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FILE: WAC 03 126 50445 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2005

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:

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the service center 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 a retailer that seeks to employ the beneficiary as a pharmacist. The petitioner, therefore, 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 because the beneficiary is not eligible for extension of H-1B nonimmigrant status under the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act because a final decision was made on the alien's employment based immigrant petition.

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, the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21<sup>st</sup> Century DOJ Appropriations Act), 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 § 11030(A)(a) of the DOJ Authorization Act, § 106(a) of AC-21 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 11030(A)(b) of the DOJ Authorization Act amended § 106(a) of AC-21 to read:

(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.

The director stated that the beneficiary has resided in the United States in H-1B classification since March 14, 1997. On March 14, 2003, 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 noted that CIS records indicated that the beneficiary's Immigrant Petition for Alien Worker, Form I-140 (WAC9910451431) filed with the California Service Center on February 11, 1999 was denied on March 02, 1999.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal counsel contends that "[h]ad [the beneficiary's] previous employer not filed an I-140 on his behalf, he would unquestionably qualify under the 21<sup>st</sup> Century Department of Justice Appropriations Act based only on the labor certification filed by his former employer." Additionally, counsel contends that [the beneficiary] would have clearly qualified for an extension beyond his six-year limit under AC21 § 106(a) as it was originally enacted because he was the beneficiary of an employment based (EB) immigrant petition and 365 days or more had passed since the filing of a labor certification application on his behalf. Counsel asserts that "[b]ecause [the beneficiary] is taking steps towards obtaining lawful permanent residence, we submit that a final decision has not been made on his application for permanent residence and he should be granted an extension of stay."

Counsel stipulated that the I-140 immigrant petition of the previous employer was denied. Although counsel alludes to the possibility that the 7<sup>th</sup> year extension could be based on the beneficiary's first labor certification that was filed and submitted with the subsequently denied I-140 petition, the petitioner has provided no evidence of any other pending labor certification application. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Additionally, counsel states that the petitioner filed its own labor certification application for the beneficiary in August 2003. The AAO notes that the instant petition for the 7<sup>th</sup> year extension was filed March 2003.

The beneficiary is not eligible for a 7<sup>th</sup> year extension of status. The Form I-140 Immigrant Petition for Alien Worker that was filed on the beneficiary's behalf was denied on March 2, 1999, more than 365 days before this application for extension of status was filed. Additionally, the beneficiary did not have a labor certification application pending for more than 365 days when the current petition for H-1B extension was filed. Therefore, the beneficiary does not meet the requirement that 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment based immigrant; or (2) 365 days or more have passed since the filing of the employment based immigrant petition (Form I-140). See Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing*

*Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313). HQPRD 70/6.2.8-P (May 12, 2005).* 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.