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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

DATE: DEC 05 2011 Office: VERMONT SERVICE CENTER [redacted]

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:

SELF-REPRESENTED

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 $630. 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 and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it is engaged in hospitality management, operation, and development, was established in [redacted] personnel, and had an estimated gross annual income of $560,000. It seeks to continue the employment of the beneficiary as a financial manager from July 14, 2009 until July 14, 2010. Accordingly, the petitioner 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B, Notice of Appeal or Motion, and statement submitted by the petitioner. The AAO reviewed the record in its entirety before issuing its decision.

The only issue to be discussed in the matter is whether the beneficiary is entitled to an extension of H-1B classification. The director found, based on United States Citizenship and Immigration Services (USCIS) records that the beneficiary had been in the United States in "H" or "L" classification since October 30, 1998, and had reached an aggregate stay of six years in the United States in such classification. The Form I-129 that is the subject of this appeal was filed June 30, 2009. USCIS records also disclose that a Form I-140, Immigrant Petition for Alien Worker, was filed on the beneficiary's behalf on January 11, 2008. The Form I-140 was denied on March 3, 2009. The petitioner in the Form I-140 matter filed a motion to reopen and reconsider the Form I-140 denial on April 3, 2009. The motion to reopen and reconsider was dismissed on September 25, 2009. The petitioner in the Form I-140 matter submitted an appeal of the dismissal of the motion to reopen and reconsider on October 28, 2009. The appeal of the dismissed motion on the Form I-140 remains pending at this time.

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] shall not exceed 6 years." However, the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act), removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030(A)(a) of the DOJ Authorization Act, § 106(a) of AC21 reads:

> (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.

Section 11030(A)(b) of the DOJ Authorization Act amended § 106(b) of AC21 to read:

> (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.

As referenced above, the director found that the beneficiary had been in H-1B classification since October 30, 1998 and that the petitioner's June 30, 2009 request to continue the beneficiary's status to July 14, 2010 placed the beneficiary beyond the six-year limit when considering the beneficiary's status in the aggregate. The director noted that USCIS records indicated that the beneficiary's Form I-140 was denied on March 3, 2009 and that a subsequent motion to reopen the matter was dismissed on September 25, 2009.

On appeal of this matter, the petitioner asserts that based on its appeal of the director's decision to dismiss the motion to reopen and reconsider the denial of the Form I-140 petition, the decision in the Form I-140 matter is not final. The petitioner also contends that denial of the instant petition would be unfair. The petitioner notes that if it had used the premium processing service when filing the Form I-129 petition, its motion to reopen the Form I-140 denial would have been pending at the time the director entered the decision on this matter in compliance with the premium processing standards. The petitioner's assertions are not probative. First, the Form I-140 denial was deemed final 33 days from the March 3, 2009 denial date. Thus, whether the petitioner had used the premium processing service or not, the Form I-140 denial was final when the Form I-129 was filed in June 2009. Second, the regulation at 8 C.F.R. § 103.5(a)(1)(iv) states in pertinent part: "the filing of a motion to reopen or reconsider or of a subsequent application or petition does not stay the execution of any decision in a case or extend a previously set departure date." As the motion to reopen the Form I-140 matter was dismissed

rather than granted, the petitioner's subsequent appeal is limited to whether the director properly dismissed the motion. Thus, the Form I-140 denial decision was final April 6, 2009 and as the Form I-140 matter was not reopened, the director's denial of the Form I-140 petition is the final administrative decision.

The beneficiary in this matter is not eligible for an extension of H-1B status. Section 106(b)(1) of AC21, as amended, specifically indicates that the one-year extension of stay should not be granted once a final decision is made to deny the I-140 immigrant petition that was filed pursuant to the granted labor certification. The Form I-140 Immigrant Petition for Alien Worker filed on the beneficiary's behalf was denied on March 3, 2009 and became final on April 6, 2009.

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 remains denied.