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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

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U.S. Citizenship  
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Services



82

FILE:



Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:

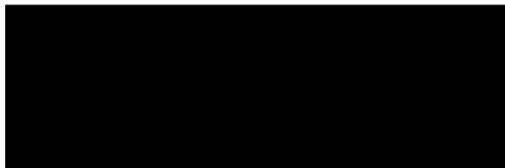


Beneficiary:

MAR 02 2011

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 \$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*  
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 petition will be denied.

The petitioner operates a chain of business stores, and seeks to employ the beneficiary as a mechanical engineer. It endeavors to classify him 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 sought 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, asserting that the petitioner's former counsel erred by failing to submit requested evidence. In addition to submitting a brief and new evidence in support of the appeal, counsel raises an ineffective assistance of counsel claim.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner did not file a complaint with the State Bar of Texas against its prior attorney for ineffective assistance of counsel. Additionally, the petitioner's claim for relief in this proceeding for ineffective assistance of counsel is not supported by an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard. Nor does the record establish that the petitioner's prior attorney whose integrity or competence is being impugned has been informed of the allegations leveled against him and be given an opportunity to respond.

Upon review, the petitioner has failed to fulfill the prerequisites for allegations of ineffective assistance of counsel. See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996); *Matter of Lozada*, 19 I&N Dec. 637. As such, the petitioner's appeal may not be sustained based on this claim.

The AAO will now address the basis for the director's denial.

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 section 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 seventh year extension, filed on November 20, 2008; (2) the director’s two requests for evidence (RFE); (3) counsel’s response with additional documentation; (4) the notice of decision, dated July 22, 2009; and (5) Form I-290B and counsel’s appeal brief.

On November 20, 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. The director noted that despite its request for current documentation establishing that a Form ETA 750, Application for Alien Employment Certification, or Form ETA 9089, Application for Permanent Employment Certification, had been pending for at least 365 days prior to the filing of the petition, the petitioner and counsel failed to submit such evidence. Upon review, the AAO notes that the petitioner submitted (1) a photocopy of a letter from the Texas Workforce Commission dated June 24, 2003, stating that an alien labor certification had been received on June 19, 2003; and (2) a copy of an email from the U.S. Department of Labor confirming that an ETA 9089 had been filed on behalf of the beneficiary on August 22, 2008.

On appeal, counsel submits a full copy of the Form ETA 9089 filed on August 22, 2008 and contends that, had former counsel for the petitioner submitted this document in response to the director’s April 9, 2009 RFE, eligibility for approval would have been established. The AAO disagrees.

The beneficiary is not eligible for a 7<sup>th</sup> year extension of status. The Form ETA 9089 upon which counsel relies on appeal was filed on the beneficiary's behalf on August 22, 2008, only three months (approximately 90 days) before this application for extension of status was filed. Additionally, the petitioner failed to demonstrate that any other application for employment certification had been pending for more than 365 days when the current petition for H-1B extension was filed. Despite submitted confirmation from the Texas Workforce Commission of the filing of an ETA 750 in June 2003, neither counsel nor the petitioner submitted current documentation to demonstrate the status and/or disposition of that application. Finally, there is no evidence that a Form I-140, Petition for Immigrant Worker, has been filed on behalf of the beneficiary. 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 William R. Yates, Associate Director for 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). 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.