

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: JUN 01 2010

IN RE:

Petitioner:

[Redacted]

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:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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).

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 an insurance company that seeks to temporarily employ the beneficiary as a 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.

The director denied the petition, finding that the petitioner had failed to demonstrate that it qualified 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, 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 ninth, tenth, and eleventh year extension, filed on March 31, 2008; (2) the notice of decision, dated July 12, 2008; and (3) Form I-290B and counsel's supporting documentation; and (4) counsel's appeal brief.

The beneficiary has resided in the United States in H-1B classification since March 8, 2000. On March 31, 2008, the petitioner applied for an extension of H-1B status for the beneficiary which would have placed the beneficiary beyond his six-year limit. (Previously, the beneficiary had been granted two one-year extensions beyond the six year limit; the instant request would extend the beneficiary's status to a ninth year).

The director found that the beneficiary's Form I-140, Immigrant Petition for Alien Worker, and PERM Labor Certification Application had not been pending for more than 365 days prior to the filing of the instant extension request, and consequently denied the petition.

On appeal, counsel contends that in addition to the PERM labor certification application, there was a pending pre-PERM labor certification application filed on behalf of the beneficiary on March 8, 2005. Counsel contended that by virtue of the fact that it had been filed by the same employer and was pending for more than 365 days prior to the filing of the instant petition, it therefore qualified the beneficiary for an extension beyond the six-year limit under AC21 § 106(a).

Upon review, the beneficiary is not eligible for a 9th year extension of status. The record of proceeding indicates that the petitioner filed two labor certification applications on behalf of the beneficiary. The first, filed on March 8, 2005, was approved on August 1, 2007. The second, filed on June 11, 2007, was approved on June 18, 2007. The record further reflects that the beneficiary's Form I-140, Immigrant Petition for Alien Worker, was filed on July 2, 2007. The PERM labor certification approved on June 18, 2007 was filed in support of the I-140 petition.

Although the director only addressed one of the two labor certifications, the director's ultimate decision denying the petition was correct. The AAO will first address the basis for the director's denial.

This application for extension of status was filed on March 31, 2008, with April 1, 2008 being the requested start date for the beneficiary's employment. The director correctly noted that the PERM labor certification filed on June 11, 2007, and approved on June 18, 2007, and the I-140 petition, filed on July 2, 2007, were not pending for more than 365 days when the current petition for H-1B extension 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 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 [REDACTED] 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).

On appeal, counsel relies upon the pre-PERM labor certification filed on March 8, 2005, noting that this labor certification had been pending for two years and five months before its approval on August 1, 2007. While the AAO does not dispute that this labor certification was pending for more than 365 prior to the filing of the instant request for extension, the labor certification approved on August 1, 2007 was not valid at the time this extension request was filed.

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 be valid.

The pre-PERM labor certification application filed by the petitioner in this matter was approved on August 1, 2007. According to the DOL Perm Fraud rule, as set out at 20 C.F.R. § 656.30(b)(2), the validity of labor certification applications approved subsequent to July 16, 2007 expire within 180 calendar days after the date of approval if not filed in support of a Form I-140. As such, the AAO finds that the petitioner's labor certification application filed on August 1, 2007 expired or ceased to be valid on January 27, 2008.

On appeal, counsel implies that the DOL regulation cited above is not applicable to AC21. Counsel avers that once 365 days have elapsed from the filing of a labor certification application, section 106(b) mandates an exemption from the six-year limitation of the H-1B cap and a one-year extension of the beneficiary's stay. Counsel also observes that USCIS has not issued a regulation incorporating DOL's rule into AC21 and that prior policy guidance indicates that a request for an H-1B extension beyond the 6-year limit should not be denied on the sole basis that an I-140 petition has not yet been filed.¹

¹ The AAO acknowledges that, while USCIS has not addressed this issue by promulgating a regulation, it has issued policy guidance on this issue as it relates to DOL's Perm Fraud rule. *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*

Regardless, 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. 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 herein, 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).

Therefore, contrary to the assertions of counsel, 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.² 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 accept counsel's contrary interpretation, USCIS would be required to indefinitely extend an individual's stay in the United States in one-year increments once a labor certification had been approved, even if the labor certification expired according to DOL regulations or was otherwise considered invalid. Again, nothing in the AC21 or DOJ21 legislative history serves to suggest that Congress intended that petitioners on behalf of

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). In addition, contrary to counsel's claims, this policy guidance states that "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 the validity period, as specified by DOL." *Id.*

² 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).

individual aliens retain the ability to have those aliens remain in the United States indefinitely, e.g., for twenty 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.

In this matter, the pre-PERM labor certification was not filed in support of an I-140 petition within 180 from the date of its approval. Therefore, this labor certification was not valid at the time the instant petition was filed on March 31, 2008. For the reasons outlined above, the petitioner cannot rely upon this labor certification as the basis for a 9th year extension of H-1B status for the beneficiary. Accordingly, the AAO shall 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.