U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: WAC 06 120 51403 Office: CALIFORNIA SERVICE CENTER Date: OCT 29 2007

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, 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 provides computer and engineering consulting services. It seeks to extend the beneficiary's employment as a project manager for a seventh year. 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 record of proceeding before the AAO contains: (1) the Form I-129, filed March 6, 2006 and supporting documentation; (2) the director's May 15, 2006 request for additional evidence (RFE); (3) counsel for the petitioner's August 4, 2006 response to the director's request; (4) the director's August 28, 2006 denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition determining that the petitioner had not satisfied the requirements for the beneficiary's extension of stay under the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

On appeal, counsel for the petitioner submits a brief.

The issue in this matter is whether the beneficiary is eligible for a seventh year extension pursuant to the requirements for an extension of stay under AC21 and DOJ21. The AAO finds the petitioner has not overcome the basis for the director's decision on appeal.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years" and that an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year. AC21 (as amended by DOJ21) removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays and broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ21, section 106(a) of AC21 states the following:

> (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)).
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> (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 DOJ21 amended section 106(a) of AC21 to state the following:

> (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—
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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
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> (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 May 15, 2006, the director specifically requested that the petitioner provide verification from the Department of Labor (DOL) that the employer[1] labor certification had been pending for 365 days. The director noted in the RFE that permanent cases from the DOL's regional offices and the State Workforce Agencies were transferred to the ETA Backlog Processing Center as of April 22, 2005. The director requested evidence, such as the "45-day letter" from the DOL that the employer is still pursuing its labor certification, a DOL screenshot, and evidence that the employer had appealed any denied decision, to establish that the labor certification application was still pending. The director advised the petitioner on the process to obtain this information.

In response to the director's RFE, counsel for the petitioner in this matter provided evidence that his office had requested information from the Backlog Processing Centers regarding a labor certification application filed by an employer, different than the petitioner, for the beneficiary that had been given a priority date of April 20, 2001. Counsel noted that his office had not received a response.

The director determined: (1) that the beneficiary had resided in the United States in H or L classification since April 20, 1999; (2) that an extension of employment pursuant to the instant petition would place the beneficiary beyond the six-year limitation; and (3) that the petitioner had not provided the requested verification that the beneficiary still had a pending labor certification. The director concluded that the

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[1] The employer listed in the Form 750, labor certification application, is a different employer than the petitioner requesting the beneficiary's seventh year extension petition.

record of proceeding did not establish an underlying basis for the beneficiary's eligibility for a seventh year extension.

On appeal, counsel for the petitioner observes that an application for labor certification was filed on the beneficiary's behalf on May 16, 2001 and to the best of the petitioner's knowledge, the beneficiary's knowledge, and counsel's knowledge, the application remains pending. Counsel notes that despite numerous attempts to obtain evidence regarding the labor certification application filed May 16, 2001, the petitioner has not received notice of the most recent action on the labor certification application. Counsel provides evidence of the attempts made to obtain information relating to the matter. Counsel asserts that the petitioner's efforts to comply with the procedures to demonstrate the beneficiary's eligibility for a seventh year extension pursuant to AC21 and DOJ21, and the DOL's failure to provide the petitioner with the necessary documentation should not result in a denial of an otherwise eligible applicant's petition. Counsel asserts that Citizenship and Immigration Services (CIS) has the burden of proving that the labor certification application is no longer pending.

Counsel's assertions are not persuasive. The AAO finds that the petitioner and the beneficiary are in the best position to discover and submit proof of a pending labor certification application. The AAO notes that the petitioner in this matter is different than the company that submitted the Form ETA-750 on the beneficiary's behalf. Regarding the Form ETA-750 submitted on the beneficiary's behalf, this record of proceeding contains: the name of the company that filed the Form ETA-750; a case number and priority date assigned to the application; evidence that the Form ETA-750 was being handled by the California Employment Development Department, (EDD) State Workforce Agency; and a May 10, 2002 letter mailed to counsel from the EDD indicating a conversion request had been received and the case file had been moved to the RIR shelf under the date of 5/8/02. The evidence of record does not verify that the Form ETA-750 filed May 16, 2001 is pending. The petitioner must submit supporting documentary evidence to meet its burden of proof. *See 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)). Moreover, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this matter, the petitioner has not established that the beneficiary is fully qualified for an extension beyond the six-year limitation of authorized stay in H-1B visa status. The petitioner has not provided evidence sufficient to overcome the director's decision on this issue.

The petition will be denied and the appeal dismissed for the above stated reason. 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.