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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 0 2 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,

Ron Rosenberg
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 submitted a Form I-129 (Petition for Nonimmigrant Worker) to the Vermont Service Center on April 26, 2012. On the Form I-129 visa petition, the petitioner describes itself as a travel agency established in 1980. In order to continue to employ the beneficiary in what it designates as a sales manager 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 denied the petition, finding that the petitioner failed to establish that the beneficiary is eligible for an extension of stay. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's notice of intent to deny (NOID); (3) the petitioner's response to the NOID; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

Under the Act, H-1B admission is limited to six years. *See* section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B or L nonimmigrant in the United States, unless he/she has resided and been physically present outside the United States for the immediate prior year. *See* 8 C.F.R. § 214.2(h)(13)(iii)(A). Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay. However, as will be discussed, section 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) removes the six-year limitation on the authorized period of stay in H-1B classification for aliens under certain conditions.

Specifically, section 106(a) of 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. *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). 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.

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:*
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> *(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 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—
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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.*

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). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based petition under section 203(b) of the Act is considered a lengthy adjudication delay for purposes of this exemption. *See* Pub. Law No. 107-273, 116 Stat. at 1836.

In the instant matter, the petitioner submitted the Form I-129 petition on April 26, 2012. In the Form I-129 petition, the petitioner was asked to provide the beneficiary's prior period of stay in H classification in the United States. The petitioner was notified that it should list only those periods in which the beneficiary was actually in the United States in an H classification. The petitioner provided the following information on the Form I-129 petition (page 11):

From: **10/14/2004** To: **present**

Thus, the petitioner indicated in the Form I-129 petition that the beneficiary's prior period of stay in H classification "in the United States" was from October 14, 2004 through the submission of the H-1B petition (without interruption) to April 26, 2012. As previously discussed, H-1B admission is limited to six years. *See* section 214(g)(4) of the Act. Based on the information provided in the Form I-129 petition, the beneficiary reached six years of stay in the H-1B classification on October 13, 2010.

In the cover letter dated April 24, 2012 filed in support of the H-1B petition, counsel for the petitioner indicated that the petitioner is requesting an extension beyond the six years under Section 106 of AC21. In support, counsel submitted a copy of a decision dated December 23, 2011 from the U.S. Department of Labor (DOL), Board of Alien Labor Certification Appeals (BALCA). In the decision, the denial of the labor certification was affirmed.[1]

On July 30, 2012, the director issued a NOID. The director noted that the petitioner is requesting an extension of the beneficiary's stay under section 106 of AC21. The director acknowledged that petitioner submitted the BALCA decision and notified the petitioner that it may not be used to apply for an extension of stay. The petitioner was asked to provide evidence to demonstrate eligibility for the benefit sought.

Counsel submitted a response to the NOID. In the letter dated August 29, 2012, counsel asserted that while the BALCA "has issued its final decision, the [p]etitioning employer is still considering whether to pursue review of the decision in Federal District court." Counsel resubmitted the BALCA decision. No further evidence to establish eligibility was provided by the petitioner.

On October 26, 2012, the director denied the petition. The director noted that a final decision was issued by BALCA on December 23, 2011, and that a denied permanent labor certification may not be used to apply for an extension under section 106 of AC21. Counsel submitted an appeal of the denial of the H-1B petition.

Upon review of the record of proceeding, the AAO finds that the petitioner failed to establish that the beneficiary is eligible for an extension beyond the six-year limitation. The record of proceeding contains no evidence that a qualifying labor certification application or a Form I-140 petition had been pending for *at least 365 days* on or prior to the last day of the beneficiary's authorized period of H-1B admission. As noted, BALCA issued its decision on December 23, 2011 affirming the DOL's decision to deny the labor certification application. The petitioner submitted the instant H-1B petition on April 26, 2012, approximately four months after the BALCA decision was issued. Thus, at the time of filing the instant petition, there was no evidence that a labor certification or an immigrant petition had been pending for at least 365 days on or prior to the last day of the beneficiary's authorized stay.

[1] The decision states, "This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board." There is no evidence in the record of proceeding that the petitioner petitioned for review by the full Board.

Subsequent to filing the appeal, counsel supplemented the record by submitting an approval notice for a Form I-140 petition (SRC-13-100-51556). The receipt date is February 15, 2013 and the date is February 26, 2013. Thus, the Form I-140 petition was adjudicated approximately eleven days after submission.

Counsel asserted that the beneficiary "is eligible for a three year extension of his H-1B based on the I-140 approval." However, the AAO notes that the Form I-140 petition was filed and approved approximately *nine months after* the filing of the instant H-1B petition.

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

> 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.

Under 104(c) of AC21, an alien who is subject to a per-country limitation and who is the beneficiary of an approved immigrant petition under section 203(b)(1), (2), or (3) of the Act, 8 U.S.C. 1153(b)(1), (2), or (3), is eligible for H-1B approval beyond the statutory six-year maximum. *See* Pub. Law 106-313, 114 Stat. at 1252-1253. The H-1B petitioner must demonstrate that an immigrant visa is not available to the alien at the time the H-1B petition is filed.

The AAO notes that the regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Here, the above mentioned I-140 petition was filed and approved after filing the instant H-1B petition. Therefore, the beneficiary was also not eligible for an extension of stay under 104(c) of AC21.

Section 214(g)(4) of the Act limits the period of authorized admission of an H-1B nonimmigrant. The petitioner did not demonstrate that the beneficiary was eligible for an exemption from this

statutory provision and was eligible for an extension of stay when the H-1B petition was submitted. The petitioner failed to establish eligibility for the benefit sought at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1).

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.