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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
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FILE: WAC 08 144 51749 Office: CALIFORNIA SERVICE CENTER Date:

MAR 04 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the service center director and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner describes itself as an operation of care facilities business that seeks to employ the beneficiary as an accountant, budget. The petitioner, therefore, 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 director denied the petition because the petitioner failed to establish that the beneficiary is entitled to a seventh-year H-1B extension under The American Competitiveness in the Twenty-First Century Act (“AC21”), Public Law 106-313.

On November 20, 2008, counsel for the petitioner submitted a Form I-290B (Notice of Appeal) with an addendum, but without a brief or additional evidence. The addendum reads as follows:

The labor certification (LC) was filed on 02/27/2008. It was approved on 04/04/2008. The underlying I-129 petition was filed on 04/18/2008, two weeks after the LC approval. The I-140 petition (SRC-08-800-38411) was filed on 09/25/2008 and is currently with Texas Service Center pending adjudication.

[The beneficiary] last arrived in the United States on 04/19/2002. He immediately reported for work with the petitioner. However, he did not commence employment immediately as he had to wait for his social security card to arrive. During this period, [the beneficiary] was not in productive status. Upon receipt of his social security card in or about July 2002, he was then placed in the petitioner’s payroll. He received his first paycheck on or about July 15, 2002. Since there is remaining time left on his H-1B, the Service erroneously denied the petition. See AFM at 31.3(g)(8) Note.

We will be sending a separate brief and/or additional evidence in support of our appeal within 30 days.

(Emphasis added). The AAO did not receive any brief or additional evidence in support of the appeal.

Counsel and the petitioner filed the initial petition as an AC21 request for the beneficiary to be granted a seventh year H-1B extension. The director denied the petition finding that the beneficiary is ineligible for a seventh year extension under AC21. For the first time on appeal, counsel requests that some of the beneficiary’s H-1B time be recaptured. Although the addendum cites to the Adjudicators Field Manual, counsel does not provide under which law the beneficiary is eligible to recapture H-1B time. Moreover, no evidence was submitted to demonstrate that the beneficiary is eligible to recapture H-1B time.

The AAO notes that recapturing H-1B time is only possible when the beneficiary has been outside the United States. Section 101(a)(13)(A) of the Act states that “[t]he terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer.” The plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal.

2001). It is further supported by a policy memorandum issued by the United States Citizenship and Immigration Services (USCIS) that adopts *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005) as formal policy. See Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005). Furthermore, the petitioner must submit supporting documentary evidence to meet this burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). This the petitioner and counsel did not do.

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

The petitioner fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As the petitioner does not present additional evidence on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

The burden of proof in this proceeding 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 summarily dismissed.