

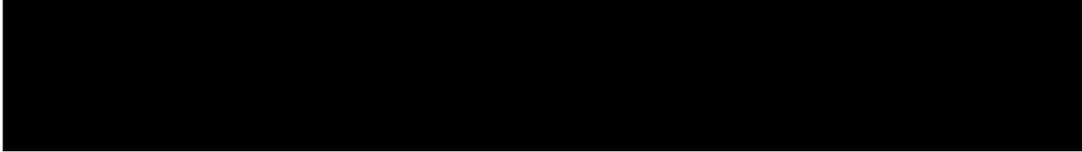
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2



DATE: **DEC 16 2011** Office: CALIFORNIA SERVICE CENTER FILE:

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:

SELF-REPRESENTED

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 Director, California Service Center, 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 remain denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it is an educational institution established in 1807. It seeks to continue the employment of the beneficiary as a faculty research associate 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 record of proceeding before the AAO contains (1) the Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and statement submitted by the petitioner. The AAO reviewed the record in its entirety before issuing its decision.

The director found, based on United States Citizenship and Immigration Services (USCIS) records, that the beneficiary had been in the United States in "H" classification for six years and that the petitioner's November 23, 2009 request to continue the beneficiary's status to November 14, 2010 placed the beneficiary beyond the six-year limit. The director determined that the petitioner had not shown that the beneficiary was eligible for a further extension.¹ In this matter, the petition that the petitioner sought to extend () expired on November 14, 2009. The Form I-129 that is the subject of this appeal is date stamped as filed November 23, 2009, nine days after the expiration of the petition that the petitioner sought to extend. The regulations provide: "A request for a petition extension may be filed *only if the validity of the original petition has not expired.*" 8 C.F.R. § 214.2(h)(14) (Emphasis added). The regulations do not allow for a stay in H-1B classification when the beneficiary is no longer in the original H-1B status. Thus, the petition in this matter must be denied as it was filed after the expiration of the petition it sought to extend.

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension. In this matter, the director did not raise this issue in the denial, and thus it appears that the director erroneously exercised favorable discretion to the petitioner under the provisions of 8 C.F.R. § 214.1(c)(4)(i). The director's omission is harmless, however, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As noted above, the petition must be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). This non-discretionary basis for denial renders the

¹ On appeal, the petitioner provided and USCIS records confirm that a Form I-140, Immigrant Petition for Alien Worker, was filed on the beneficiary's behalf on October 14, 2006 with a priority date of May 5, 2006. The category that formed the basis of the Form I-140 is a skilled worker or professional and was approved September 24, 2007. The beneficiary filed a Form I-485, Application to Adjust Status on September 26, 2007 which remains adjudicated. The petitioner asserts, based upon the Form I-140 approval, that the beneficiary is eligible for a three-year extension of the H-1B extension.

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remaining issues in this proceeding moot. For this reason, the appeal must be dismissed and the petition denied.

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 remains denied.