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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: SEP 04 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

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 (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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, ("the director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking to continue to employ the beneficiary and to classify him 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, determining that the petitioner had not established the beneficiary's eligibility for an extension of stay in H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21). More specifically, the director found that the petitioner had not provided sufficient documentary evidence to establish that the denied permanent labor certification application was pending appeal on October 20, 2011, the date the instant petition was filed.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, and counsel's statement on the Form I-290B. The record now also includes a Decision and Order Affirming Denial of Certification, issued by the Board of Alien Labor Certification Appeals (BALCA) on February 7, 2013.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21, as amended by DOJ21, temporarily 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.

As amended by § 11030A(a) of DOJ21, § 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)).*
>
> *(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 § 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. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

The record of proceeding reveals the following salient facts. The petitioner filed three Forms I-129 on behalf of the beneficiary which were all approved, granting the beneficiary H-1B status from November 3, 2003 until October 28, 2009.[1] On May 22, 2009, prior to the expiration of the beneficiary's authorized stay, the petitioner filed an Application for Permanent Employment Certification (ETA Form 9089) (hereinafter "PERM Application") on behalf of the beneficiary. Subsequently, on October 9, 2009, the petitioner filed a fourth Form I-129 requesting an extension of the beneficiary's H-1B status.[2] The fourth Form I-129 was approved for a one-year extension period from October 29, 2009 until October 28, 2010. A fifth petition was filed and was also approved for a one-year extension period from October 29, 2010 until October 28, 2011.

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[1] During this same time period (i.e., on March 5, 2007) the petitioner filed a Form I-140 (SRC 07 118 51253) on behalf of the beneficiary. This Form I-140, however, was denied on October 3, 2007.

[2] The time the beneficiary spends in the United States after lawful admission in H-1B status is the time that counts toward the maximum six-year period of authorized stay. In this matter, while it may appear that the beneficiary would have reached his six-year maximum period of authorized admission in H-1B status on November 2, 2009, the record indicates that the beneficiary's first admission to the United States in H-1B status was not until December 8, 2003. In addition, while the current record does not include comprehensive evidence demonstrating what time, if any, the beneficiary spent outside the United States during the six years in H-1B status, it will be assumed for purposes of this decision that this evidence was included in the prior record of proceeding (i.e.,). *See* 8 C.F.R. § 214.2(h)(14) (permitting the filing of a petition extension without all supporting evidence unless requested). Otherwise, it would have been gross error on the part of the director to have determined that the beneficiary was entitled to recapture any days spent outside the United States and extend the maximum period of H-1B classification sufficient to qualify for an extension of stay beyond that normally permitted pursuant to section 106 of AC21. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(*5*) (requiring revocation on notice of the approval of an H-1B petition where that approval violated paragraph (h) of that section or involved gross error).

On March 30, 2011, the U.S. Department of Labor (DOL) through its certifying officer (CO) denied the pending PERM Application for eight reasons. The petitioner filed a request for reconsideration of the denial on April 20, 2011. On October 13, 2011, the petitioner filed the instant Form I-129 petition.

In a request for further evidence, the director requested that the petitioner provide evidence that it had appealed the denial of the PERM Application and that the appeal is currently pending. In a May 4, 2012 response, the petitioner advised the director that it had been notified that the CO had accepted some of its arguments on reconsideration but had determined that six of the denial reasons had not been overcome. The petitioner also advised the director that BALCA had provided a notice that the appeal had been docketed on January 3, 2012. The record does not include a copy of that notice from BALCA. The record, however, does include an undated "memorandum" addressed to the petitioner in care of counsel from the Atlanta National Processing Center Certifying Officer. The memorandum identified the ETA Case Number and referenced an enclosed "CD-Rom copy of the above referenced permanent labor certification appeal file" that had been submitted to BALCA. The record further included counsel's brief, signed February 14, 2012, submitted to BALCA presenting arguments for reversal of the denial of the PERM Application.

As observed above, the director found that the petitioner had failed to provide sufficient documentary evidence establishing that the denied PERM Application was pending appeal when the instant petition was filed. On appeal, counsel asserts that the petitioner had provided documentary evidence from the CO when it filed the instant petition requesting an extension of the beneficiary's H-1B stay pursuant to AC21.

Subsequent to the filing of the Form I-290B, BALCA's decision on the appeal of the denial of the petitioner's PERM Application was incorporated into the record of the instant Form I-129 extension petition.[3] The BALCA decision provides the following pertinent history: (1) the employer (the petitioner in this matter) requested reconsideration of the denial of the PERM Application on April 20, 2011;[4] (2) on reconsideration the CO accepted some of the petitioner's arguments but determined that six of the denial reasons had not been overcome; and (3) the case was forwarded to BALCA where it was docketed on January 3, 2012. Upon review, BALCA affirmed the CO's denial of the PERM Application on February 7, 2013.

Upon review of the totality of the record, including the BALCA decision dated February 7, 2013, the AAO finds that the beneficiary was eligible for a temporary exemption from the six-year limitation on his admission in H-1B nonimmigrant classification under AC21, section 106(a), and to an extension of his stay in H-1B status for a ninth year under AC21, section 106(b), at the time the instant petition was filed on October 20, 2011. The record now includes documentary

[3] It is noted that this evidence was obtained by the AAO on its own volition, incorporated into the record of proceeding, and considered on appeal. As this decision is not adverse and as this evidence was neither derogatory nor presumably unknown to the petitioner, no prior notice of its incorporation into this record is required by 8 C.F.R. § 103.2(b)(16)(i).

[4] Under DOL regulations, a request to review or reconsider a decision is an appeal of a CO's decision to deny certification, not a motion. *See generally* 20 C.F.R. §§ 656.24 and 656.26.

evidence showing that, although the application for labor certification under section 212(a)(5)(A) of the Act had been denied on March 30, 2011, the petitioner had subsequently requested reconsideration of the denial. The petitioner provided information in the form of counsel's February 14, 2012 appeal brief, that it was pursuing the appeal. On appeal, this assertion has now been corroborated by the BALCA decision issued February 7, 2013.

The AAO notes that U.S. Citizenship and Immigration Services (USCIS) regulations implementing the provisions of AC21 as amended have not yet been issued. The DOL regulations, however, allow an administrative request for review if a labor certification is denied and further state that the failure to timely request review "constitutes a failure to exhaust administrative remedies," indicating that a decision pending review or reconsideration by BALCA is not final until BALCA issues its decision in that matter. 20 C.F.R. § 656.24(e)(3); *see also* 20 C.F.R. § 656.32 (stating that if rebuttal evidence is not submitted to a Notice of Intent to Revoke issued by DOL, that notice "becomes the final decision of the Secretary [of Labor]."

Therefore, absent contrary USCIS regulations implementing AC21, as amended, the AAO concludes that as long as a decision on a PERM Application may be reversed on appeal by BALCA, USCIS should not consider that decision final for purposes of section 106(b) of AC21.[5] Accordingly, as the PERM Application in this matter was pending appeal and remained pending during the one-year employment period requested in the instant Form I-129 petition, the beneficiary was eligible for an extension of stay for that one-year period (i.e., from October 29, 2011 until October 28, 2012) pursuant to section 106(b) of AC21, as amended. As such, the instant Form I-129 requesting an extension of H-1B nonimmigrant classification on behalf of the beneficiary until October 28, 2012 will be approved.

In this matter, as the PERM Application was pending for purposes of the requested AC21 extension until February 7, 2013, the beneficiary was still entitled at the time the petition was filed to an AC21 extension of stay in H-1B nonimmigrant status for the entire one-year period requested in the petition. Accordingly, the appeal will be sustained, and the petition will be approved.

ORDER: The appeal is sustained. The petition is approved.

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[5] 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) for additional guidance to USCIS officers on adjudicating AC21-based H-1B petitions. This guidance specifically states, "USCIS will not consider a DOL decision to be final until either the time for appeal has run and no appeal has been filed or, if an appeal is taken, the date a decision is issued by BALCA." *Id.* at 12.