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AUG 04 2009

FILE: EAC 08 136 52047 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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)

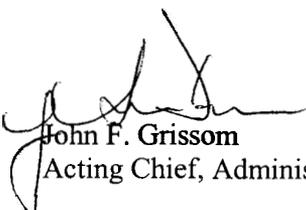
ON BEHALF OF PETITIONER:

SELF-REPRESENTED<sup>1</sup>

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

<sup>1</sup> The AAO notes that the petitioner's appellate submission was prepared by an attorney. However, counsel did not submit a Form G-28, Notice of Entry Appearance as Attorney or Representative. Accordingly, counsel is not authorized to receive notice of the outcome of this proceeding.

**DISCUSSION:** The 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 is a preschool that seeks to employ the beneficiary as a bilingual preschool teacher. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 on the basis of his determination that the beneficiary had exhausted the six-year maximum period of authorized H-1B stay, pursuant to 8 C.F.R. § 214.2(h)(13)(iii), and is therefore ineligible for an extension of nonimmigrant status.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to deny (NOID) the petition; (3) the petitioner's response to the director's NOID; (4) the director's denial letter; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision. Although the petitioner marked the box at Part 2 of the Form I-290B to indicate that a brief and/or additional evidence would be submitted to the AAO within 30 days, the AAO never received a brief and/or additional evidence. As such, the AAO deems the record complete and ready for adjudication.

The record indicates that the beneficiary entered into H-1B nonimmigrant status on April 22, 2002, and that such status ended on April 21, 2008. U.S. Citizenship and Immigration Services (USCIS) records indicate that three H-1B approvals have been issued on behalf of the beneficiary:

- SRC 02 083 53554, valid April 22, 2002 through February 8, 2003;
- SRC 03 090 51491, valid February 9, 2003 through August 11, 2005; and
- SRC 05 149 51294, valid August 12, 2005 through April 21, 2008.

The issue before the AAO is whether the beneficiary is eligible for additional time in H-1B status based upon the American Competitiveness in the Twenty-First Century Act<sup>2</sup> (AC-21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act<sup>3</sup> (DOJ-21).

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC-21 removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens

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<sup>2</sup> American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

<sup>3</sup> Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays, and DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

- (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 DOJ-21 amended section 106(b) of AC-21 to state the following:

- (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 petitioner filed the instant petition on April 14, 2008,<sup>4</sup> and requested that the beneficiary's H-1B status be extended from April 22, 2008 through February 22, 2009. When it filed the petition, the petitioner submitted evidence to establish that it had filed an application for labor certification on August 30, 2007.

In his April 18, 2008 NOID, the director notified the petitioner of his intent to deny the petition. The director notified the petitioner that since the application for labor certification had been filed on August 30, 2007, less than 365 days before the requested start date of April 22, 2008, the beneficiary was ineligible for benefits under sections 106(a) or (b) of AC-21.

The petitioner responded to the director's NOID on May 23, 2008. In its May 20, 2008 letter, the petitioner stated that it had actually filed two applications for labor certification on behalf of the beneficiary. The petitioner submitted further evidence to establish that it had indeed filed a labor certification on behalf of the beneficiary on August 30, 2007. It also submitted an e-mail from the Department of Labor which indicated that an application for labor certification had also been filed on May 29, 2007.

The director denied the petition on June 3, 2008. The director reiterated the language of his NOID with regard to the application for labor certification that had been filed on August 30, 2007, stating again that because it had not been filed more than 365 days before the April 22, 2008 start date of the period of authorized employment requested on the Form I-129, that application did not avail the beneficiary to benefits under sections 106(a) or (b) of AC-21. The director also found that the application for labor certification that had been submitted on May 29, 2007 did not avail the beneficiary to benefits under sections 106(a) or (b) of AC-21, for two reasons: (1) it was not filed more than 365 days before the April 22, 2008 start date of the period of authorized employment requested on the Form I-129; and (2) that the petitioner had submitted insufficient evidence to demonstrate that the May 29, 2007 application was still pending.<sup>5</sup>

The petitioner filed a timely appeal on July 2, 2008. The petitioner's argument that the petition should be approved rests on three contentions: (1) that the petitioner has filed an application for labor certification on behalf of the beneficiary, and that it is still pending; (2) that the beneficiary is entitled to "recapture" time spent outside the United States; and (3) that the proposed position qualifies for classification as a specialty occupation.

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<sup>4</sup> In its response to the director's NOID, the petitioner stated that the petition "was properly filed on April 7, 2008." However, the petitioner's assertion is factually incorrect: the mailing label on the Express Mail envelope used by the petitioner to mail the petition states specifically that it was accepted by the United States Postal Service at 12:53 P.M. on April 10, 2008. It was not delivered to the service center, and therefore not properly filed, until April 14, 2008.

<sup>5</sup> As noted by the director, "[c]orrespondence between a petitioner and the Department of Labor prior to the Department of Labor assigning a Case Number and determining and issuing a Filing Date is not [evidence] of a pending application."

With regard to the petitioner's first contention, that an application for labor certification filed on behalf of the beneficiary is still pending, the AAO notes that the director did not dispute the fact that such an application is still pending. The deficiency highlighted by the director, which the petitioner elects not to address, is that it was filed on August 30, 2007, which is less than 365 days prior to the April 22, 2008 start date of the period of authorized employment requested by the petitioner on the Form I-129. Even if the AAO were to accept the petitioner's apparent assertion in the NOID response that an application for labor certification was filed on May 29, 2007, it would not aid the beneficiary, as that date is also less than 365 days prior to the April 22, 2008 start date of the period of authorized employment requested by the petitioner on the Form I-129. There is no evidence of record that the petitioner filed an application for labor certification that would have been pending for more than 365 days on April 22, 2008, the requested start date of employment. The petitioner submits no evidence or makes no argument on appeal to rebut the director's findings in this regard. Accordingly, the AAO agrees with the director's determination that the beneficiary does not qualify for an additional year of H-1B status pursuant to AC-21, as amended by DOJ-21.

The AAO turns next to the petitioner's argument on appeal that because the beneficiary has spent 36 days outside of the United States during her time in H-1B nonimmigrant status, she is entitled to recapture those days, thereby adding 36 days to her status. The AAO notes that the petitioner raises this issue for the first time on appeal; it made no mention of time spent outside of the United States in either its initial filing, or in its response to the director's NOID.

As was noted previously, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that, as a general rule, "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." The regulation at 8 C.F.R. § 214.2 (h)(13)(iii)(A) states, in pertinent part, the following:

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless . . . . [emphasis added].

Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." The plain language of the statute and the regulations indicates that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States, and this conclusion is supported by *Nair v. Coultrice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001) and *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005).<sup>6</sup> Accordingly, the AAO agrees with the petitioner's general

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<sup>6</sup> See also Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005), which adopts *Matter of I-* as formal USCIS policy.

assertion that time spent by H-1B beneficiaries outside of the United States does not accrue toward their six-year periods.

However, although the AAO agrees with the petitioner's general assertion, the record of proceeding in this particular case does not contain sufficient evidence to establish that the beneficiary is entitled to recapture time spent outside the United States. Although the petitioner asserts that the beneficiary has spent 36 days outside of the United States since entering into H-1B status, the only evidence of record relating to the beneficiary's travels are copies of three entry stamps at page 14 of the beneficiary's passport. According to these passport stamps, the beneficiary entered the United States on January 16, 2007; July 7, 2007; and August 12, 2007. No further evidence is submitted.

The petitioner is in the best position to organize and submit proof of the beneficiary's departures from, and reentry to, the United States. The three passport stamps submitted by the petitioner, in the absence of any sort of accompanying statement or chart of dates the beneficiary spent outside the country, along with clear and corroborating proof of departures from and reentry to the United States, are subject to errors in interpretation. The AAO will not attempt to surmise how long each of these three trips by the beneficiary lasted. The petitioner must submit supporting documentary evidence to meet its burden of proof. *See 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)). The record of proceeding, as it currently stands, is insufficient to establish that the beneficiary spent 36 days outside the United States, as claimed by the petitioner.

Finally, the AAO turns to the petitioner's third assertion made on appeal in support of its stance that the petition should be approved: that the proposed position qualifies for classification as a specialty occupation. Although the petitioner makes this assertion on appeal, and devotes the majority of its appeal to making that assertion, the AAO notes that the director did not question the proposed position's status as a specialty occupation. As the specialty occupation issue was not a component of the director's denial, the AAO is unclear as to why the petitioner spends time on appeal making the argument. In any event, as the issue did not factor into the director's decision to deny the petition, the petitioner's assertions on appeal with regard to the proposed position's status as a specialty occupation do not overcome that decision.

For all of these reasons, the AAO agrees with the director's decision to deny the petition. The petitioner has failed to establish that the beneficiary is eligible for benefits under AC-21, as amended by DOJ-21. It has also failed to establish that the beneficiary is entitled to recapture the 36 days she reportedly spent outside of the United States for the purpose of extending her H-1B status on that basis. Accordingly, the AAO will 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.