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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: EAC 07 226 52071 OFFICE: VERMONT SERVICE CENTER DATE: NOV 18 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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 avers that it is an ornamental plant nursery that was established in 1994 and currently has 3 employees. It seeks permission to employ the beneficiary as a horticulturalist/plant manager and, 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 because the beneficiary, who had already spent six years in the United States in H-1B status, was ineligible to extend his status pursuant to section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21). On appeal, counsel submits a brief and contends that the beneficiary is eligible to extend his H-1B status because his application for a labor certification is still pending

On the I-129 petition, the petitioner indicated that the beneficiary had been in the United States in H-1B status since September 6, 1997. The petitioner also stated that an Application for Alien Employment Certification (Form ETA 750) was filed on behalf of the beneficiary, and it submitted a copy of the ETA 750 to which the Department of Labor (DOL) assigned a May 1, 2001 priority date. The petitioner was seeking to extend the beneficiary's H-1B status for an additional one year.

In his December 11, 2007 request for evidence (RFE), the director notified the petitioner that its ETA 750 that was filed on the beneficiary's behalf had been closed. The director, therefore, asked the petitioner to submit evidence that would entitle the beneficiary to extend his H-1B status.

In response, the petitioner's former counsel indicated that on January 21, 2008, it had sent a letter to DOL requesting a reopening of the petitioner's ETA 750 because it had not received any correspondence on the matter from DOL. Counsel asked the director to hold the adjudication of the petition in abeyance until it could resolve the matter with DOL.

On March 24, 2008, the director denied the petition. The director noted counsel's request to hold the petition's adjudication in abeyance, but stated that he could not provide such an extension of time. The director ultimately denied the petition because the beneficiary was ineligible for an extension of his H-1B status under section 106(a) of AC21 as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

On appeal, the petitioner's current counsel submits email messages that were sent to DOL to reopen the ETA 750 that was filed on the beneficiary's behalf. According to counsel, DOL agreed to reopen the ETA 750 in August 2008 and, therefore, the beneficiary is eligible to extend his H-1B status pursuant to section 106(a) of AC21.

The AAO notes that 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 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 § 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).

When reviewing the director's decision, the AAO looks to whether the petitioner complied with the regulation at 8 C.F.R. § 103.2(b)(1), which states:

> Demonstrating eligibility at time of filing . An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence

> submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

Although counsel states on appeal that the DOL has reopened the petitioner's closed ETA 750, at the time of filing the I-129 petition, the labor certification was no longer pending and, therefore, the beneficiary was not eligible to extend his H-1B nonimmigrant status for an additional one year pursuant to section 106(a) of AC21. The AAO notes further that even if it had found the reopened ETA 750 to satisfy section 106(a) of AC21, the petition could not have been approved because of section 106(b) of AC21, which states:

> Section 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:
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> (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—
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> *(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;*
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> *(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).

According to USCIS records, the petitioner filed a Form I-140 on the beneficiary's behalf on March 5, 2009, which USCIS denied on November 2, 2009. Therefore, pursuant to section 106(b) of AC21, as USCIS has made a final decision to deny the Form I-140, the beneficiary is not eligible to extend his H-1B nonimmigrant status.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden.

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