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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**



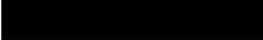
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Date: **MAY 03 2012**

Office: CALIFORNIA 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.

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 service center director denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition the petitioner stated that it is an office of chiropractors and physicians. It seeks to extend the employment of the beneficiary as a chiropractor from February 21, 2009 to February 20, 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 director denied the petition, finding that the beneficiary had been in H or L nonimmigrant status for the maximum six years permitted and did not otherwise qualify for an extension of H-1B nonimmigrant classification.

The record shows that the beneficiary was present in the United States in H-1B status for six years from February 20, 2003 through February 20, 2009. An Application for Alien Employment Certification (Form ETA 750) was filed on behalf of the beneficiary (Case [REDACTED]). That application, upon which counsel now relies to show that the instant petition may be approved, was subsequently denied. See U.S. Department of Labor Employment and Training Administration website at http://pds.pbis.doleta.gov/pbis_pds.cfm, last visited April 27, 2012. The filing date and the date the application was denied are not available at that location, though it does confirm that the application counsel relies upon was denied. Moreover, while there was no requirement for her to do so, the service center director verified that the labor certification had been denied on April 16, 2009, a date prior to the May 11, 2009 denial in this matter.

On November 26, 2009, prior to the expiration of the beneficiary's H-1B status on February 20, 2009, the petitioner filed the instant petition, requesting a continuation of previously approved employment without change with the same employer and requesting the extension of the beneficiary's stay since the beneficiary now holds this status. The petitioner requested the continuation of the beneficiary's employment in H-1B status from February 21, 2009 to February 20, 2010.

Counsel for the petitioner asserted that, as a labor certification had been filed over 365 days ago, pursuant to section 106 of the "American Competitiveness in the Twenty-First Century Act" (AC21), a one-year extension is mandatory.

On May 11, 2009, the director denied the petition. Citing to 8 C.F.R. § 214.2(h)(13)(iii), the director observed that the petitioner's current request to employ the beneficiary as an H-1B nonimmigrant would place the beneficiary beyond the six-year limit. The director noted that the permanent labor certification application, filed on behalf of the beneficiary, had been denied and, thus, the beneficiary was not eligible for an extension of H-1B nonimmigrant status under section 106 of AC21 as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

On appeal, counsel noted the director's observation that the Form ETA 750 filed for the beneficiary had been denied. Counsel asserted, first, that he had received no notification of that denial, and,

second, that the denial is irrelevant to the approvability of the instant petition. The AAO notes, initially, that the asserted failure of counsel to receive notification of the denial of the Form ETA 750 relied upon has no bearing on the approvability of the instant petition. Counsel's second assertion will be addressed in more depth, *infra*.

The AAO notes that, 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 § 11030A(a) of 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 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] 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.*

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

Counsel avers that once 365 days have elapsed from the filing of a labor certification application, section 106(b) mandates an exemption from the six-year limitation of the H-1B cap and a one-year extension of the beneficiary's stay. Counsel contends that the denial of the labor certification is irrelevant under the statute.

Contrary to counsel's assertion, section 106(b)(1) of AC21, as amended by DOJ21, makes clear that the additional one-year extensions are no longer available when, as in this case, the Form ETA 750 has been denied. Here, the petitioner failed to meet its burden to show that the labor certification application in question remained pending during any of the period of employment requested in this petition. Absent such evidence, it appears that this labor certification application was denied before the instant H-1B petition was ever filed. As no extension is available in the instant case, the appeal must be dismissed and the petition denied.

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