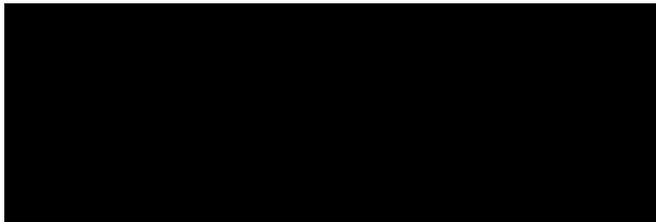


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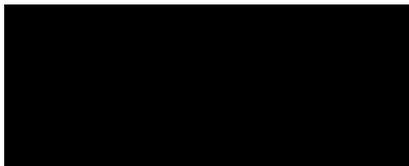
Office: NEBRASKA SERVICE CENTER

Date: AUG 16 2005

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:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Nebraska 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 university hospital conducting state-funded medical research. It seeks extend its employment of the beneficiary as a research associate under 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 denied the petition because the beneficiary is not eligible for extension of H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). The director determined that, at the time of filing, there was no employment-based immigrant visa petition for the beneficiary pending before Citizenship and Immigration Services (CIS).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B, with a letter from counsel and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21, as amended by the 21st Century DOJ Appropriations Act, removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant visa petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by section 11030(A)(a) of the 21st Century DOJ Appropriations Act, 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 11030(A)(b) of the 21st Century DOJ Appropriations Act amended § 106(a) of AC-21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The Attorney General 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.

The beneficiary has resided in the United States in H-1B classification since April 1, 1996, having twice previously had his maximum authorized period of stay extended by CIS. On March 26, 2004, the petitioner again applied to extend the beneficiary's H-1B stay beyond the initial six-year period. The director denied the extension, noting that CIS records indicated that the beneficiary's Immigrant Petition for Alien Worker, Form I-140, had been denied on October 28, 2002 and there were no other petitions pending with CIS.

On appeal, counsel asserts that an H-1B beneficiary may qualify for an extension of stay under AC21 if a petitioner files a labor certification (Form ETA-750) for this individual at least 365 days prior to the expiration of H-1B status. He submits documentation to establish that the petitioner filed a labor certification with the Ohio Department of Job and Family Services on April 14, 2003. While he acknowledges that the period between the filing of the labor certification and the expiration of the beneficiary's second extension falls short of a year, he contends that the ten-day grace period offered by 8 C.F.R. § 214.2(h)(13)(i)(A) practically extended the beneficiary's period of authorized stay from March 31, 2004 to April 10, 2004, which would make the filing of the labor certification on April 14, 2003 only four days short of the required 365 day period and, therefore, insignificant, for the purposes of these proceedings.

Counsel submits a copy of the labor certification he submitted to the local Labor Department, and asserts that the filing meets the requirements of section 106(a) of AC21, as amended. The documentation submitted by counsel is insufficient to establish that an application for labor certification had been pending 365 days or more on the date the petitioner filed the Form I-129.

Policy guidance issued by CIS on April 24, 2003, and referenced by counsel in the petitioner's appeal, lists the documentation needed to establish that an application for labor certification filed on behalf of an H-1B beneficiary has been pending 365 days or more, as follows:

(1) a document from a State Workforce Agency (SWA) notifying the employer, the employer's representative, the Department of Labor, or the [CIS] that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more; or

(2) a document from one of the Department of Labor's Employment and Training Administration (ETA) regional notifying the employer, the employer's representative or the [CIS] that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365

days or more.

The memorandum requires that “[t]he 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.” Memorandum from [REDACTED] Acting Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator’s Field Manual Update AD 03-09*. HQBCIS 70/6.2.8-P (April 24, 2003), page seven.

While the copy of the Form ETA-750 counsel submits on appeal is accompanied by his firm’s transmittal letter dated April 14, 2003, the record contains no evidence of filing that would satisfy the CIS documentation requirements just noted. The copy of the petitioner’s ETA-750 is not date stamped by the Ohio Department of Job and Family Services as being received, nor does the file include any documentation from that agency regarding its receipt of the application. Accordingly, the record does not establish that the petitioner filed a labor certification on behalf of the beneficiary on April 14, 2003 or on any other date. Counsel’s assertions that the ETA-750 was filed on April 14, 2003 cannot serve as proof for the purposes of these proceedings. Without documentary evidence to support the claim, the assertions of counsel do not satisfy the petitioner’s burden of proof. The statements of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also questions CIS denial of the instant petition in light of the two previous extensions of the beneficiary’s stay. He contends that there have been no substantial changes in the case, nor any information that adversely impacts the beneficiary’s eligibility. He raises a CIS memorandum of April 23, 2004, which instructs officers to give deference to prior determinations when adjudicating extension cases involving the same parties and the same underlying facts. The AAO does not find counsel’s reasoning to be persuasive.

As noted in the April 23, 2004 memorandum referenced by counsel, CIS has the authority to question prior determinations. CIS is not bound to approve applications or 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. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Further, the AAO’s authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *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 previously discussed, the record before the AAO offers no evidence that, on the March 26, 2004 date of filing, the H-1B worker in the instant case was the beneficiary of a labor certification application pending for more than 365 days, as required for an extension under section 106(a) of AC21, as amended. Nor, as previously noted by the director, was this individual the beneficiary of an employment-based immigrant visa petition awaiting adjudication by CIS. The Form I-140 filed on behalf of the beneficiary by the petitioner had been denied on October 28, 2002. Accordingly, the petitioner has not established that the beneficiary is eligible for a further extension of his H-1B stay in the United States. *See* Memorandum from [REDACTED] Associate Director for Operations, 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 American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313). HQPRD 70/6.2.8-P (May 12, 2005).

Counsel states that the facts in the instant case are not substantially different from those in the first and second extension requests, which were approved. He contends that the petitioner's third request should also be approved in deference to these previous decisions. If counsel is correct and the record of evidence in these earlier extension cases also failed to establish that, at the time of filing, a labor certification application or employment-based immigrant visa petition benefiting the H-1B worker had been pending for more than 365 days, then these prior extensions of the beneficiary's maximum authorized period of stay may have been approved in error. Approving the instant petition would simply compound these errors.

For the reasons previously discussed, the beneficiary, on the date of filing, was not eligible for an exemption from the six-year limitation on his H-1B classification under section 106(a) of AC21, and an extension of his H-1B status for an eighth year under section 106(b) of AC21. Accordingly, the appeal will be dismissed.

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.