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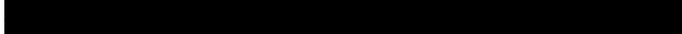
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*Dr*

FILE: EAC 04 254 51341 Office: VERMONT SERVICE CENTER Date: **AUG 29 2006**

IN RE: Petitioner:   
Beneficiary: 

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the Vermont 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 pharmacy with six employees. It seeks extend its employment of the beneficiary as an accountant 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 (21<sup>st</sup> Century DOJ Appropriations Act). The director determined that the record did not establish that the proffered position qualified as a specialty occupation or that a labor certification application benefiting the beneficiary had been pending for at least 365 days.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with a letter from counsel and additional 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 21<sup>st</sup> 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 21<sup>st</sup> 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 21<sup>st</sup> 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.

CIS has issued guidance indicating that extensions of H-1B status should be granted beyond the sixth year if a pending or approved labor certification application had been filed at least 365 days prior to the requested employment start date on the H-1B petition and the beneficiary would still be in H-1B status 365 days from that filing. See Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *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 6<sup>th</sup> Year*, HQPRD 70/6.2.8 (September 23, 2005).

CIS has once previously extended the H-1B status of the beneficiary, who reached the maximum six-year limit on his H-1B classification on June 15, 2003. The petitioner has applied to extend the beneficiary's H-1B status for a second year. The director denied the extension, finding that the record did not demonstrate that a labor certification application benefiting the beneficiary was pending with the U.S. Labor Department. The director noted that the record contained a copy of a DOL notice indicating the agency's intent to deny the previously-filed labor certification application as of September 18, 2003, unless it received a response to its findings that the job duties provided in connection with the application were "not normally combined" and that the description of certain duties was vague. He found the petitioner to have submitted no evidence to establish that the labor certification application referenced in the DOL notice was still pending and that Labor had not acted on its intention to deny the application. The director also found the record to contain no evidence documenting the petitioner's filing of a second labor certification application on behalf of the beneficiary, as claimed by counsel in response to the request for evidence.

On appeal, counsel submits a copy of the new labor certification application (Form ETA-750) benefiting the beneficiary, which he asserts was filed with the New York State Department of Labor on June 10, 2004.<sup>1</sup> As proof of the date of filing, counsel offers copies of a certified mail receipt and an electronic confirmation of

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<sup>1</sup> In response to the director's request for evidence, counsel stated that he had responded to the DOL notice prior to the September 18, 2003 deadline. However, the petitioner in the instant case did not file the ETA-750 referenced in the DOL notice. The employer addressed by the notice is Lowitt Labs Pharmacy, Inc. of Jackson Heights, New York. On appeal, counsel indicates only that he filed the petitioner's new labor certification application on behalf of the beneficiary.

delivery from the U.S. Postal Service. The evidence does not, however, establish that the submitted labor certification application is pending with the Department of Labor.

The certified mail receipt and the electronic delivery confirmation do not indicate what was delivered to the New York State Department of Labor on June 10, 2004, nor confirm that it was mailed by the petitioner. Going on record without supporting documentation is not sufficient to meet the petitioner's burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). Therefore, the record does not establish that a labor certification application for the beneficiary is pending with the U.S. Department of Labor. Moreover, the period between the claimed filing date of June 10, 2004 and the August 5, 2004 employment start date indicated on the Form I-129 falls far short of the 365 days required to satisfy the requirements of section 106(a) of AC21. As previously discussed, to exempt a beneficiary from the six-year limit on H-1B status, a labor certification application benefiting him or her must have been pending 365 or more days on the date the H-1B petition identifies as the start of the proffered employment. Accordingly, as the record does not demonstrate that a labor certification application filed on behalf of the beneficiary has been pending 365 or more days, it does not provide a basis for again exempting him from the limits imposed by section 214(g)(4) of the Act, 8 U.S.C. 1184(g)(4), on H-1B admissions to the United States.

The AAO notes that the director also found that the record did not establish the proffered position as a specialty occupation based on his determination that the job title and description listed on the Form I-129 are substantially different from that provided in connection with the Form ETA-750, even though the petitioner stated that its extension request would continue the beneficiary's previously approved employment without change. In his denial, the director stated that the petitioner had failed to explain these differences.

On appeal, counsel attributes the differences between the information provided by the Form ETA-750 and the petitioner's Form I-129 submission to errors made by previous counsel. However, the AAO notes that the Form ETA 750 referred to by the director was filed on behalf of the beneficiary by an employer other than the petitioner. The job title and duties listed on the previously filed Form ETA 750 by this employer do not, therefore, contradict the petitioner's statement at filing that it wished to continue its employment of the beneficiary without change. Accordingly, the AAO withdraws the director's finding that the differences in the employment described in the Forms ETA-750 and I-129 provide a basis for determining that the proffered position does not qualify as a specialty occupation.

Nevertheless, for the reasons previously discussed, the AAO will not disturb the director's denial of the petition. The petitioner has failed to establish that the beneficiary qualifies for another exemption from the six-year limit on H-1B admission under section 106(a) of AC21, as amended.

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.