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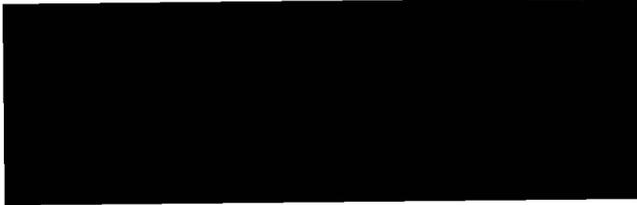
U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. 3000
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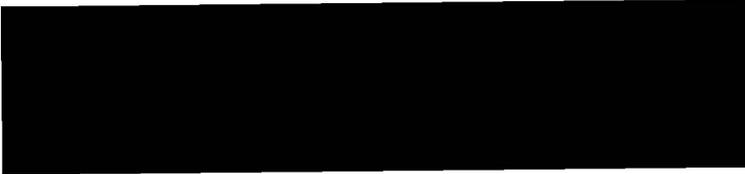
FILE: WAC 06 256 52280 Office: CALIFORNIA SERVICE CENTER Date: **JAN 16 2008**

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is an international courier and freight forwarding company that employs the beneficiary as a field marketing representative. The petitioner seeks to extend for a seventh year the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 on the ground that the beneficiary did not qualify for an exemption from the normal six-year limit on H-1B status.

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] may not exceed 6 years." However, the amended American Competitiveness in the Twenty-First Century Act ("AC21") 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 section 11030(A)(a) and (b) of the 21st Century Department of Justice Appropriations Act, 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.

The record of proceeding before the AAO includes (1) the Form I-129 and supporting documentation for a seventh year extension, filed on August 16, 2006; (2) the director's request for evidence (RFE); (3) counsel's response letter with additional documentation; (4) the director's denial letter; and, (4) the Form I-290B and supporting documentation.

The record shows that the beneficiary resided in the United States with H-1B classification continuously from October 20, 2000 through October 20, 2006. According to previous counsel, the petitioner filed a labor certification application (Form ETA-750) on behalf of the beneficiary on November 4, 2004, followed by the instant petition (Form I-129) on August 16, 2006 to extend the beneficiary's H-1B status by one year. Prior counsel stated in the response to the director's request for evidence, that the beneficiary did not receive any notification from the Department of Labor (DOL) regarding the labor certification application filed in November 2004. Counsel further stated that "it seems that the Department of Labor has lost the documents." Previous counsel submitted a copy of a certified mail receipt and return receipt sent by counsel and addressed to the State of New York Department of Labor, which indicated a receipt stamp of November 4, 2004.

Neither counsel nor the petitioner submitted sufficient documentation to establish that a labor certification application on behalf of the beneficiary was received by the State of New York Department of Labor in November 2004. In reviewing the copy of the certified mail receipt submitted by counsel, it does not reference the application on behalf of the beneficiary, and does not indicate exactly what previous counsel filed with the State of New York DOL. In addition, previous counsel asserted that the DOL "lost the documents"; however, the instant petition does not contain any corroborating evidence to this claim such as correspondence from DOL indicating that it had in fact lost the application for a labor certification application filed on behalf of the beneficiary. In addition, the petitioner did not submit any evidence that it requested a status inquiry from DOL about the application at any time after November 4, 2004. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel states that the evidence on record "demonstrate that the Beneficiary is prima facie eligible for an H-1B extension beyond his sixth year based upon an application for labor certification filed in November 2004." Counsel argues that even though the petition does not provide documentation from DOL regarding the application for a labor certification filed in November 2004, the petitioner provided "other forms of highly probative evidence" such as the copy of the certified mail receipt proving delivery to the New York Department of Labor on November 4, 2004.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence does not establish that a labor certification application was filed on behalf of the beneficiary on November 4, 2004. As discussed above, the copy of the certified mail receipt does not indicate that the filing with the New York State Department of Labor was on behalf of the beneficiary. In addition, the petitioner did not submit any documentation from DOL to indicate that it had lost the documents for any application filed on November 4, 2004. In the request for additional evidence, the director provided the petitioner with an email address in order to request a status verification of a pending application; however, it does not appear that the petitioner made an inquiry since it was not addressed on appeal and a copy of the inquiry is not in the file. The petitioner did not send a copy of the application for labor certification filed in November 2004. Again, 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. at 165.

In response to the director's request for evidence, previous counsel for petitioner stated that the petitioner "re-filed his Labor Certification under PERM in December 2006." A copy of the confirmation of this filing was attached. Thus, the only evidence of filing a labor certification application on behalf of the beneficiary is the PERM application which was filed on December 20, 2006. As the instant petition was filed on August 16, 2006, 365 days had not passed between the filing of the Form ETA-9059 on December 20, 2006 and the filing of the extension of status petition. The AAO agrees with the director's conclusion that the beneficiary is ineligible for exemption from the six-year limitation on H-1B classification and an extension of his H-1B status under AC21.

The petition for extension of H-1B status for a seventh year was filed on August 16, 2006, which preceded the filing of the labor certification application under PERM on December 20, 2006. In addition, the evidence of record does not support that a labor certification application was filed on November 4, 2004 on behalf of the beneficiary. Therefore, the beneficiary is not eligible for an exemption from the six-year limitation on his H-1B classification under AC21 section 106(a), and an extension of his H-1B status for a seventh year under AC21 section 106(b). In accordance with section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), limiting the authorized period of admission for an H-1B nonimmigrant to six years, the extension petition must be denied.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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