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: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 04 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 elementary school district that seeks to employ the beneficiary as a school psychologist. Accordingly, the petitioner 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 petitioner had failed to demonstrate that it qualified to extend the beneficiary's stay in H-1B classification beyond the maximum six-year period of stay in the United States permitted by section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). On appeal, counsel contends that the director erroneously denied the petition.

In general, section 214(g)(4) of the Act provides that "[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years." However, the amended "American Competitiveness in the Twenty-First Century Act" (AC21), Pub. L. No. 106-313 (2000), removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by sections 11030(A)(a) and (b) of the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21), reads as follows:

(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.

(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.

Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002).

Subsequent to the enactment and effective date of AC21 as amended by DOJ21, (hereinafter referenced as AC21) the United States Department of Labor (DOL) issued the "Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System." 69 Fed. Reg. 77326 (Perm Rule) (published on December 27, 2004, and effective as of March 28, 2005). The DOL Perm rule, in general, provides for the revocation of approved labor certifications if a subsequent finding is made that the certification was not justified. *Id.* It is codified at 20 C.F.R. § 656.32.

DOL issued a second rule, the "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," published on May 17, 2007, which took effect on July 16, 2007. 72 Fed. Reg. 27904 (Perm Fraud rule). The DOL Perm Fraud rule, now found at 20 C.F.R. § 656.30(b), provides for a 180-day validity period for labor certifications that are approved on or after July 16, 2007. Petitioning employers 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 U.S. Citizenship and Immigration Services (USCIS). The regulation at 20 C.F.R. § 656.30(b)(2) also established an implementation period for the continued validity of labor certifications that were approved by DOL prior to July 16, 2007; such labor certifications must have been filed in support of an I-140 petition within 180 calendar days after the effective date of the DOL final rule (July 16, 2007) in order to be valid.

The beneficiary has resided in the United States in H-1B classification since March 17, 2003. On March 16, 2009, 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 found that the beneficiary's PERM labor certification application, certified on April 29, 2008, had expired prior to the petitioner's filing of Form I-140, Immigrant Petition for Alien Worker [redacted]. Specifically, the director noted that the labor certification expired on October 26, 2008 in accordance with the 180 validity period under the PERM Fraud rule. Since the immigrant petition in this matter was not filed until December 17, 2008, the director concluded that the labor certification was invalid at the time of filing, thus precluding the beneficiary from receiving a 7th year extension.

On appeal, counsel contends that the director erroneously went "behind the record" in issuing the denial. Specifically, counsel alleges that the PERM labor certification application, filed on February 23, 2008 and

certified on April 29, 2008, had been pending for more that 365 days at the time of filing the instant petition. Additionally, counsel contends that while the director notes the expiration of the labor certification as a basis for the denial, the immigrant petition filed on behalf of the beneficiary was still pending at the time of the filing of the extension request. Counsel argued, therefore, that although the labor certification upon which the immigrant petition was based may have expired, a final decision to deny that petition had not been made when this extension request was filed. Counsel concluded by asserting that since a final decision to deny the immigrant petition had not been made at the time of filing, the beneficiary was qualified for an extension beyond the six-year limit under AC21 § 106(a).

Counsel's argument is insufficient to warrant a 7th year extension in this matter, since counsel does not take into account that approved labor certifications must be filed with a Form I-140 petition *within the validity period stipulated by DOL* in order to remain valid. While the AAO does not dispute that the labor certification was pending for more than 365 prior to the filing of the instant request for extension, the labor certification was not valid at the time this extension request was filed. According to the DOL Perm Fraud rule, as set out at 20 C.F.R. § 656.30(b)(2), the validity of labor certification applications approved subsequent to July 16, 2007 expire within 180 calendar days after the date of approval if not filed in support of a Form I-140. As such, the AAO concurs with the director's finding that the petitioner's labor certification application filed on April 29, 2008 expired or ceased to be valid on October 26, 2008.

Based upon the supplemental information in DOL's Perm Fraud rule as well as the plain language of 20 C.F.R. § 656.30, a labor certification that is invalid may not provide the basis for an approval of a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act. *See generally* 72 Fed. Reg. 27904, 27925, 27939. Therefore, an immigrant petition filed with an invalid or expired labor certification may not provide a basis for an AC21 based exemption to section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

The legislative history of DOJ21 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. 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 AC21 as amended by DOJ21.

Thus, whether the validity of a labor certification application is terminated by a denial or by regulatory expiration, the lack of a valid labor certification application precludes USCIS from further processing petitions or applications dependent upon those labor certification applications. 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 approved, even if the labor certification expired according to DOL regulations or an immigrant petition was filed based upon an expired labor certification. 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 the petitioner fails to file a immigrant petition for the beneficiary.

Finally, while USCIS has not addressed this issue by promulgating a regulation, it has issued policy guidance on this issue as it relates to DOL's Perm Fraud rule. *See Supplemental Guidance Relating to Processing Forms I-140, Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) Title IV of Div. D. of Public Law 105-277*, HQ 70/6.2 AD 08-06 (May 30, 2008). Contrary to counsel's claims, this policy guidance states that "USCIS will *not* grant an extension of stay under AC21 § 106(a) if, at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during the validity period, as specified by DOL." *Id.*

Moreover, this policy guidance states that "the filing of an immigrant petition with an expired labor certification would result in the automatic rejection, or if accepted in error, denial of that EB immigrant petition, which in turn, acts as a statutory bar to the granting of an extension beyond the 6-year maximum." *Id.* The AAO notes that the immigrant petition in this matter was initially accepted in error but was ultimately denied on May 30, 2009.

In this matter, the PERM labor certification was not filed in support of an I-140 petition within 180 days from the date of its approval. Therefore, this labor certification expired on the 180th day, and was therefore not valid at the time the instant petition was filed on March 16, 2009. The fact that the petitioner ultimately filed a defective immigrant petition based upon the expired labor certification does not provide the beneficiary a channel through which to extend his stay in the United States. For the reasons outlined above, the petitioner cannot rely upon this labor certification and the deficient immigrant petition that was pending at the time of filing as the basis for a 7th year extension of H-1B status for the beneficiary. 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.