U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 0 5 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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.

On the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a software consulting and staffing company with 20 employees. In order to employ the beneficiary in what it designates as an Oracle database administrator position, the petitioner seeks 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 found that the petition could not be approved because the petitioner failed to establish that the beneficiary is exempt from the six-year limitation contained in section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), pursuant to sections 104(c) and 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21). *See* Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002).

On appeal, counsel contends that the director erroneously denied the petition. Specifically, counsel contends that the regulations do not require that a labor certification be filed prior to the expiration of the beneficiary's H-1B status, and that the director's findings were thus "ultra vires and invalid as a matter of law." No additional evidence was submitted in support of the petitioner's appeal.

United States Citizenship and Immigration Services (USCIS) records reflect that the beneficiary held H-1B status from April 11, 2006 to May 10, 2012. The record of proceeding shows that on October 28, 2011, the petitioner filed an application for alien employment certification with the U.S. Department of Labor, which was denied on June 1, 2012.[1] The instant petition for a seventh-year extension under AC21 was filed on November 6, 2012.

The AAO notes that in general section 214(g)(4) of the Act provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21, as amended by DOJ21, 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.

Section 104(c) of AC21 reads in pertinent part:

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[1] The record indicates that the petitioner filed a request for appeal of the denied Form ETA 9089 on June 27, 2012, and a screen print of DOL records indicate that the case was pending as of November 14, 2012. Nevertheless, the fact that the labor certification was pending appeal at the time the current petition was filed is irrelevant for the reasons set forth in this decision.

> Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—
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> > (1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and
> >
> > (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs, may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253.

By its very terms, section 104 applies in cases where a petitioner is seeking to extend the current nonimmigrant status of the beneficiary. In such a situation, 8 C.F.R. § 214.2(h)(14) further mandates that this "request for a petition extension may be filed only if the validity of the original petition has not expired." In this matter, the petitioner clearly indicated on the Form I-129 that it was filing this request as a petition for new employment and *not* as a continuation of previously approved employment without change with the same employer, i.e., a petition extension. Therefore, the beneficiary does not qualify for an extension of such status beyond the maximum period permitted under section 104(c) of AC21.

As amended by section 11030A(a) of DOJ21, section 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 section 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. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

In this matter, the AAO finds that there is insufficient evidence in the record that 365 days or more have elapsed from either (1) the filing of a labor certification application or (2) the filing of an employment-based immigrant petition (Form I-140). The director correctly observed that the labor certification, filed on October 28, 2011, had not been pending for the requisite period at the time the beneficiary's H-1B status expired. Therefore, the beneficiary is ineligible for a one-year period of stay beyond the maximum period permitted in H-1B status under AC21.

Accordingly, the director did not err in concluding that the beneficiary is not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants contained in section 214(g)(4) of the Act. Therefore, the appeal is dismissed. The petition is denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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