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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

PUBLIC COPY



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Date: MAR 07 2012

Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner:
 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:



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and/or reconsider. The motion will be granted. The petition will be approved.

The petitioner seeks to extend the employment of 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, finding that the beneficiary, who had already spent six years in the United States in H-1B status, was ineligible to extend his stay pursuant to section 106 of the "American Competitiveness in the Twenty-First Century Act" (AC21). Specifically, the director found that the Application for Alien Employment Certification (Form ETA 750) filed on behalf of the beneficiary and upon which the request for extension was based had been closed. Consequently, the director concluded that the beneficiary was ineligible for an extension of his stay in H-1B status under section 106 of AC21 as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

On appeal, counsel for the petitioner submitted a brief and additional evidence to the AAO and contended that the beneficiary was eligible to extend his stay in H-1B status because his application for a labor certification was still pending at the time of filing.

The AAO upheld the director's decision. The AAO found that, although counsel presented evidence demonstrating that DOL reopened the petitioner's closed ETA 750 in August 2008, the labor certification was no longer pending at the time of filing the I-129 petition. The AAO concluded that based upon this finding, the beneficiary was not eligible to extend his stay in H-1B nonimmigrant status for an additional one year pursuant to section 106 of AC21. The AAO further noted that, even if it had found the reopened ETA 750 to satisfy section 106(a) of AC21, the petition could not have been approved because a final decision had been made to deny the beneficiary's I-140 petition on November 2, 2009.

On motion, counsel submits additional evidence to address the grounds of the director's denial and the findings of the AAO. Specifically, counsel submits the Form I-290B; a brief in letter format dated December 10, 2009; and copies of the following documents:

1. Copy of August 10, 2007 Notice of Case Closure Letter
2. Copy of July 14, 2008 email to DOL
3. Copy of the August 14, 2008 email from Chicago National Processing Center
4. Copy of October 1, 2008 Final Determination Letter
5. Copies of former counsel's correspondence to DOL and the Certifying Officer
6. Copy of the I-290B Receipt Notice for the I-140 appeal, dated November 30,

- 2009
7. Copy of the Memorandum dated September 23, 2005 by William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, entitled *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests for Extension of H-1B Status Beyond the 6th Year*; and
 8. Copy of the Memorandum dated May 12, 2005 by William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, entitled *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)*.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. Generally, the new facts submitted on motion must be material and unavailable previously, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

Here, the motion is accompanied by two documents that represent new facts that were previously unavailable. Specifically, the petitioner submits a copy of DOL's final determination letter, indicating that the petitioner's Labor Certification Application, filed on May 1, 2001, was certified on October 1, 2008. Additionally, counsel submits a copy of Form I-797C, demonstrating that an appeal of the beneficiary's denied I-140 petition was filed with USCIS on November 30, 2009. A review of this evidence reveals that the appeal of the I-140 petition could be considered *new* under 8 C.F.R. 103.5(a)(2) as it could not have been presented in the prior proceeding. Therefore, the petitioner's motion to reopen is granted.

The issue before the AAO is whether the beneficiary is eligible for an extension of stay in H-1B classification beyond the maximum, permitted six-year period of stay in the United States.

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, AC21, as amended by DOJ21, 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 DOJ21, § 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 DOJ21 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.

The beneficiary has resided in the United States in H-1B classification since September 1997. On July 24, 2007, the petitioner applied for an extension of H-1B status for the beneficiary for the period from August 1, 2007 to July 31, 2008, which would have placed the beneficiary beyond his six-year limit.

The record demonstrates that the labor certification, upon which the instant extension request is based, was closed by DOL in August 2007. The petitioner submits evidence demonstrating that it filed a timely request to re-open the case, as well as evidence that DOL reopened the application on August 14, 2008. Finally, the petitioner submits a copy of the labor certification and a letter from DOL indicating that the labor certification, originally filed on April 12, 2004 with a priority date of May 1, 2001, was ultimately certified on October 1, 2008.

Additionally, the record indicates that the petitioner filed an I-140 petition on behalf of the beneficiary based on the approved labor certification on March 5, 2009. It is noted that the AAO

cited the November 2, 2009 denial of the I-140 petition as an alternate basis of denial in this matter, since it constituted a final decision. However, as demonstrated by counsel's submissions on motion as well as by USCIS records, an appeal of the denied I-140 petition was subsequently filed on November 30, 2009, and that appeal is still pending before the AAO. The record, therefore, indicates that a final decision to grant or deny the beneficiary's immigrant petition has not yet been entered, contrary to the prior findings of the AAO.

Contrary to its previous finding as well as the previous findings of the director, the AAO finds that the beneficiary is eligible for an exemption from the six-year limitation on his H-1B classification under AC21, section 106(a), and to an extension of his stay in H-1B status for an additional year under AC21, section 106(b). The record indicates that the labor certification, filed on May 1, 2001, had been pending for at least 365 days prior to the filing of the instant extension request and was ultimately certified on October 1, 2008. Moreover, a final determination regarding the beneficiary's I-140 petition, based upon the labor certification certified on October 1, 2008, has not yet been entered. Accordingly, the previous findings of the director and the AAO are withdrawn.

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 sustained that burden.

ORDER: The motion is granted. The previous decision of the AAO, dated November 18, 2009, is withdrawn. The petition is approved.