

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **NOV 29 2013** OFFICE: VERMONT SERVICE CENTER FILE: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. Thereafter, counsel for the petitioner filed an appeal. The Administrative Appeals Office (AAO) reviewed the record of proceeding and dismissed the appeal. The matter is again before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner submitted a Form I-129 (Petition for Nonimmigrant Worker) to the Vermont Service Center on April 26, 2012. On the Form I-129 visa petition, the petitioner describes itself as a travel agency established in 1980. In order to continue to employ the beneficiary in what it designates as a sales manager position, the petitioner seeks 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).

Under the Act, H-1B admission is limited to six years. See section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B or L nonimmigrant in the United States, unless he/she has resided and been physically present outside the United States for the immediate prior year. See 8 C.F.R. § 214.2(h)(13)(iii)(A). Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay. Section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) removes the six-year limitation on the authorized period of stay in H-1B classification for aliens under certain conditions.

Specifically, section 106(a) of 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. See Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002). According to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21.

As amended by section 11030A(a) of DOJ21, section 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 section 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. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based petition under section 203(b) of the Act is considered a lengthy adjudication delay for purposes of this exemption. See Pub. Law No. 107-273, 116 Stat. at 1836.

With the Form I-129 petition, counsel provided a letter dated April 24, 2012. In the letter, counsel indicated that the petitioner is requesting an extension beyond the six years under Section 106 of AC21. In support of this assertion, counsel submitted a copy of a decision dated December 23, 2011 from the U.S. Department of Labor (DOL), Board of Alien Labor Certification Appeals (BALCA). In the decision, the denial of the labor certification was affirmed.¹ In a letter dated August 29, 2012, counsel asserted that while BALCA "has issued its final decision, the [p]etitioning employer is still considering whether to pursue review of the decision in Federal District court." Counsel claimed that the denial of the application for permanent employment certification was not a final decision. The director reviewed the record of proceeding and denied the petition, finding that the petitioner failed to establish that the beneficiary is eligible for an extension of stay in the H-1B classification beyond six years.

Subsequently, counsel submitted an appeal, which the AAO dismissed on October 2, 2013. In the decision, the AAO noted that section 214(g)(4) of the Act limits the period of authorized admission

¹ The decision states, "This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board." There is no evidence in the record of proceeding that the petitioner petitioned for review by the full Board.

of an H-1B nonimmigrant, and that the petitioner did not demonstrate that the beneficiary was eligible for an exemption from this statutory provision and was eligible for an extension of stay when the H-1B petition was submitted.² The AAO also noted that the petitioner failed to establish eligibility for the benefit sought at the time of filing the nonimmigrant visa petition.³ 8 C.F.R. § 103.2(b)(1).

Thereafter, the petitioner filed this motion to reopen. With the Form I-290B, counsel provided a brief and a copy of the AAO's decision dismissing the appeal. In the brief submitted with the motion to reopen, counsel claims that "[a]t the time of the appeal, the [p]etitioner was still considering appealing the decision of the Board of Alien Labor Certification (BALCA) to federal court." Additionally, counsel claims that the "[p]etitioner is not required to petition for review by the full board at BALCA before seeking relief in federal court. As a result, the decision denying the perm application was not a final decision."

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.⁴ The new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

² Through the application for permanent employment certification process, DOL certifies to U.S. Citizenship and Immigration Services (USCIS) that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. *See* 20 C.F.R. § 656.24(b).

A final decision to deny an application for permanent employment certification is evidence that DOL has completed its process of adjudicating the application, and that the beneficiary's application process for obtaining lawful permanent resident status in the United States by way of that application has ended. Thus, the final decision to deny the application precludes USCIS from further processing a nonimmigrant extension of stay request based upon section 106(a) of AC21. To accept a contrary interpretation, USCIS would be required to indefinitely extend an individual's stay in the United States in one-year increments. Nothing in the legislative history of AC21 serves to suggest that Congress intended that petitioners on behalf of individual aliens retain the ability to have those aliens remain in the United States indefinitely. Rather, the legislative intent reflects only a desire to shield individual aliens from the inequities of government bureaucratic inefficiency and does not include a mandate for an infinite extension of stay in a nonimmigrant status.

³ Further, while the petitioner may have considered appealing the decision of BALCA or seeking relief in federal court, there is no evidence that the petitioner actually petitioned or sought relief in federal court.

⁴ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

Upon review, the AAO finds that the petitioner and counsel failed to state new facts that were not available and could not have been discovered or presented in the previous proceeding. In the response to the Notice of Intent to Deny and in the appeal, counsel made similar statements with regard to the petitioner "considering appealing" the BALCA decision in federal court and his claim that the denial of the application for permanent employment certification was not a final decision. Both the director and the AAO addressed counsel's assertions in the prior decisions. Counsel's claims are not new facts that were not available and could not have been discovered or presented in the previous proceeding.

There is no documentary evidence that at the time of filing the H-1B petition, a qualifying labor certification or a Form I-140 petition had been pending for at least 365 days on or prior to the last day of the beneficiary's authorized period of H-1B admission. The evidence in the record of proceeding indicates that BALCA affirmed the denial of the labor certification prior to filing of the H-1B petition. The petitioner and its counsel have not established a basis for reopening the proceeding, and the submission fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

The motion will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *see e.g.*, *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The motion is dismissed. The previous decision of the AAO dated October 2, 2013, is affirmed. The petition is denied.