U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 08 124 50122 Office: CALIFORNIA SERVICE CENTER Date: DEC 0 1 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew for
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 dental clinic that seeks to continue to employ the beneficiary as a computer system analyst. The petitioner, therefore, endeavors to continue to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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 denied the petition, concluding that the beneficiary is not eligible for extension of H-1B nonimmigrant status under the 21st Century Department of Justice Appropriations Authorization Act because a final decision was made on the alien's employment based immigrant petition.

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, 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), removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant 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 § 11030(A)(a) of the DOJ Authorization Act, § 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 DOJ Authorization Act amended § 106(b) of AC21 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 director stated that the beneficiary has resided in the United States in H-1B classification since April 30, 1998. On March 26, 2008, the petitioner applied for an extension of H-1B status for the beneficiary which would have placed the beneficiary beyond his six-year limit. The director noted that United States Citizenship and Immigration Services (USCIS) records indicated that the beneficiary's Immigrant Petition for Alien Worker, Form I-140 (LIN 07 190 52582), filed with the Nebraska Service Center, was denied. The director also noted that the I-140 petition was subsequently denied again on August 18, 2007 after granting a motion to reopen or reconsider the matter (LIN 07 218 54197).

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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal counsel contends that the petitioner "did indeed have an I-140 on file for an underlying approved Labor Certification that had been in process for more than one year." Counsel further explained that the petitioner did not receive a receipt for the filed I-140 and thus instead included a copy of the cashed check of that filing, dated January 4, 2007. However, in reviewing the USCIS records, the Form I-140 was filed on June 22, 2007, thus the check submitted with this file could not be the same check used to file the I-140 form six months after the check was cashed.

In addition, counsel submits the USCIS receipt notice for the filing of the Form I-140, dated April 9, 2008 (LIN 08 075 50876). Counsel also submits a copy of the approved labor certification for the petitioner, dated September 29, 2006. Counsel asserts that the H-1B extension should be granted since the I-140 is "currently on file and [was] pending at the time of the extension filing."

Counsel stipulated that a "previously filed I-140 on the case" was denied. Although counsel alludes to the possibility that the 7th year extension could be based on the beneficiary's first labor certification that was filed and submitted with the subsequently denied I-140 petition, the petitioner has provided no evidence of any other pending labor certification application. 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)).

Regardless, the beneficiary is not eligible for a 7th year extension of H-1B status. Section 106(b)(1) of AC21, as amended, specifically indicates that the one-year extension of stay should not be granted once a final decision is made to deny the I-140 immigrant petition that was filed pursuant to the granted labor certification. The Form I-140 Immigrant Petition for Alien Worker that was filed on the beneficiary's behalf was denied. In addition, the motion subsequently filed by the petitioner only resulted in the issuance of another denial of the I-140 petition on August 18, 2007. Since the I-140 was denied based on the approved labor certification, dated September 29, 2006, the petitioner may not use that labor certification for the current H-1B extension petition. Neither the plain language of the statute nor the pertinent legislative history indicate that Congress intended to permit an alien beneficiary to have his or her stay indefinitely extended in a temporary, nonimmigrant classification based on a prior, approved labor certification once the I-140 petition filed using that labor certification is denied. To otherwise permit a petitioner to thereafter repeatedly file I-140 petition(s), whether frivolous or not, based on that same labor certification in order to permit the indefinite extension of stay in a temporary H-1B nonimmigrant status of the alien beneficiary would be demonstrably at odds with the Act as a whole, with regard to immigrant versus nonimmigrant classification, as well as with the plain language of Section 106 of AC21, as amended.

Be that as it may, the petitioner has provided a receipt notice for a second I-140 filing, received by USCIS on January 8, 2008. Thus, the petitioner did not have a Form I-140 pending for more than 365 days when the current petition for H-1B extension was filed on March 26, 2008. The I-140 was pending for less than three months when the current H-1B extension petition was filed. Therefore, the beneficiary does not meet the requirement that 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment based immigrant; or (2) 365 days or more have passed since the filing of the employment based immigrant petition (Form I-140). *See* Memorandum from William R. Yates, 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). Accordingly, the AAO shall not disturb the director's denial of the petition.

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.