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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:  Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2010

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:

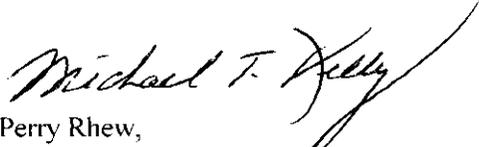


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 a computer software consulting company that seeks to temporarily employ the beneficiary as a computer programmer analyst and extend 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 requested extension would place the beneficiary beyond the six-year limit imposed by section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

The director denied the petition because the petitioner had not demonstrated eligibility to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. On appeal, counsel contends that the director erroneously denied the petition.

In general, section 214(g)(4) of the Act 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 sections 11030(A)(a) and (b) of the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21), 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. § 182(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) Form I-129 and supporting documentation for a seventh year extension, filed on February 2, 2009; (2) the director's request for evidence (RFE), dated February 9, 2009; (3) the petitioner's response to the RFE, dated March 16, 2009; (4) the director's notice of decision, dated March 30, 2009; and (3) Form I-290B and counsel's appeal brief.

The record indicates that the beneficiary has been in the United States in H-1B classification since March 18, 2000, and further indicates that the beneficiary has previously been granted AC21 extensions. At the time of filing, the petitioner submitted evidence demonstrating that an Immigrant Petition for Alien Worker, Form I-140 [REDACTED] was pending with the Nebraska Service Center on behalf of the beneficiary since December 29, 2008.

The record further indicates that the petitioner previously filed a Form I-140 on behalf of the beneficiary on February 14, 2008 (LIN 08 101 50630), which was denied on October 8, 2008. USCIS records also demonstrate that an Application to Register Permanent Residence or Adjust Status, Form I-485, was filed on behalf of the beneficiary on September 26, 2008. That application was denied on October 24, 2008.

A copy of a cover letter used by the petitioner in support of the second Form I-140, dated December 18, 2008, is also included in the record, which states that "it is our purpose to use the same approved alien employment certification filed with the prior petition." The labor certification on which both petitions were based was filed by the petitioner on March 17, 2005 and certified on November 20, 2007.

In denying the petition, the director noted that while the I-140 petition filed on December 29, 2008 was pending at the time of filing, it was also the second immigrant petition based on the original labor certification. The director noted that, while the labor certification was valid for use in support of the second I-140 petition, a new clock started for AC21 purposes after the denial of the initial I-140 petition. The director concluded that the beneficiary was not eligible for an AC21 extension because a final decision had been made on both the beneficiary's prior I-140 petition and the I-485 application.

On appeal, counsel contends that the beneficiary is qualified for a 7th year extension because the pending I-140 petition is based on a labor certification that was valid at the time of filing and had not lapsed. Counsel also indicates that it never received a copy of the denial and can only speculate as to the reasons for the denial

in this matter.¹

The AAO acknowledges that, in the absence of fraud, a labor certification remains valid indefinitely for the purpose of filing a future I-140 petition by the same sponsoring employer or its successor-in-interest on behalf of the same beneficiary if it is filed with an I-140 petition within its 180 validity period. Since the petitioner complied with this 180-day requirement in filing the first Form I-140, the validity of the labor certification is not at question.

However, the basis for counsel's claim of eligibility in this matter is flawed. Section 106(b)(1) of AC21, as amended, specifically indicates that the one-year extension of stay should not be granted once a final decision is made to deny the I-140 immigrant petition that was filed pursuant to the granted labor certification. The first Form I-140 that was filed on the beneficiary's behalf was denied on October 8, 2008, and the subsequent Form I-485 was denied on October 24, 2008. Since the I-140 was denied based on the approved labor certification filed on March 17, 2005, the petitioner may not use that labor certification for the current H-1B extension petition. Neither the plain language of the statute nor the pertinent legislative history indicate that Congress intended to permit an alien beneficiary to have his or her stay indefinitely extended in a temporary, nonimmigrant classification based on a prior, approved labor certification once the I-140 petition filed using that labor certification is denied. To otherwise permit a petitioner to thereafter repeatedly file I-140 petition(s), whether frivolous or not, based on that same labor certification in order to permit the indefinite extension of stay in a temporary H-1B nonimmigrant status of the alien beneficiary would be demonstrably at odds with the Act as a whole, with regard to immigrant versus nonimmigrant classification, as well as with the plain language of Section 106 of AC21, as amended.

Be that as it may, the petitioner has provided a receipt notice for a second I-140 filing based on the above-referenced labor certification which was received by USCIS on December 29, 2008. Thus, while the Form I-140 was pending at the time this current petition for H-1B extension was filed on February 2, 2009, the Form I-140 was not pending for more than 365 days. Rather, the Form I-140 was pending for less than six months when the current H-1B extension petition was filed. Therefore, the beneficiary does not meet the requirement that (1) 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.

¹ Counsel claims that neither the petitioner nor counsel received a copy of the decision. USCIS records indicate, however, that a full copy of the Director's decision was sent to both the petitioner and counsel at their address of record. There is no record of a change of address on file for either party, and neither of the mailings was returned to USCIS as undeliverable.

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.