

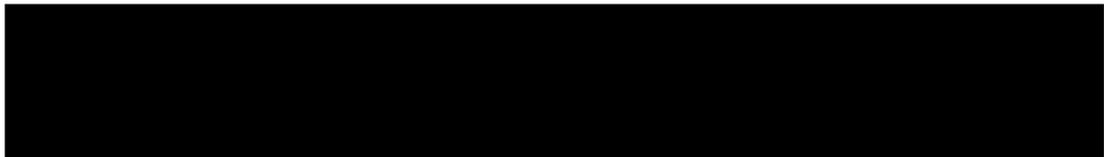


U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent identity and warranted
invasion of personal privacy

PUBLIC COPY

D2

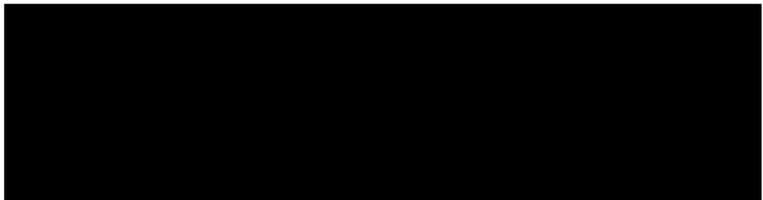


FILE: [redacted] Office: VERMONT SERVICE CENTER Date: **SEP 10 2010**

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:

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 \$585. 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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner is a television network that employs the beneficiary in a position entitled "technical director graphic art and video director." 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.

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 "American Competitiveness in the Twenty-First Century Act" (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) removed 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 broadened 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 DOJ21 reads in pertinent part 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 August 21, 2008; (2) the director's request for additional evidence dated September 15, 2008 and the petitioner's response; (3) the notice of decision, dated September 30, 2008; and (4) Form I-290B and supporting evidence.

The record shows that the beneficiary has continuously resided in the United States as an H-1B nonimmigrant since June 5, 2002. As the director noted in his decision, the petitioner filed a labor certification application (Form ETA-9089, Case Number [REDACTED]) on behalf of the beneficiary on November 13, 2006 followed by the instant petition (Form I-129) on August 21, 2008 to extend the beneficiary's H-1B status by one year. The director found that the labor certification had been denied, and no additional evidence to establish that the beneficiary was eligible for an exemption, such as a pending Form I-140 based on an approved permanent labor certification, was contained in the record. As a result, the director denied the petition.

On appeal, counsel argues that the labor certification application is still pending. Counsel contends that the petitioner requested a review of the denial of the labor certification application, as evidenced by a letter from American Immigration Federation (AIF), written on behalf of the petitioner, to the Employment and Training Administration (ETA) dated September 4, 2007. Moreover, counsel submits copies of email correspondence between the petitioner, AIF, and the U.S. Department of Labor (DOL) on appeal, and contends that such evidence demonstrates that the labor certification application is still pending. Counsel concludes by stating that, since the case is currently pending due to the petitioner's request to review the denial, a final decision has not yet been rendered and the beneficiary therefore is exempt from the six-year maximum limitation on H-1B classification.

In the absence of regulations implementing AC21, as amended, U.S. Citizenship and Immigration Services (USCIS) issued a guidance memorandum, dated May 30, 2008, from Donald Neufeld, Acting Associate Director, Domestic Operations, intended to assist USCIS adjudicators in considering an extension of stay under AC21 sections 106(a) and (b). In pertinent part, USCIS expressly stated:

USCIS will accept the following documents as evidence that an application for labor certification filed on behalf of the H-1B beneficiary is still pending, or has been certified and is still valid:

- If the labor certification is a Form ETA-750 that is still pending with DOL, a screen-print from the [Backlog Elimination Center's (BEC) Public Disclosure System (PDS)] that shows that the status of the labor certification application is *In Process* or is actively *On Appeal* that includes the name of the petitioning employer, the date that the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the pending Form ETA-750; or,

- If the labor certification is a Form ETA-9089 that was denied but is on appeal, documentation from DOL or [the Board of Alien Labor Certification Appeals (BALCA)] that shows that the labor certification is on appeal[.]

* * *

If an applicant for extension of stay cannot present a screen print from the PDS, he or she may present a letter from DOL issued within the previous 60 days prior to the filing of the extension petition instead. The DOL letter must explain why the PDS screen print is unavailable and verify that an application for a labor certification is pending.

See Memo. from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, U.S. Citizenship and Immigration Serv., to Field Leadership, *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. D. of Public Law 105-277*, HQ 70/6.2 AD 08-06 (May 30, 2008).

As correctly noted by the director, the record contains insufficient evidence to demonstrate that the labor certification application, filed by the petitioner on November 13, 2006, was still pending at the time the instant H-1B petition was filed. However, as a matter of discretion, the AAO on its own initiative reviewed DOL's publicly available online database for information pertaining to this matter. The DOL database demonstrated that a final decision denying the labor certification application (Form ETA-9089, Case Number [REDACTED] filed on behalf of the beneficiary was not entered until September 11, 2009. Since the instant petition was filed on August 14, 2008, the labor certification application for the beneficiary, on which the petitioner's claim of eligibility is based, was still pending as of the filing date of the petition and remained pending through the entire requested period of employment. Consequently, the beneficiary was eligible at that time for a one-year extension of stay in H-1B status beyond the normal six-year limit.

It must be emphasized that the AAO's independent and discretionary review of DOL's public database in this matter does not in any way absolve a petitioner from presenting sufficient, documentary evidence in support of a petition. While the beneficiary in this matter was in fact eligible for a seventh year extension by virtue of the pending labor certification application, the petitioner failed to independently satisfy its burden of proof in these proceedings. Although the guidance memorandum, cited above, specifically outlines the types of documentation that constitute acceptable evidence of a pending appeal, the petitioner failed to submit such evidence and instead relied on the statements of counsel to support its position. The petitioner is advised that 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 Obaighena*, 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. *See* section 291 of the Act, 8 U.S.C. § 1361. While the petitioner failed to sustain that burden in these proceedings, the AAO's discretionary and independent review of DOL's public

database, reveal that the petitioner and the sponsored beneficiary are eligible for the benefit sought in this matter. In the interest of justice, this evidence will not be ignored and will hereby be incorporated into the record of proceeding. Accordingly, the decision of the director is withdrawn, and the petition is approved.

ORDER: The appeal is sustained. The petition is approved.