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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

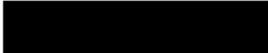
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Date: **JUL 05 2011**

Office: VERMONT SERVICE CENTER

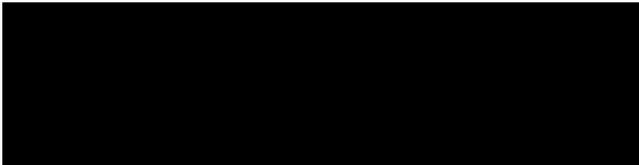
FILE: 

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:



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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition submitted on February 3, 2009, the petitioner stated that it is an organization that operates public charter schools. To extend its employment of the beneficiary as a teacher, 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 on August 31, 2009, finding that the petitioner failed to provide requested evidence. On appeal, counsel asserts that the director's basis for denial was erroneous, and contends that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

The director's denial was based on the petitioner's failure to submit requested evidence. However, a review of the record demonstrates a more critical issue pertaining to the petitioner's eligibility to extend its employment of the beneficiary in H-1B status.

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). In this matter, the petition that the petitioner is seeking to extend (EAC 08 173 52252) expired on January 30, 2009. The instant petition was filed on February 3, 2009, four days after the original petition's expiration.

A review of the record indicates that the director raised this issue in the RFE issued on May 21, 2009. In a response dated June 19, 2009, counsel contended that the petitioner filed the instant petition on a *pro se* basis. Counsel asserts that, while the petitioner was aware of the expiration date of the prior petition, it incorrectly assumed that the instant petition needed only to be *mailed* to, and not received by, U.S. Citizenship and Immigration Services (USCIS) prior to the petition's expiration. Counsel requested favorable discretion under 8 C.F.R. § 214.1(c)(4)(i).

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 as requested by counsel 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).

The petition must therefore 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).

Because the petition must be denied as it was filed after the expiration of the petition it sought to extend, further pursuit of the original basis for the director's denial in the matter at hand is moot.

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.