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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[redacted]

FILE: WAC 08 062 50161 Office: CALIFORNIA SERVICE CENTER Date: FEB 25 2010

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 is an automation engineering, machine building, project/process engineering, and software and development consulting company that seeks to employ the beneficiary as a quality manager. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record indicates that the beneficiary entered into H-1B nonimmigrant status in May 1999, and that such status ended on September 14, 2006. An additional H-1B petition, which did not extend the beneficiary's nonimmigrant status, was approved on October 29, 2007, with validity dates of October 10, 2007 through September 1, 2008. U.S. Citizenship and Immigration Services (USCIS) records indicate that the following H-1B approvals have been issued on behalf of the beneficiary:

- LIN 99 115 50776, valid April 8, 1999 through January 31, 2002;
- LIN 02 005 52607, valid November 8, 2001 through September 14, 2004;
- LIN 04 800 46437, valid September 15, 2004 through September 14, 2005;
- LIN 05 249 51539, valid September 15, 2005 through September 14, 2006; and
- WAC 07 254 53900, valid October 10, 2007 through September 1, 2008.

The issue before the AAO is whether the beneficiary is eligible for additional time in H-1B status based upon the American Competitiveness in the Twenty-First Century Act (AC-21)[1], as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ-21).[2]

As a general rule, 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." However, AC-21 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 DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

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[1] American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

[2] Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

(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.*

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states 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—

(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.*

(emphasis added to identify sections amended by DOJ-21.)

When it filed the petition, the petitioner submitted evidence that another employer had filed an application for labor certification on behalf of the beneficiary on February 21, 2002. In her January 4, 2008 request for additional evidence, the director requested, among other items, evidence from the Department of Labor (DOL) regarding the current status of the labor certification. The petitioner responded to the director's request on January 28, 2008, and failed to submit any evidence regarding the current status of the application. However, counsel did state in her January 24, 2008 letter that "[w]e know for a fact that the labor certification application filed on behalf of [the beneficiary] has not been denied." The director found this explanation and lack of supporting documentation insufficient, and denied the petition on February 13, 2008.

On appeal, counsel submits a March 6, 2008 printout from the DOL website indicating that the labor certification has been "CLOSED."[3] Although counsel acknowledges in her appellate brief that the application was closed by the DOL, she contends that the beneficiary's H-1B status should be extended nonetheless, as sections 106(a) and (b) of AC-21, as amended by DOJ-21, do not provide for the closure of labor certification applications.

The AAO disagrees with counsel's analysis, and finds, for reasons discussed *infra*, that a labor certification that is invalid due to administrative closure may not provide a basis for an AC-21 based exemption to section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

The primary issue in this matter revolves around the definition of the term "deny" as used in section 106(b)(1) and 106(b)(2) of AC-21, as amended by DOJ-21. The statute itself does not provide a definition of the term "deny," and the congressional record also fails to directly define this term. Therefore, an analysis of the plain language of the statute and, failing that, the congressional intent behind the statute, must be undertaken to determine whether the statute incorporates the term "valid" or "invalid" or "expired" as those terms relate to a labor certification that is being used as a basis to extend an alien's stay under section 106(b)(1).

Again, sections 106(b)(1) and 106(b)(2) use only the term "deny" when outlining the parameters of the factors involved in the extension of an alien's stay under AC-21. Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991). We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

As the plain meaning of the word "deny" does not by its own definition incorporate the terms "invalid" or "closed" when referring to a labor certification that forms the basis for an extension of an alien's stay based on an exemption under subsections 106(b)(1) and (2), the AAO must therefore examine the legislative intent in enacting AC-21 and the subsequent amendment of AC-21 by DOJ-21 to ensure that a literal application of the statute will not produce a result demonstrably at odds with the intent of its drafters. *See Samuels, Kramer & Co. v. CIR*, 930 F.2d 975, *cert. denied*, 112 S. Ct. 416. Senator Leahy and Representative Smith (TX), sponsors of DOJ-21, but not of

[3] The AAO notes that the DOL website still describes the current status of the labor certification as "CLOSED." *See* http://pds.pbls.doleta.gov/pbls_pds.cfm (accessed January 4, 2010).

AC-21, both made comments stating that section 11030A of DOJ-21 permits H-1B aliens who have labor certification applications caught in lengthy agency backlogs to extend their status beyond the sixth year limitation. 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002); *accord* 148 Cong. Rec. S11063 (daily ed. Nov. 14, 2002). Representative Smith also noted that AC-21 was put in place to recognize the lengthy delays at the legacy Immigration and Naturalization Service (INS) in adjudicating petitions and that DOJ-21 addresses the lengthy processing delays at the DOL. Representative Smith observed that the DOJ-21 legislation allowed those who are about to exceed their six years in H-1B status to not be subject to the additional requirement of having to file the immigrant petition by the end of the sixth year, which he noted "is impossible when DOL had not finished its part in the process." 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002). Thus, the legislative history of DOJ-21 underscores the legislative concern regarding the lengthy processing delays occurring at the DOL. More importantly, the main purpose of the legislative change appears centered on providing an additional means by which aliens may remain in the United States and continue to work during the time their application for permanent resident status is pending.

The legislative history of DOJ-21 does not in any way reflect an intent to indefinitely extend an alien's stay in a temporary, nonimmigrant status once DOL finishes its part, i.e., adjudicating the labor certification application, in the employment-based immigrant visa process. Rather, as noted above, the law was designed to permit H-1B nonimmigrants to continue their stay in the United States and work in H-1B status as long as there was a pending and ongoing process to obtain lawful permanent resident status in the United States.[4] To interpret this statutory provision otherwise and provide a means by which an alien can remain indefinitely and thereby permanently in the United States in a temporary, nonimmigrant status is demonstrably at odds with the Act as a whole as well as with the clear intent behind the drafting of section 106 of AC-21, as amended by DOJ-21.

The AAO acknowledges that a denial of a labor certification differs from that of a labor certification application that has been closed. However, for the reasons discussed, giving the words "deny" or "denied" their ordinary meaning and construing the terms in relation to the intent of the statute and the Act as a whole, the terms "deny" or "denied" incorporate the meaning of the terms "invalid" and "closed." Both a denial issued through an individualized decision as well as the closure of an application for labor certification result in the invalidity of the labor certification and are evidence that DOL has completed its process of adjudicating the labor certification application and that the

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[4] The AAO notes that an "extension of stay" must be distinguished from an extension of H-1B status, which occurs through a "petition extension." Although those seeking H-1B status are currently permitted to file one form to request a petition extension, extension of stay, and change of status, they are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). The AAO observes that in general, according to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21. On the other hand, the title of section 106(b) of AC21 reads "Extension of H-1B Worker Status." In this situation, where the title uses the word "[s]tatus" and the text uses the word "stay," the text of the statute prevails. The title of a statutory section is not controlling, and where it is contrary to the text of the statute, the text is controlling. *Immig. and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 308-309 (2001).

beneficiary's application process for obtaining lawful permanent resident status in the United States by way of that labor certification has ended.

Thus, whether the validity of an application for labor certification is terminated by a denial or by closure of the proceeding, the lack of a valid labor certification application precludes USCIS from further processing petitions or applications dependent upon those labor certification applications. Again, to accept counsel's contrary interpretation, USCIS would be required to indefinitely extend an individual's stay in the United States in one-year increments once a labor certification had been filed, even if the labor certification application had been administratively closed and never approved, or was otherwise considered invalid. To reiterate, nothing in the AC-21 or DOJ-21 legislative history serves to suggest that Congress intended that petitioners on behalf of individual aliens retain the ability to have those aliens remain in the United States indefinitely, e.g., for twenty or thirty years, simply because an application for labor certification had been "closed" by the DOL rather than denied. Rather, the legislative intent reflects only a desire to shield individual aliens from the inequities of government bureaucratic inefficiency and does not include a mandate for an infinite extension of stay in a nonimmigrant status when an application has been administratively closed.

As observed above, using counsel's reasoning, an individual's stay in H-1B status would be almost completely unrestricted once 365 days had elapsed since the filing of an application for labor certification, even if the application was closed administratively (i.e., not approved). Once these conditions were met, the individual's stay would absurdly result in continuous one-year extensions with no requirement that the petitioner ever file any petition that would ultimately result in the beneficiary obtaining lawful permanent resident status in the United States. To avoid this incongruous outcome, the AAO has applied the most reasonable interpretation of the term "deny" such that it complies with and complements Congressional intent in establishing an exemption from the maximum six-year stay in H-1B status. As such, USCIS must consider the validity of the DOL labor certification application when adjudicating an AC-21 H-1B extension petition, as without a valid labor certification upon which to base a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act, there is not basis for the approval of an employment-based immigrant petition.

Accordingly, the director did not err as a matter of law or policy in concluding that the beneficiary is not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants under section 214(g)(4) of the Act. Therefore, the beneficiary is ineligible for additional time in H-1B status on that basis, and this petition was properly denied.

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.