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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **NOV 05 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and 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 an institution of higher education. To employ the beneficiary as an assistant professor of French/Italian, the petitioner endeavors 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 denied the petition, finding that the petitioner filed the petition more than six months before the date of actual need for the beneficiary's services. On appeal, counsel characterized the Form I-129 visa petition as a request to correct the end date of the beneficiary's current H-1B visa approval and to permit recapture of unused H-1B time periods. Counsel implied that the instant H-1B petition was therefore permissibly filed more than six months before the expiration of the beneficiary's current H-1B status.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's denial letter; and (3) the Form I-290B appeal and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) states: "[A petition for a temporary employee visa] may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services or training."

On January 24, 2009 USCIS issued an H-1B visa to the beneficiary for temporary employment by the instant petitioner through May 30, 2010. The instant petition was filed on April 14, 2009, more than six months prior to the expiration of the beneficiary's current approved H-1B visa status.

Notwithstanding counsel's characterization of the instant visa petition as a request to correct the end date of the beneficiary's current H-1B visa approval and to permit recapture of unused H-1B time periods, it is a visa petition for a temporary employee, and filing it more than six months prior to the expiration of the beneficiary's current approved H-1B visa status was impermissible. The appeal will be dismissed and the instant visa petition will be denied on that basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.