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**U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529**



**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 07 091 51736 Office: CALIFORNIA SERVICE CENTER Date:

FEB 21 2008

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:

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

A handwritten signature in black ink, appearing to read "Elizabeth Mie".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a bakery and food production company. It claims to employ 24 personnel and to have had \$1 million in gross annual income when the petition was filed. It seeks to continue the employment of the beneficiary as a marketing manager. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 Form I-129 petition determining that the beneficiary was not in a valid H-1B status when the petition was filed.

The record of proceeding before the AAO contains: (1) the Form I-129 filed February 7, 2007 and supporting documentation; (2) the director's April 4, 2007 request for further evidence (RFE); (3) counsel for the petitioner's April 19, 2007 response to the RFE; (4) the director's May 3, 2007 denial decision; and (5) the Form I-290B and letter in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When denying the Form I-129 and the extension of status request, the director cited the regulation at 8 C.F.R. § 214.1(c)(4) that states in pertinent part:

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....

The AAO finds that the regulation applicable to the adjudication of the Form I-129 in this matter is at 8 C.F.R. § 214.2(h)(14) which states:

(14) Extension of visa petition validity. The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. A request for a petition extension may be filed only if the validity of the original petition has not expired.

The only issue properly before the AAO is whether the director's adjudication of the extension petition is correct. Although the director did not cite the applicable regulation in this matter, the petitioner's request for a petition extension may not be approved as the petition extension may be filed only if the validity of the original petition has not expired. In this matter, the record contains the Form I-797B, Approval Notice, indicating the petitioner had received approval for an H-1B classification valid from January 15, 2004 to May 15, 2005. When the petitioner filed the Form I-129 on February 7, 2007, the prior approval of the H-1B classification was no longer valid. The director correctly determined that the Form I-129 petition extension must be denied, as the original petition was not valid when the Form I-129 in this matter was filed on February 7, 2007.

The AAO acknowledges counsel's assertion that the director improperly denied the petitioner's request for an extension of the beneficiary's stay; however, an extension of stay request is not properly before the AAO. This issue rests within the exclusive jurisdiction of the director.

As always, 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.