former employer, Dansker & Aspromonte Associates. It is noted that this application has not been endorsed by the DOL. The record also contains a status report, dated October 23, 2003, from the State of New York Department of Labor, in reply to a status inquiry regarding the labor certification filed on April 21, 2003, by Lubin & St. Louis, P.C. on behalf of the beneficiary. As found by the director, however, the petitioner did not provide a verification letter from the DOL as evidence that the beneficiary still has a pending labor certification.

The AAO finds that the director was correct in determining that the petitioner had not established that either the Dansker & Aspromonte Associates or the Lubin & St. Louis, P.C. labor certification application had been pending for the required time. On September 23, 2005 CIS provided the following interim guidance to its personnel with regard to evidence of the pendency of permanent labor certification applications:¹

The USCIS will accept the following documents as evidence that an application for labor certification filed on behalf of the H-1B beneficiary has been pending 365 days or more:

¹ Memorandum from William R. Yates, Associate Director, CIS Operations, *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year*. HQPRD70/6.2.8 (September 23, 2005).

- A document from a State Workforce Agency (SWA) reflecting that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more; or
- A document from one of Department of Labor's Employment and Training Administration (ETA) regional offices reflecting that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more, or
- A database screen-print from one of Department of Labor's Employment and Training Administration (ETA) backlog reduction centers reflecting that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more.

The above documents must include the name of the petitioning employer, the date that the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the pending Form ETA-750. . . .

The instant petition was filed on January 17, 2007, and therefore was subject to the above adjudicative standards. The petitioner, however, provided none of the documents there specified.

The AAO further notes that CIS has taken administrative notice that "all labor certification applications filed with the DOL prior to March 28, 2005 have received a final determination with the exception of still-active cases pending on appeal at BALCA [Board of Alien Labor Certification Appeals] or those cases still noted as pending in the BEC's [Backlog Elimination Center's] Public Disclosure System (PDS) [<http://pds.pbls.doleta.gov>]." ²

Accordingly, these labor certification application documents submitted by the petitioner cannot be a basis for extending the beneficiary's authorized period of stay in the United States in H-1B status beyond the maximum six-year limit.

The beneficiary's authorized period of stay expired on May 31, 2006; however, the instant petition seeking an additional one-year period of authorized employment was not filed until January 12, 2007. The petitioner's assertions that the previous petition for an extension (WAC-06-225-52989) was improperly denied, and that the untimely filing of the instant petition is due to the director's improper denial of the previous petition, are noted. As denial of the previous petition is not a proper subject of this appeal, the AAO will not adjudicate that issue.

² Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277*. HQ 70/6.2 / AD 08-06 (MAY 30, 2008), at page 5. .

Pursuant to 8 C.F.R. § 214.2(h)(14), a request for an H-1B petition extension may be filed only if the validity of the original petition has not expired. As the validity of the previous petition expired on May 31, 2006, more than seven months prior to the January 12, 2007 filing of the current petition, the petition extension may not be approved. Accordingly, the beneficiary has reached the 6-year maximum allowable period of stay as an H-1B nonimmigrant, the petition was filed after the validity of the previous petition had expired, and therefore the alien is not eligible for an extension of stay pursuant to 8 C.F.R. § 214.2(h)(14) and section 106(a) of AC21. In view of the foregoing, the AAO will not disturb the director's denial of the petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.