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FILE: EAC 08 188 52097 Office: VERMONT SERVICE CENTER Date: **MAR 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)

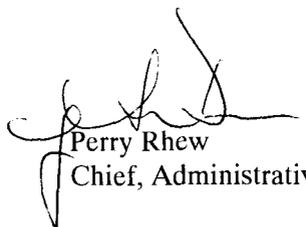
ON BEHALF OF PETITIONER:



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


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a construction company that seeks to continue its employment of the beneficiary as an accountant. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record indicates that the beneficiary entered into H-1B nonimmigrant status on August 2, 2002, and that such status ended on June 30, 2008. U.S. Citizenship and Immigration Services (USCIS) records indicate that two H-1B approvals have been issued on behalf of the beneficiary:

- EAC 02 248 53009, valid August 2, 2002 through July 1, 2005; and
- EAC 05 183 53362, valid July 1, 2005 through June 30, 2008.

The first issue before the AAO is whether the beneficiary is eligible for additional time in H-1B status based upon the American Competitiveness in the Twenty-First Century Act¹ (AC-21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act² (DOJ-21).

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC-21 removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays, and DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

- (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.

¹ American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

² Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

§ 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.*

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states the following:

- (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.*

(emphasis added to identify sections amended by DOJ-21.)

Subsequent to the enactment and effective date of AC-21 as amended by DOJ-21 (hereinafter referenced as AC-21), 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 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.

The 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 another employed filed the application for labor certification (August 20, 2003) to the date the petitioner filed the Form I-129, request to extend the employment of the beneficiary (June 25, 2008). The AAO also notes, however, that the application for labor certification filed by the petitioner was certified on March 13, 2007. The effective date of the DOL Perm Fraud rule, as set forth 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-140.³ As such, the AAO finds that the petitioner's labor certification application filed on August 20, 2003 expired, or ceased to be valid, on January 13, 2008.⁴

The AAO notes that USCIS issued a policy memorandum regarding this issue on May 30, 2008.⁵ In that policy memorandum, USCIS addressed the intersection of 8 C.F.R. § 656.30(b) and AC-21. As noted by the May 30, 2008 policy memorandum, previous field guidance did not take into account the fact that petitioners were now required to file Forms I-140 within the 180-day validity period stipulated by the DOL in order to remain valid. As such, the policy memorandum instructed adjudicators that extensions of stay could be granted pursuant to AC-21 only if the "labor certification is unexpired at the time of filing of the Form I-129."

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 them into consideration 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

³ The record indicates that the petitioner filed a Form I-140 on the basis of the certified application for labor certification on January 18, 2008. However, because the Form I-140 was filed after the labor certification expired on January 13, 2008 it was rejected.

⁴ Counsel also submits evidence that another application for labor certification on behalf of the beneficiary was filed on July 30, 2008. However, that application was filed after the instant H-1B petition was filed and affords no benefits to the beneficiary under AC-21 as amended by DOJ-21.

⁵ See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, *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. C. of Public Law 105-277, HQ 70/6.2 (May 30, 2008).*

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 AC-21 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 used in section 106(b)(1) and 106(b)(2) of AC-21, as amended by DOJ-21. 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 AC-21. 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 AC-21 and the subsequent amendment of AC-21 by DOJ-21 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 AC-21 was put in place to recognize the lengthy delays at the legacy Immigration and Naturalization Service (INS) in adjudicating petitions and that DOJ-21 addresses the lengthy processing delays at the DOL. Representative Smith observed that the DOJ-21 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 DOJ-21 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.

The legislative history of DOJ-21 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.⁶ 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 AC-21, as amended by DOJ-21.

The AAO acknowledges that a denial of a labor certification differs from that of a labor certification application that has expired. However, for the reasons discussed, giving the words “deny” or “denied” their ordinary meaning and construing the terms in relation to the intent of the statute and the Act as a whole, the terms “deny” or “denied” incorporate the meaning of the terms “invalid” and “expired.” Both a denial issued through an individualized decision as well as an expiration of the validity of a labor certification result in the invalidity of the labor certification and are evidence that DOL has completed its process of adjudicating the labor certification application and that the beneficiary’s application process for obtaining lawful permanent resident status in the United States by way of that labor certification has ended.

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. Again, to accept counsel’s apparent interpretation, USCIS would be required to indefinitely extend

⁶ 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 AC-21. 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).

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. To reiterate, nothing in the AC-21 or DOJ-21 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 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 AC-21, the AAO observes that when DOJ-21 amending AC-21 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.

As observed above, using counsel's apparent reasoning, an individual's stay in H-1B status would be almost completely unrestricted once 365 days had elapsed since the filing of an application for labor certification, provided the labor certification was subsequently approved and as long as the petitioner did not file an immigrant petition on behalf of the individual. Once these conditions were met, the individual's stay would absurdly result in continuous one-year extensions with no requirement that the petitioner ever file any petition that would ultimately result in the beneficiary obtaining lawful permanent resident status in the United States. To avoid this incongruous outcome, the AAO has applied the most reasonable interpretation of the term "deny" such that it complies with and complements Congressional intent in establishing an exemption from the maximum six-year stay in H-1B status. As such, USCIS must consider the validity of the DOL labor certification application when adjudicating an AC-21 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, as indicated previously, the AAO notes that current USCIS policy is in accord with this statutory interpretation of AC-21 as amended by DOJ-21. Specifically, to assist USCIS adjudicators when considering an extension of stay under AC-21 section 106(a) in light of the DOL regulations, the policy memorandum cited at footnote 3 expressly stated the following:

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.

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 beneficiary is ineligible for additional time in H-1B status beyond the maximum six-year period of stay, and this petition was properly denied on that ground.

However, the AAO notes that, as the beneficiary entered into H-1B status on August 2, 2002, his six-year limitation on the authorized period of stay in H-1B status did not end until August 1, 2008. Since his previous H-1B status was set to expire on June 30, 2008, the director should have determined whether the beneficiary could be granted H-1B status between July 1, 2008 and August 1, 2008. Upon review of the record of proceeding, the AAO finds that the director's failure to make a determination was harmless error, as the position being offered to the beneficiary is not a specialty occupation and, even if the position could be classified as a specialty occupation, the beneficiary is not qualified for employment in a specialty occupation.

Regarding the specialty occupation issue, many of the listed job responsibilities are too generic to ascertain whether the duties relate more specifically to a bookkeeping position or to an accounting position. For example, the petitioner indicates generally that the beneficiary will, among other duties: prepare reports on revenue received; prepare invoices; reconcile bank accounts with credit card statements; prepare payroll; and prepare profit and loss accounts on a monthly basis. The record does not include sufficient supporting information to determine whether these generally described duties require quantitative analysis, and does not detail the analysis, if any, that would be involved. As the record presently stands, the position is more akin to a bookkeeper than an accountant, and the position of a bookkeeper does not require the attainment of a bachelor's degree or the equivalent in a specific specialty.

Furthermore, even if the AAO could determine that the proffered position was an accounting position that required the incumbent to possess a bachelor's degree or the equivalent in accounting or a related field, the beneficiary would not be qualified for the position. The beneficiary earned a Bachelor of Commerce degree from the University of the Punjab. The record contains an undated evaluation from [REDACTED], an employee of the City University of New York regarding the beneficiary's education and work experience. According to [REDACTED] the beneficiary's combination of education and work experience are equivalent to a bachelor's degree in business administration, with a major in accounting. However, this evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), as there has been no demonstration that [REDACTED] possesses the authority to grant college-level credit for training and/or experience in a related field at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience in the field. Simply going on record without supporting documentary evidence is

not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Additionally, the beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), as the current record does not establish that the beneficiary's work experience included the theoretical and practical application of specialized knowledge required by the specialty; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that he achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). As such, the current record fails to establish that the beneficiary qualifies to perform the duties of a specialty occupation that would require a bachelor's degree or the equivalent in accounting or a related field.

Accordingly, based upon the record currently before the AAO, the beneficiary would not have been eligible to extend his H-1B nonimmigrant status until August 1, 2008 because the position that the petitioner is offering is not a specialty occupation and, even if it could be considered an accounting job, the beneficiary is not qualified to hold a specialty occupation. The prior H-1B approvals do not preclude USCIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met its burden.

ORDER: The appeal is dismissed.