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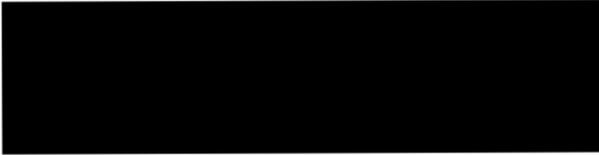
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

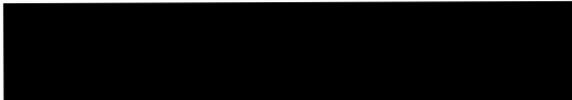
U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 230 54581 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



SEP 21 2009

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

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

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 construction management services company that seeks to continue its employment of the beneficiary as a project manager. 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 ineligible for further extension of his 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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record indicates that the beneficiary entered into H-1B nonimmigrant status on April 8, 1998. The information submitted by the petitioner indicates that seven H-1B approvals have been issued on behalf of the beneficiary:

- LIN 98 094 50052, valid April 8, 1998 through March 1, 2001;
- LIN 99 024 53381, valid December 18, 1998 through October 1, 2001;
- LIN 02 006 52400, valid October 1, 2001 through April 22, 2004;
- LIN 04 142 53900, valid April 23, 2004 through August 19, 2005;
- LIN 05 226 52308, valid August 19, 2005 through August 18, 2006;
- EAC 06 197 52470, valid August 18, 2006 through August 17, 2007; and
- WAC 07 039 53405, valid May 24, 2007 through November 12, 2007.

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 Act¹ (AC-21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act² (DOJ-21).

¹ American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

² Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

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 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 July 30, 2007, and requested that the beneficiary's H-1B status be extended from November 12, 2007 through November 11, 2008. When it filed the petition, the petitioner submitted evidence to establish that an application for labor certification had been filed on behalf of the beneficiary on or around July 9, 2003.

Upon adjudication of the petition, the director accessed the Department of Labor's public website, which stated that, as of October 3, 2007,³ the labor certification filed on behalf of the beneficiary had been "CLOSED." In her December 12, 2007 NOID, the director notified the petitioner of the current status of the beneficiary's labor certification and that, accordingly, the beneficiary was "not clearly eligible for classification under this section."

The petitioner responded to the director's NOID on January 10, 2008. The petitioner submitted no evidence that an application for labor certification on behalf of the beneficiary was currently pending. Rather, the petitioner asserted that the petition should be approved because the labor certification was still pending at the time the petition had been filed. The director found the petitioner's argument unconvincing, and denied the petition on February 6, 2008.

The petitioner submitted a timely appeal of the director's decision on March 3, 2008, which centers around three primary arguments: (1) that the petition should be approved because the labor certification was still "in process" at the time the instant petition was filed; (2) that the director failed to adjudicate the petition in a timely manner; and (3) that the director relied on information unrelated to the beneficiary in denying the petition.

Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition, and will address each of the petitioner's arguments in turn. As noted previously, the petitioner's first assertion is that, because the labor certification was still "in process" on the date the petition was filed, the petition should be approved, regardless of the fact that the labor certification had been closed by the time the instant petition was adjudicated.

The AAO finds this argument unpersuasive. As noted previously, section 106(b) of AC-21, as amended by section 11030(A)(b) of DOJ-21, provides that the Attorney General (now Secretary of Homeland Security) shall extend the stay of an alien who qualifies for an exemption under subsection (a) of AC-21 *until* such time as a final decision is made on the application for labor certification. In other words, once the labor certification has been denied, the alien is no longer eligible for benefits under AC-21, as amended by DOJ-21. The beneficiary's labor certification was "CLOSED" on or before October 3, 2007, which constituted evidence that the beneficiary was not eligible for the benefit being sought and, therefore, the director properly provided the petitioner the opportunity, via the NOID, to provide evidence that the beneficiary qualified for benefits under AC-21, as amended by DOJ-21. Rather than providing evidence of eligibility, the petitioner argued that the petition should be approved because the labor certification had not yet been closed at the time the petition was filed. The beneficiary does not

³ See http://pds.pbls.doleta.gov/pbls_pds.cfm (accessed October 3, 2007). As of September 5, 2009, this website contains identical information. See *id.*

have a labor certification pending. Nor has the petitioner provided evidence that the previous labor certification was certified. The record does not establish that the beneficiary is eligible for benefits under AC-21, as amended by DOJ-21. For all of these reasons, the AAO does not find the petitioner's first argument persuasive.

The petitioner argues next that the director did not adjudicate the petition in a timely manner. In support of this argument, counsel submits a printout from the website of U.S. Citizenship and Immigration Services (USCIS), which states that, on July 16, 2007, the California Service Center was processing H-1B cases received on May 15, 2007. The AAO notes that the petitioner made a similar argument in his January 7, 2008 NOID response when he stated that it had been awarded a contract on October 5, 2007 and that, "if this petition had been processed in the time that was originally anticipated, the Labor Certification would have remained 'in process' and would not be a reason to deny the petition."

The AAO does not find this argument persuasive. First and foremost, the AAO notes that the service center director's estimate of current processing times is provided as a public service to immigration benefits filers. It creates no legal mandate on the part of the director to continue processing applications at the same rate. Nor does it create a legal right on the part of filers to have their petitions approved if such petitions are unable to be adjudicated within that timeframe.

Second, the AAO notes that the service center director's July 16, 2007 report of processing times indicated that the service center was processing H-1B petitions filed on May 15, 2007. In other words, cases were typically being adjudicated within 62 days. On October 3, 2007,⁴ 61 days after the receipt notice date of August 3, 2007, the public website of the Department of Labor, to which the petitioner had the same access as USCIS, stated that the labor certification had been "closed." The Department of Labor, therefore, closed the beneficiary's labor certification, at the latest, on October 3, 2007. Accordingly, given that the Department of Labor closed the beneficiary's labor certification within the 62-day period during which the director was typically adjudicating cases at the time the instant petition was filed, the petitioner's assertion that the beneficiary's would have remained in process "if this if this petition had been processed in the time that was originally anticipated" is factually incorrect.⁵

For all of these reasons, the AAO find the petitioner's second argument unpersuasive.

Finally, the AAO turns to the petitioner's third argument. In her February 6, 2008 denial, the director stated that USCIS records indicated that the beneficiary had filed a Form I-485,

⁴ See *id.*

⁵ As noted, the petitioner stated that it had been awarded a contract on October 5, 2007. The petitioner stated further that the "Labor Certification was believed to be ongoing" and that there was "[t]herefore no concern that the obligation could not be met." Again, the director checked the Department of Labor's public website, to which the petitioner also had free access, on October 3, 2007, and learned that the labor certification had been closed. The petitioner did not indicate why it did not check the status of the beneficiary's labor certification.

Application to Register Permanent Residence or Adjust Status, on May 21, 2007, and that the application had been rejected. On appeal, counsel states that the beneficiary has never filed a Form I-485, and that the director erred in relying on such information.

The director's analysis of this case was not dependent upon her statements with regard to the filing of a Form I-485. Her analysis of the issue at hand in this case, i.e., whether the beneficiary is eligible for additional time in H-1B status pursuant to AC-21 as amended by DOJ-21, is in no way dependent upon the beneficiary's having filed (or not filed) a Form I-485. Thus, even if the director's statements regarding the filing of a Form I-485 were incorrect, her analysis of the substantive issue at hand in this case remains correct.

However, in this case, the issue of whether the beneficiary has filed a Form I-485 is not relevant to the determination as to whether the beneficiary is entitled to additional time in H-1B status pursuant to AC-21 as amended by DOJ-21, regardless of whether the director was factually correct in her assertion that a Form I-485 has been filed. As such, the AAO will withdraw the director's sentence regarding the filing of a Form I-485.⁶

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. 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.

⁶ A check of USCIS systems shows that the beneficiary filed a Form I-485 on December 2, 2008, which was approved on March 16, 2009. According to USCIS systems, the beneficiary is currently a conditional resident (CR6) of the United States.