U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D-2

FILE: WAC 06 115 51323 Office: CALIFORNIA SERVICE CENTER Date: JUL 23 2007

IN RE: Petitioner:
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:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be rejected.

The petitioner provides care services for the elderly. It seeks to employ the beneficiary as an accountant and to classify her 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 approved the requested H-1B classification for the beneficiary, but denied the petitioner's request to extend the beneficiary's H-1B status. The beneficiary failed to maintain a valid nonimmigrant status and is therefore ineligible for the requested extension of stay. The petitioner was advised that the beneficiary was ineligible for an extension of status and would have to depart the United States and apply for the H-1B visa at a consulate abroad. The approved I-129 petition for classification of the beneficiary as an H-1B nonimmigrant was forwarded to the Manila Consulate.

As provided in 8 C.F.R. § 214.1(c)(5), where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. There is no appeal from the denial of an application for extension of stay filed on a Form I–129.

Since there is no legal basis for the instant appeal, it must be rejected.

The AAO notes counsel's assertion that the beneficiary was in valid H-1B status on February 8, 2006, when the initial I-129 petition was mailed. The initial I-129 petition was received by the California Service Center on February 16, 2006. The director rejected the initial petition on February 21, 2006 because it was incomplete at the time of filing. The petitioner resubmitted a complete I-129 petition and it was received on February 28, 2006, ten (10) days after the beneficiary's H-1B status expired on February 18, 2006.

Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who fails to maintain the previously accorded status or where such status expires before the application or petition is filed. The record reflects that the petitioner did not file the petition for an extension within the required time frame. In the present case, the beneficiary's authorized period of stay expired on February 18, 2006. However, the petition for an extension of the beneficiary's H-1B status was filed on February 28, 2006. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed and counsel did not demonstrate that the delay was due to extraordinary circumstances, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

Counsel argues that the Service['s] late rejection has caused the petitioner to lose the time to respond and re-file the instant petition. The initial I-129 petition was received by the California Service Center on February 16, 2006 and rejected as an incomplete petition on February 21, 2006. The director rejected the initial filing within three (3) business days of the filing. Counsel has not clarified as to how he determined that the director's rejection was a late rejection. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA

1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also argues that the original filing date should be used as the date in which the I-129 petition was filed stating:

> There had [sic] been numerous cases where the Service sends back a petition filed on time and reconsiders the same, retroacting on the date first filed and looks upon the merits and substance of the case. In here, the Service has indeed, committed an error in not considering the February 8, 2006 filing but rejected the entire packet sending them on a later dated passed the beneficiary's authorized period of stay of until February 18, 2006. Petitioner should not be given the burden of such error to the prejudice of the I-129 Petition and of the Beneficiary's nonimmigrant status.
>
> The Service's erroneous denial of the instant I-129 Petition for H-1B1 Classification warrants the reversal and reconsideration of the said decision and that the nonimmigrant status of the beneficiary be restored.

Pursuant to 8 C.F.R. § 103.2(a)(1), every I-129 petition must be executed and filed in accordance with the instructions on the form. The director's February 21, 2006 rejection notice lists that the information on page 2, part 3, number 1 is missing. Therefore, the petitioner's initial Form I-129 was not executed in accordance to the instructions on the form. The AAO observes that the director correctly rejected the initial I-129 petition as not properly filed under 8 C.F.R. § 103.2(a)(1).

The AAO notes counsel's following statement:

> Petitioner-Appellant respectfully invokes that in the interest of justice, fair trade and economic contribution that business organization are involved into, require reconsideration/reversal of its I-129 Petition (H-1B1 classification) and grant the alien-beneficiary the extension of her nonimmigrant status without the need of departing from the United States. Her professional services are needed to fill in the gap in the shortage of qualified personnel that would play a vital role in the conduct of Petitioner's business and trade.

Counsel suggests that the director's adjudication of the extension of status was unfair. The petitioner has not demonstrated any error by the director in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). Moreover the AAO, like the Board of Immigration Appeals, is without authority to address the issue of fairness so as to preclude a component part of Citizenship and Immigration Services from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991).

ORDER: The appeal is rejected.