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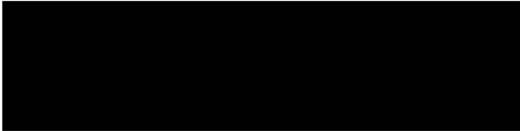
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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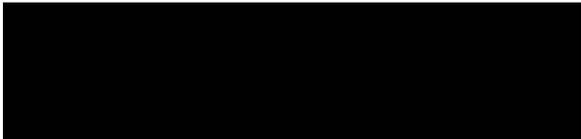


FILE: WAC 07 126 53418 Office: CALIFORNIA SERVICE CENTER Date: **JAN 15 2010**

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 and dismissed a subsequent motion to reconsider. 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 executive placement company that employs the beneficiary as an accounting consultant. 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, and dismissed a subsequent motion to reconsider for failing to meet applicable requirements. On appeal, counsel contends that the director's decision was erroneous, and submits a brief in support of this contention.

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 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. § 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) Form I-129 and supporting documentation for a seventh year extension, filed on March 23, 2007; (2) the notice of decision denying the petition, dated October 1, 2007; (3) counsel's motion to reconsider dated October 15, 2007; (4) the notice of decision dismissing the motion, dated February 19, 2008; and (5) Form I-290B and appeal brief.

The record shows that the beneficiary resided in the United States with H-1B or L-1 classification continuously since March 27, 1998. As the director noted in his decision, the petitioner filed a labor certification application (Form ETA-750, [REDACTED]) on behalf of the beneficiary on January 28, 2002, followed by the instant petition (Form I-129) on March 23, 2007 to extend the beneficiary's H-1B status by one year. The director found that the labor certification application had been denied, and no additional evidence to establish that the beneficiary was eligible for an exemption was contained in the record. As a result, the director denied the petition.

On motion, counsel failed to support its reasons for reconsideration with pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy, as required by 8 C.F.R. § 103.5(a)(2). Additionally, the director found that the petitioner failed to submit any new facts or evidence. The motion was dismissed for failure to meet applicable requirements on February 19, 2008.

On appeal to the AAO, counsel claims that, contrary to the director's finding, there was no denial of the labor certification. As a result, counsel contends that the director's decision was erroneous. The AAO notes that the basis of the director's dismissal of the motion to reconsider; namely, its failure to meet applicable requirements for a motion to reopen and/or reconsider, is not addressed on appeal. As such, as the appeal is of the director's decision to dismiss the motion and as the petitioner has failed to specifically identify an error in the motion's dismissal, the appeal must be dismissed for this reason.

Although the appeal must be dismissed for the above stated reason, the AAO will nevertheless, as a matter of discretion, address counsel's arguments on appeal with regard to the basis for the initial denial of the petition. With the initial petition, the petitioner submitted a letter dated June 24, 2005 from the U.S. Department of Labor, which included a screen shot of the beneficiary's case information and confirmed that the beneficiary's labor certification application was awaiting processing. Noting that the screen shot evidencing the status of the labor certification was not dated, the director issued a request for evidence (RFE) on June 16, 2007, requesting updated evidence demonstrating the current status of the case, dated within the last six months. In a response dated August 30, 2007, counsel for the petitioner submitted a copy of an email inquiry to the Philadelphia Backlog Elimination Center dated

August 8, 2007, which included once again an undated screen shot of the beneficiary's case information. No status update was included in this document.

The record indicates that the director conducted an online search of the Backlog Disclosure System maintained by the U.S Department of Labor, Employment and Training Administration on September 20, 2007, which revealed that the status of the petitioner's case was listed as DENIED. Consequently, the director denied the petition on October 1, 2007, finding that the case had been denied and thus there was no pending application which would permit the beneficiary to qualify for an exemption from the normal six-year limit on H-1B status.

The director also relied on an April 24, 2003 guidance memorandum from William B. Yates, Acting Associate Director for Operations, which paraphrases section 106(b) of AC21, as amended by DOJ21, and states that United States Citizenship and Immigration Services (USCIS) is required to grant the extension of stay of such H-1B nonimmigrants who qualify for the exemption contemplated by the AC21 in one-year increments, until a final decision is made:

- to deny the application for labor certification, or, if the labor certification is approved, to deny the EB [employment based] immigrant petition that was filed pursuant to the approved labor certification;
- To deny the EB immigrant petition; or
- To grant or deny the alien's application for an immigrant visa or for adjustment of status.

See Memo. from William R. Yates, Acting Assoc. Dir. for Operations, Bureau of Citizenship and Immigration Serv., to All Regional Directors et al., *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273)*, Adjudicator's Field Manual Update AD 03-09, HQBCIS 70 / 6.2.8-P (April 24, 2003). The memorandum further provides that a decision that is under appeal will not be considered final until such time as a decision is issued by the Board of Alien Labor Certification Appeals. *See id.*

On motion and again on appeal, counsel contends that a denial notice was never received by the petitioner, and concludes that the application consequently was not denied as alleged by the director. The AAO, however, finds this claim insufficient.

In the RFE issued on June 19, 2007, the director requested evidence of the status of the labor certification *dated within the last six months*. The petitioner, however, submitted a copy of email correspondence with the Philadelphia Backlog Elimination Center dated August 7, 2007, which (1) was outside the six month period prescribed by the director; and (2) provided no dated information regarding the status of the application. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Despite being afforded the opportunity to present evidence demonstrating that the labor certification application was pending at the time of filing, the petitioner failed to do so. In addition, despite filing both a motion to reconsider and an appeal in this matter, the petitioner has failed to supplement the record with evidence demonstrating eligibility in this matter.

As stated above, an online search of the Backlog Disclosure System maintained by the U.S Department of Labor, Employment and Training Administration on September 20, 2007, revealed that the status of the petitioner's case was listed as DENIED. Despite being advised of this finding, counsel maintained that the case was not denied since neither counsel nor the petitioner received notice of said denial. 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).

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 decisions denying the petition and dismissing the subsequent motion.**

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