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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: EAC 04 064 52996 Office: VERMONT SERVICE CENTER Date: MAR 0 2 2005

IN RE: Petitioner:
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:

[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.

Robert P. Wiemann, Director
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 computer software training and consultancy business that seeks to employ the beneficiary as a programmer analyst. 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 because the beneficiary is not eligible for extension of H-1B nonimmigrant status under the 21st Century Department of Justice Appropriations Authorization Act because the petitioner had not provided sufficient evidence that 365 days or more had elapsed since the filing of the Labor Certification (Form ETA-750) with the Department of Labor.

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 Competiveness in the 21st Century Act (AC-21) 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.

On January 6, 2004, the petitioner applied for an extension of H-1B status for the beneficiary which placed the beneficiary beyond his six-year limit. On January 13, 2004, the director requested additional evidence to establish the beneficiary's eligibility under section 106 of the AC21. The director requested a copy of the Application for Alien Employment Labor Certification (Form ETA-750). The director stated that in order to establish eligibility, CIS would accept evidence that a labor certification application was pending for 365 days or more. The director stated that this evidence may include documentation, letters from a state workforce agency (SWA) or from the Department of Labor's ETA regional offices. The director noted if the regional Department of Labor office is refusing to issue a letter, the petitioner should be prepared to provide evidence of this refusal to CIS. The director stated that without the verifying letters from the Department of Labor, CIS would not be able to approve the requested 7th year extension. Additionally, the director advised that CIS would not be able to accept a photocopy of the Form ETA 750 application without supporting documentation from the appropriate Department of Labor office.

The petitioner's response was received on or about April 9, 2004. The petitioner stated that it had not been able to receive proof of filing from the labor department. The petitioner stated that it sent two letters to the local labor department. The first letter was dated February 17, 2004 and the second letter was dated February 25, 2004. The petitioner submitted a letter that it received a letter from the New Jersey Department of Labor Office of Alien Labor Certification. This letter states "we do not provide acknowledgement of the receipt of a case. For future submittals, if you wish proof, submit the application by certified mail or a delivery service referencing the beneficiary on the receipt form." The director denied the petition and stated the evidence of record does not establish that the beneficiary is eligible for an extension of stay beyond six years under the provisions of sections 104(a) or 106 of the AC21.

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

On the Form I-290B counsel states "we have once again verified the fact that a labor certification application is pending with the NJ Department of Labor ([redacted]Beneficiaries [sic] case[redacted] We shall forward details of the case as soon as we receive correspondence for the NJ DOL." The AAO notes that it has not received any additional correspondence. The record is considered complete.

If the alien is not otherwise eligible for an extension of H-1B status, then Citizenship and Immigration Services (CIS) will not approve a request for extension of H-1B status. The beneficiary is not eligible for a 7th year extension based on the record of proceeding. The beneficiary is unable to establish that a labor certification application filed on his behalf has been pending for more than 365 days when this H-1B extension was filed.

Therefore, the beneficiary does not meet the requirements 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, 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 AD03-09.* HQBCIS 70/6.2.8-P (April 24, 2003). Counsel submitted no proof that the petitioner filed the labor certification application as alleged. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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.