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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: WAC 07 149 54197 Office: CALIFORNIA SERVICE CENTER Date: JUL 01 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 software company that seeks to employ the beneficiary as a project lead. The petitioner, therefore, endeavors 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, finding 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 AC-21 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(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 director stated that the beneficiary has resided in the United States in H and or L classification since May 5, 2001. On April 23, 2007, 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 07 123 52800), filed with the Nebraska Service Center on March 22, 2007, was denied on March 29, 2007.

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.

On appeal, counsel contends that the beneficiary's eligibility is based upon a separate labor certification filed by the beneficiary's prior employer, Rightorder, Inc. (Rightorder). Specifically, counsel contends that Rightorder filed an Application for Employment Certification on behalf of the beneficiary on January 9, 2006. Said labor certification was approved on March 20, 2006. Since the extension request in this matter was filed on April 23, 2007, over 365 days since the filing of Rightorder's labor certification on behalf of the beneficiary, counsel contends that the beneficiary is eligible for extension of H-1B status. In support of this contention, counsel submits a copy of the certification notice dated March 20, 2006.

Upon review, the AAO notes that while the director's basis for the denial was appropriate, he overlooked the evidence cited by counsel on appeal. The AAO has reviewed the record in its entirety before issuing its decision.

The beneficiary is not eligible for a 7th year extension of status. The Form I-140, Immigrant Petition for Alien Worker, that was filed on the beneficiary's behalf by the petitioner was denied on March 29, 2007. Although the record indicates that at the time of the extension request, another labor certification was certified and had been filed more than 365 days prior to the filing of the instant petition to extend the beneficiary's status, that labor certification is no longer valid.

The Department of Labor (DOL) amended the administrative regulations at 20 CFR part 656 through a final rule-making published on May 17, 2007, which took effect on July 16, 2007 (71 FR 27904) ("DOL final rule"). The DOL final rule includes several provisions that will significantly impact adjudication of Form I-140 petitions that require DOL-approved labor certifications as a supporting document. New 20 CFR 656.11 prohibits the alteration of any information contained in the labor certification after the labor certification application is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. New 20 CFR 656.30(b)(1) provides a 180-day

validity period for approved labor certifications; employers will have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS. New 20 CFR 656.30(b)(2) establishes an implementation period for the continued validity of labor certifications that were or are approved by DOL prior to July 16, 2007; such labor certifications will have to be filed in support of an I-140 petition within 180 days after the effective date of the DOL final rule.

In this matter, while the petitioner is correct in asserting that the labor certification filed by Rightorder and approved on March 20, 2006 was valid and was pending for more than 365 days at the time of the filing of this petition, the labor certification upon which the petitioner relies has since been rendered invalid based on the above. The regulation at 20 C.F.R. § 656.30(b)(2) provides that the petitioner had 180 days from July 16, 2007 in which to file the labor certification in support of an Form I-140 application. Therefore, the validity of said certification expired on January 12, 2008.

It is noted that counsel relied upon the following provisions from a USCIS interoffice memorandum in support of the beneficiary's eligibility:

> Question 6. Should service centers or district offices deny a request for an H-1B extension beyond the 6-year limit where the labor certification was filed over 365 days ago, has been approved, but the I-140/I-485 has not yet been filed?
>
> Answer: No. Until further guidance is published, a request for an H-1B extension beyond the 6-year limit should not be denied on the sole basis that an I-140 petition has not yet been filed.
>
> Question 7. Should service centers or district offices deny a request for an H-1B extension beyond the 6-year limit where the labor certification or immigrant petition from an employer who is not the H-1B petitioner was filed for the beneficiary more than 365 days ago?
>
> Answer: No. The statute does not require that the labor certification or immigrant petition must be from the same employer requesting the H-1B extension.

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).

This memorandum, however, does not constitute official USCIS policy, and will not be considered as such in the adjudication of petitions or applications. While the AAO is loathe to differ with the stated interpretation of the law as set forth in a USCIS memorandum, we do not find counsel's contention, even as supported by the Yates' memorandum, of this particular issue to be sufficiently persuasive. The AAO is not bound by the statutory interpretation set forth in the memorandum. The memorandum is not the product of formal rulemaking procedures, nor is it a precedent decision. It is strictly an operational memorandum from the Associate Director for Operations directing the USCIS Service Centers and Regional Directors in their

adjudicative work. *See Yeboah v. U.S. Dept. of Justice,* 345 F.3d 216, 222 n. 4 (3rd Cir. 2003)(finding that an INS memorandum should not be afforded deference because it lacks statutory construction and was not the product of formal rule-making procedures); *see also Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004)("It is doubtful that an internal agency memorandum of this sort could confer substantive legal benefits upon aliens or bind [USCIS]."). Most importantly, this memorandum pre-dates the final rule implemented on July 16, 2007 under 20 CFR part 656.

Under the DOL final rule, the labor certification on which this petition is based is no longer valid. *See* 20 C.F.R. § 656.30(b)(2). Therefore, the beneficiary is not eligible for the benefit sought.

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 failed to meet that burden.

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