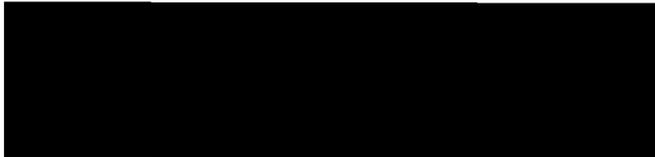




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent identity unnumbered
invasion of personal privacy

PUBLIC COPY



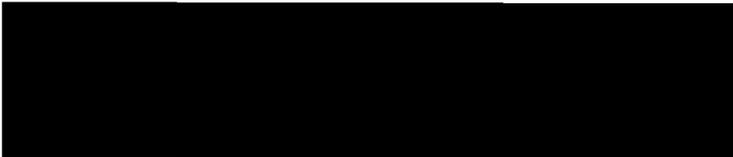
D2

Date: **APR 04 2012** 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 September 10, 2009, the petitioner stated that it is an educational organization. To extend its employment of the beneficiary as a high school teacher, the petitioner endeavors to continue 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 January 21, 2010, finding that the beneficiary is not eligible pursuant to the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21), for an exemption from the six-year limitation on H-1B nonimmigrant admission contained in section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), because the record of proceeding does not establish that it has been 365 or more days since the filing of a still valid labor certification application or employment-based immigrant visa petition as required by section 106(a) and (b) of AC21, as amended by DOJ21.

In addition, the director found that, at the time the instant petition was filed, the record of proceeding failed to establish that the beneficiary had an approved employment-based immigrant visa petition and was eligible for that status but for the application of the per country limitations as required by section 104(c) of AC21 and 8 C.F.R. § 103.2(b)(1) (requiring eligibility for a benefit sought to be established at the time of filing).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Although the director's denial was based on the petitioner's failure to establish eligibility for an exemption from the limitation contained in section 214(g)(4) of the Act, 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. Specifically, 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) (stating that a "request for a petition extension may be filed only if the validity of the original petition has not expired"). In this matter, the petition that the petitioner is seeking to extend (EAC 08 230 51033) expired on August 26, 2009. The instant petition was filed on September 10, 2009, 15 days after the original petition's expiration.

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 may have erroneously exercised favorable discretion to the petitioner under the provisions of 8 C.F.R. § 214.1(c)(4)(i). The director's error 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, and the omission of this non-discretionary ground for denial did not result in the improper granting of a benefit in this matter, i.e., the error did not change the outcome of this case. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "harmless error" and stating that it is not grounds for reversal).

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

Even if the remaining issues in this proceeding were not moot, however, it could not be found that eligibility for an additional one-year extension of H-1B status has been otherwise established.

First, section 106(b) of AC21, as amended, specifically indicates that the one-year extension of stay should not be granted once a final decision is made to deny the I-140 immigrant petition that was filed pursuant to the granted labor certification. Pub. L. No. 106-313, § 106(b), 114 Stat. 1251, 1254 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002). The Form I-140 Immigrant Petition for Alien Worker [REDACTED] that was filed on the beneficiary's behalf was denied on March 17, 2009, which is nearly six months prior to the filing of the current H-1B extension petition on September 10, 2009. As the I-140 petition was denied without appeal prior to the filing of the instant H-1B extension petition on September 10, 2009, making such decision final, the petitioner may not use that I-140 for the current H-1B extension petition. Neither the plain language of the statute nor the pertinent legislative history indicate that Congress intended to permit an alien beneficiary to have his or her stay indefinitely extended in a temporary, nonimmigrant classification based on a prior, approved labor certification once the I-140 petition filed using that labor certification is denied.¹

Counsel has also provided an approval notice for a second I-140 filing ([REDACTED]) received by USCIS on September 2, 2009 with a priority date of September 2, 2009. Thus, the

¹ Senator [REDACTED] and Representative [REDACTED] (TX), sponsors of the DOJ21, but not of AC21, both made comments stating that § 11030A of DOJ21 permits H-1B aliens who have labor certification applications caught in lengthy agency backlogs to extend their status beyond the sixth year limitation. 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002); *accord* 148 Cong. Rec. S11063 (daily ed. Nov. 14, 2002). Representative [REDACTED] also noted that AC21 was put in place to recognize the lengthy delays at the legacy Immigration and Naturalization Service (INS) in adjudicating petitions and that DOJ21 addresses the lengthy processing delays at DOL. Representative Smith observed that the DOJ21 legislation allowed those who are about to exceed their six years in H-1B status to not be subject to the additional requirement of having to file the immigrant petition by the end of the sixth year, which he noted "is impossible when DOL had not finished its part in the process." 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002). Thus, the legislative history of DOJ21 underscores the legislative concern regarding the lengthy processing delays occurring at DOL. More importantly, the main purpose of the legislative change appears centered on providing an additional means by which aliens may remain in the United States and continue to work during the time their application for permanent resident status is pending.

petitioner did not have a Form I-140 pending for more than 365 days when the current petition for H-1B extension was filed on September 10, 2009. The I-140 petition was pending for eight days when the current H-1B extension petition was filed. Therefore, the beneficiary does not meet the requirement that (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment based immigrant; or (2) 365 days or more have passed since the filing of the employment based immigrant petition (Form I-140). Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002); *see also* Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313)*. HQPRD 70/6.2.8-P (May 12, 2005). Accordingly, the AAO shall not disturb the director's denial of the petition.

Second, as correctly noted by the director, the record of evidence does not establish, at the time of filing, that (1) the beneficiary is also the beneficiary of an approved employment-based immigrant petition pursuant to section 203(b)(1), (2), or (3) of the Act, 8 U.S.C. § 1153(b)(1), (2), or (3); or (2) the beneficiary was eligible at that time to be granted that employment-based immigrant status but for the application of the per country limitations. Pub. L. No. 106-313, § 104(c), 114 Stat. 1251, 1253 (2000). More specifically and as noted above, the second Form I-140 filed eight days before the instant petition had not been approved on or before the date this nonimmigrant petition was filed with U.S. Citizenship and Immigration Services. In addition, even if the I-140 had been approved, the Visa Bulletin for September 2009 indicates that a visa number was available for the beneficiary under the second preference category at that time, rendering the beneficiary ineligible for section 104(c) of AC21 for this additional reason.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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