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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: **FEB 09 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 director of the Vermont 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 be denied.

The petitioner states that it is a restaurant with 20 employees and a gross annual income of \$819,324.00. It seeks to continue to employ the beneficiary as an executive pastry chef 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).

On August 13, 2010, the director denied the petition determining that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker. On appeal, counsel for the petitioner claims that the petition was capriciously and arbitrarily denied by virtue of a harmless technical error caused by failures of the U.S. Department of Labor's (DOL) iCERT system.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation filed on March 25, 2010, requesting a petition extension with an employment start date of March 26, 2009¹; (2) the Labor Condition Application (LCA) certified on April 30, 2009 for employment starting April 30, 2009 and ending March 26, 2010; (3) the LCA "in process" for employment starting March 26, 2010 and ending March 26, 2011; (4) the director's request for additional evidence (RFE) dated May 4, 2010; (5) the petitioner's response to the director's RFE; (6) the LCA certified on June 23, 2010 for employment starting June 17, 2010 and ending June 17, 2011; (7) the director's August 13, 2010 denial decision; and (8) the Form I-290B and supporting materials. The AAO has considered the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by the United States Citizenship and Immigration Services (USCIS) on March 25, 2010. A review of the record, however, demonstrates a more critical, but related issue pertaining to

¹ In a letter dated March 24, 2010, counsel first requests that the beneficiary be granted H-1B status, valid from March 26, 2010 through March 26, 2011. Counsel then requests *nunc pro tunc* relief and requests that the H-1B classification be backdated to March 26, 2009. It must be noted for the record that, even if eligibility for the benefit sought was otherwise established, as the authority of the AAO is limited to that specifically granted or delegated to it by the Act, its implementing regulations, and the Secretary of the U.S. Department of Homeland Security pursuant to 8 C.F.R. § 2.1, the AAO cannot grant counsel's *nunc pro tunc* request.

Specifically and as discussed, *infra*, the regulations mandate that a petition extension be filed before the validity of the petition being extended has expired. See 8 C.F.R. § 214.2(h)(14). In addition, a petitioner must obtain a certified LCA from the DOL in the occupational specialty in which the H-1B nonimmigrant will be employed before the filing of the Form I-129. See C.F.R. § 214.2(h)(4)(i)(B). Furthermore, a petitioner must establish eligibility for the benefit sought at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Accordingly, as the law does not provide a discretionary basis to do so, the AAO has no authority to grant counsel's *nunc pro tunc* request in this matter.

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 sought to extend expired on March 25, 2009. The instant petition was filed on March 25, 2010, one year after the original petition's expiration.²

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 the benefit sought has been otherwise established. Specifically, a review of the record reveals that the petitioner did not establish that (1) at the time of filing, the petitioner had obtained a certified LCA in the claimed occupational specialty for the requested employment periods; (2) the beneficiary remained eligible for an exemption from section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4); (3) the proffered position qualified as a specialty occupation; and (4) the beneficiary was qualified to perform the duties of a specialty occupation.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

² Although the petitioner filed another H-1B extension petition with USCIS on behalf of the beneficiary on March 17, 2009, this petition was denied on June 25, 2009. Furthermore, while a motion to reconsider was filed on that decision, the motion did not stay the decision in that case. *See* 8 C.F.R. § 103.5(a)(1)(iv). As such, even if the petitioner in this case sought to extend which it did not, a petition which has not been approved is not valid and, therefore, cannot be extended for the same reasons discussed herein. *See* 8 C.F.R. § 214.2(h)(14).