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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

D2

FILE: WAC 08 039 50268 Office: CALIFORNIA SERVICE CENTER Date: **APR 05 2010**

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:

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in computer consulting, that it was established in 1999, that it employs 15 persons, and that it has an estimated gross annual income of \$1.2 million. It seeks to extend the employment of the beneficiary as a programmer/analyst from February 2, 2008 to February 1, 2009. Accordingly, the petitioner 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 record shows that the beneficiary was present in the United States in H-1B status for more than six years as of the date this petition was filed. An Application for Alien Employment Certification (Form ETA 750) was filed by the petitioner on behalf of the beneficiary on March 28, 2003. This Alien Employment Certification application was closed by the U.S. Department of Labor Employment and Training Administration, without being certified, on July 25, 2007.

Another Form ETA 750 was filed by a different petitioner, [REDACTED] on behalf of the beneficiary on November 20, 2003. This Form ETA 750 was certified on November 30, 2005. USCIS records do not show that [REDACTED] ever filed a Form I-140 on behalf of the beneficiary.

USCIS records show that the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on September 9, 2008 (LIN 08 246 51129), more than three months subsequent to the director's decision in this matter. USCIS records also show that the Form I-140 was denied on September 23, 2009.

On November 28, 2007, prior to the expiration of the beneficiary's H-1B status on February 1, 2008, the petitioner filed the instant petition, requesting a continuation of previously approved employment without change with the same employer and requesting the extension of the beneficiary's stay since the beneficiary held this status at the time the petition was filed.

In response to the director's request for further evidence (RFE) regarding an H-1B extension beyond the six-year limit, counsel for the petitioner claimed that as a labor certification application had been filed over 365 days ago, pursuant to section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21), a one-year extension is mandatory. Counsel argues that the beneficiary can take advantage of this provision based on the approved labor certification application filed by [REDACTED] as well as based on the labor certification application filed by the petitioner.

With respect to the ETA-750 filed by the petitioner, counsel provides copies of correspondence with the U.S. Department of Labor in which counsel asserts that the case was closed due to error. No documentation was provided to indicate that the labor certification application filed by the petitioner has been reopened. Counsel provided a copy of a letter from the U.S. Department of Labor (DOL) dated April 1, 2008, indicating that it was still waiting to receive the file from their Federal Records Center, and argued that this was evidence that the application was still pending. However, other correspondence submitted by the petitioner indicates that the Department of Labor closed the case on July 25, 2007, prior to the date this petition was filed. In

addition, an e-mail from DOL to the petitioner's counsel, dated March 21, 2008, indicates that: (1) the case was closed on July 25, 2007 due to an untimely or incomplete response from the petitioner; (2) there are no appeal rights on a closed case; and (3) no further action would be taken with regard to counsel's inquiry. No documentation was submitted to demonstrate that the labor certification application submitted by the petitioner was reopened on or before the date the instant petition was filed on November 21, 2007. Without evidence to the contrary, the AAO must presume that the labor certification application filed by the petitioner was closed as of July 25, 2007 and remained closed through November 21, 2007. As such, the AAO cannot conclude that the petitioner established eligibility for the AC21 one-year extension of stay based on the petitioner's ETA-750 given that no evidence was submitted to establish that it was pending as of the date the H-1B petition was filed. *See* 8 C.F.R. § 103.2(b)(1) (requiring eligibility to be established at the time of filing). Therefore, the only other labor certification left to consider is the one filed by [REDACTED]

On May 14, 2008, the director denied the H-1B petition. The director observed that the petitioner's current request to employ the beneficiary as an H-1B nonimmigrant would place the beneficiary beyond the six-year limit. As of the date of the denial, the director noted that the beneficiary's permanent labor certification from [REDACTED] was certified on November 30, 2005, and that the validity of the certified application expired on January 12, 2008. The director determined that no petitioner had filed a Form I-140 prior to the expiration of the validity period of the certified Form ETA 750; thus, the beneficiary was not eligible for an extension of H-1B nonimmigrant status under section 106(a) of AC21 as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

The AAO notes that 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 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*:

(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—

(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.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

Subsequent to the enactment and effective date of AC21 as amended by DOJ21 (hereinafter referenced as AC21), the Department of Labor (DOL) issued the “Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,” [69 Fed. Reg. 77326], (Perm Rule) (published on December 27, 2004, and effective as of March 28, 2005). The DOL Perm rule, in general, provides for the revocation of approved labor certifications if a subsequent finding is made that the certification was not justified. It is codified at 20 C.F.R. § 656.32.

DOL issued a second rule, the “Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,” published on May 17, 2007, (72 Fed. Reg. 27904), which took effect on July 16, 2007 (Perm Fraud rule). The DOL Perm Fraud rule, now found at 20 C.F.R. § 656.30(b), provides for a 180-day validity period for labor certifications that are approved on or after July 16, 2007. Petitioning employers have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS. The regulation at 20 C.F.R. § 656.30(b)(2) also established an implementation period for the continued validity of labor certifications that were approved by DOL prior to July 16, 2007; such labor certifications must have been filed in support of an I-140 petition within 180 calendar days after the effective date of the DOL final rule (July 16, 2007) in order to remain valid.

In this matter, the AAO finds that more than 365 days elapsed from the date [REDACTED] filed the labor certification application (November 20, 2003) to the date the petitioner filed the Form I-129, request to extend the employment of the beneficiary (November 28, 2007). The AAO also notes, however, that the labor certification application filed by the other employer was approved on November 30, 2005. The effective date of the DOL Perm Fraud rule, as set out at 20 C.F.R. § 656.30(b)(2), is July 16, 2007, and, as is further explicated in the Perm Fraud rule, the validity of labor certification applications approved prior to that

date expire within 180 calendar days after the effective date of the DOL Perm Fraud rule, if not filed in support of a Form I-140. As such, the AAO finds that [REDACTED] labor certification application, filed on November 27, 2004, expired or ceased to be valid on January 13, 2008.

Unless the DOL regulations on the validity of labor certifications are deemed to be ultra vires and/or otherwise contrary to the plain language of the Act, USCIS must take into consideration these regulations when evaluating the *bona fides* of labor certifications certified by DOL. An "administrative agency's regulations are presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute." *Travelers Ins. Co. v. Kulla*, 216 Conn. 390, 399 (1990) (citing *Phelps Dodge Copper Products Co. v. Groppo*, 204 Conn. 122, 128 (1987)). Therefore, based upon the supplemental information in DOL's Perm Fraud rule as well as the plain language of 20 C.F.R. § 656.30, a labor certification that is invalid may not provide the basis for an approval of a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act. *See generally* 72 Fed. Reg. 27904, 27925, 27939. Therefore, it follows, for the reasons discussed *infra*, that a labor certification that is invalid may not provide a basis for an AC21 based exemption to section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

The primary issue in this matter revolves around the definition of the term "deny" as it is used in sections 106(b)(1) and 106(b)(2) in AC21, as amended by DOJ21. The statute itself does not provide a definition of the term "deny," and the congressional record also fails to directly define this term. Therefore, an analysis of the plain language of the statute and, failing that, the congressional intent behind the statute, must be undertaken to determine whether the statute incorporates the term "valid" or "invalid" or "expired" as those terms relate to a labor certification that is being used as a basis to extend an alien's stay under section 106(b)(1).

Again, sections 106(b)(1) and 106(b)(2) use only the term "deny" when outlining the parameters of the factors involved in the extension of an alien's stay under AC21. Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991). We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

As the plain meaning of the word "deny" does not by its own definition incorporate the term "invalid" or "expired" when referring to a labor certification that forms the basis for an extension of an alien's stay based on an exemption under subsections 106(b)(1) and (2), the AAO must therefore examine the legislative intent in enacting AC21 and the subsequent amendment of AC21 by DOJ21 to ensure that a literal application of the

statute will not produce a result demonstrably at odds with the intent of its drafters. *See Samuels, Kramer & Co. v. CIR*, 930 F.2d 975, *cert. denied*, 112 S. Ct. 416. Senator Leahy and Representative Smith (TX), sponsors of the DOJ21, but not of AC21, both made comments stating that § 11030A of DOJ21 permits H-1B aliens who have labor certification applications caught in lengthy agency backlogs to extend their status beyond the sixth year limitation. 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002); *accord* 148 Cong. Rec. S11063 (daily ed. Nov. 14, 2002). Representative Smith also noted that AC21 was put in place to recognize the lengthy delays at the legacy Immigration and Naturalization Service (INS) in adjudicating petitions and that DOJ21 addresses the lengthy processing delays at DOL. Representative Smith observed that the DOJ21 legislation allowed those who are about to exceed their six years in H-1B status to not be subject to the additional requirement of having to file the immigrant petition by the end of the sixth year, which he noted “is impossible when DOL had not finished its part in the process.” 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002). Thus, the legislative history of DOJ21 underscores the legislative concern regarding the lengthy processing delays occurring at DOL. More importantly, the main purpose of the legislative change appears centered on providing an additional means by which aliens may remain in the United States and continue to work during the time their application for permanent resident status is pending.

Therefore, the legislative history of DOJ21 does not in any way reflect an intent to indefinitely extend an alien’s stay in a temporary, nonimmigrant status once DOL finishes its part, i.e., adjudicating the labor certification application, in the employment-based immigrant visa process. Rather, as noted above, the law was designed to permit H-1B nonimmigrants to continue their stay in the United States and work in H-1B status as long as there was a pending and ongoing process to obtain lawful permanent resident status in the United States.¹ To interpret this statutory provision otherwise and provide a means by which an alien can remain indefinitely and thereby permanently in the United States in a temporary, nonimmigrant status is demonstrably at odds with the Act as a whole as well as with the clear intent behind the drafting of section 106 of AC21 as amended by DOJ21.

Thus, whether the validity of a labor certification application is terminated by a denial or by regulatory expiration, the lack of a valid labor certification application precludes USCIS from further processing petitions or applications dependent upon those labor certification applications. To reiterate, nothing in the AC21 or DOJ21 legislative history serves to suggest that Congress intended that petitioners on behalf of individual aliens retain the ability to have those aliens remain in the United States indefinitely, e.g., for twenty

¹ The AAO notes that an “extension of stay” must be distinguished from an extension of H-1B status, which occurs through a “petition extension.” Although those seeking H-1B status are currently permitted to file one form to request a petition extension, extension of stay, and change of status, they are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). The AAO observes that in general, according to the text of section 106(b) of AC21, aliens may have their “stay” extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21. On the other hand, the title of section 106(b) of AC21 reads “Extension of H-1B Worker Status.” In this situation, where the title uses the word “[s]tatus” and the text uses the word “stay,” the text of the statute prevails. The title of a statutory section is not controlling, and where it is contrary to the text of the statute, the text is controlling. *Immig. and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 308-309 (2001).

or thirty years, simply by failing or choosing not to file an immigrant petition on their behalf. Rather, the legislative intent reflects only a desire to shield individual aliens from the inequities of government bureaucratic inefficiency and does not include a mandate for an infinite extension of stay in a nonimmigrant status when the petitioner fails to file an immigrant petition for the beneficiary.

Of significant import when considering the legislative intent regarding the impact of AC21, the AAO observes that when DOJ21 amending AC21 was passed, the DOL regulations pertinent to this matter, 20 C.F.R. § 656.32 and 20 C.F.R. § 656.30(b) had not been codified. Thus, when Congress used the word “denied” to indicate the completion of DOL processing, DOL had not set forth a process to “revoke” approved labor certification applications (20 C.F.R. § 656.32) and had not enacted rules governing the term of validity of an approved labor certification application (20 C.F.R. § 656.30(b)). It thereby follows that Congress was unaware of and did not foresee DOL’s use of additional terms when describing the DOL administrative process; thus Congress would not have contemplated the use of or rejection of those terms. As Congress was not aware of such regulations, the rationale set forth in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) does not apply.

USCIS must consider the validity of the DOL labor certification application when adjudicating an AC21 H-1B extension petition, as without a valid labor certification upon which to base a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act, the approval of an employment-based immigrant petition is proscribed.

Finally, it is noted that current USCIS policy is in accord with this statutory interpretation of AC21 as amended by DOJ21. Specifically, to assist USCIS adjudicators when considering an extension of stay under AC21 section 106(a), in light of the DOL regulations, USCIS recently issued guidance on this issue. In pertinent part, USCIS expressly stated:

USCIS will *not* grant an extension of stay under AC21 § 106(a) if, at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by DOL. USCIS sees no reason to consider a labor certification that has expired through the passage of time differently than one that had been denied or, for that matter revoked. In addition, the filing of an immigrant petition with an expired labor certification would result in the automatic rejection, or if accepted in error, denial of that EB immigrant petition, which in turn, acts as a statutory bar to the granting of an extension beyond the 6-year maximum.

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).

Accordingly, the director did not err as a matter of law or policy in concluding that the beneficiary is not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants under section 214(g)(4) of the Act. Therefore, the appeal is dismissed. The petition is denied.

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