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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

D2

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **DEC 29 2010**

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 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, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reconsider. The motion will be dismissed.

The petitioner is an accounting firm with five employees. It seeks to employ the beneficiary as a market research analyst 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 petitioner had filed the H-1B extension petition after the validity of the original petition had expired.

In a decision dated December 10, 2008, the AAO affirmed the director's decision and dismissed the appeal. On January 6, 2009, counsel filed a "Motion to Reconsider." On motion, counsel contends that even if the petition is to be deemed untimely, the petitioner is permitted to file the petition under 8 C.F.R. § 214.1(c)(4).¹

The record of proceeding before the AAO contains: (1) the Form I-129 filed February 27, 2007 and supporting documentation; (2) the director's April 11, 2007 request for further evidence (RFE); (3) prior counsel's July 16, 2007 response to the RFE; (4) the director's September 20, 2007 denial decision; (5) the Form I-290B and letter in support of the appeal filed October 22, 2007; (6) the AAO's decision to dismiss the appeal on December 10, 2008; and (7) the petitioner's Motion to Reconsider with supporting documentation submitted on January 6, 2009. The AAO reviewed the record in its entirety before issuing its decision.

Before adjudicating the instant petition, the AAO finds useful a review of the procedural history. This H-1B petition and request for extension was filed on February 27, 2007. The petitioner's original H-1B petition approved on behalf of the beneficiary was valid from March 15, 2004 until January 1, 2007. The petitioner originally submitted a Form I-129 H-1B extension petition in December 2006. However, that petition was properly rejected because the petitioner failed to include the proper fee with the petition's filing. The petitioner resubmitted the petition with the proper fee on February 27, 2007, a date after the original petition's validity had expired. The petition was then denied on September 20, 2007 and the petitioner appealed this decision. The AAO dismissed the petitioner's appeal on December 10, 2008, and the petitioner has filed the present Motion to Reconsider.

In the brief filed with the petitioner's appeal on October 22, 2007, counsel argues that USCIS miscalculated the filing fee and thereby improperly denied the petition on this ground. The record shows that the H-1B petition and request for extension were initially sent without the requisite American Competitiveness Workforce Improvement Act of 1998 (ACWIA) Fee of \$750. Prior counsel then again attempted to submit the petitioner's H-1B petition and request for extension without the \$750 ACWIA fee, arguing that this is the petitioner's second request for an H-1B extension filed on behalf of the beneficiary and, therefore, the ACWIA fee is not required. However, prior counsel was incorrect that this petition is the petitioner's second request for an H-1B extension. In fact, this petition is the first request for H-1B extension by the petitioner on

¹ In Part 3 of the Form I-290B, Notice of Appeal or Motion, counsel incorrectly refers to this regulation as 8 C.F.R. § 214.2(4).

behalf of the beneficiary as the record demonstrates that the prior H-1B approval, with validity dates of March 15, 2004 to January 1, 2007, was approved as a change of status. Therefore, the petitioner was required to pay the \$750 ACWIA fee for the present petition and request for H-1B extension. The petition was again rejected on February 15, 2007 for failure to pay the ACWIA fee and prior counsel then submitted the present petition and request for H-1B extension along with the proper filing fees on February 27, 2007.

In the petitioner's present motion to reconsider, counsel references 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. . . .

Regarding counsel's assertion that the director improperly denied the petitioner's request for an extension of the beneficiary's stay, an extension of stay request is not properly before the AAO. This issue is not appealable and rests within the exclusive jurisdiction of the director unless certified to the AAO. *See* 8 C.F.R. §§ 103.4 and 214.1(c)(5).

Additionally, under 8 C.F.R. § 103.5(a)(3), a motion to reconsider a decision on a petition must be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The motion to reconsider must also establish that the AAO's initial decision was incorrect based on the evidence of record at the time of that initial decision. *Id.* This the petitioner failed to do.

As counsel did not provide a lawful basis for its motion to reconsider the AAO's prior decision and also did not provide any precedent decisions to establish that the decision was based on an incorrect application of law or Service policy, the motion to reconsider the AAO's prior decision with respect to this petition is dismissed.

The AAO notes 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.

Although counsel did not cite the applicable regulation in this matter, the AAO finds that even if counsel had properly filed a motion to reconsider under 8 C.F.R. § 214.2(h)(14), the petitioner's request could not be approved as the H-1B 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 initially received approval for an H-1B classification valid from March 15, 2004 to January 1, 2007. When the petitioner filed the instant Form I-129 request for H-1B extension on February 27, 2007, the prior approval of the H-

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1B classification was no longer valid. The director correctly determined that the Form I-129 H-1B petition and request for extension must be denied, as the original petition was not valid when the Form I-129 in this matter was filed on February 27, 2007. *See Id.*

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 motion to reconsider the AAO's prior decision is dismissed.