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U.S. Citizenship
and Immigration
Services

[REDACTED]

D2

DATE: **JUL 05 2012** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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:

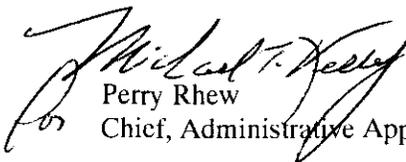
[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on November 6, 2009. In the Form I-129 visa petition, the petitioner describes itself as an *information technology firm* established in 1991. In order to continue to employ the beneficiary in what it designates as a business systems analyst position, the petitioner seeks to classify him 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 9, 2010, finding that the petitioner had not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions.

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

The issue before the AAO is whether the petitioner established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. A review of the record, however, 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 sought to extend (WAC 07 013 51655) expired on October 11, 2009. The instant petition was filed on November 6, 2009, twenty-seven days after the expiration of the validity of the original petition.

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension.¹ U.S. Citizenship and Immigration Services (USCIS) does not have the

¹ There is no discretion to grant a late-filed petition extension. The AAO acknowledges that the petitioner submitted an affidavit from the beneficiary stating that his spouse had gallbladder surgery on August 21, 2009 (52 days prior to the expiration of the petition that the petitioner sought to extend). The beneficiary stated that his spouse's surgery "combined with the care for the children and the demands of a very stressful job led to [his] forgetting to complete the paperwork for the H1B extension." The petitioner also submitted a certified Labor Condition Application valid from October 28, 2009 to October 28, 2010.

The director stated in the decision that "[i]t is not the responsibility of the beneficiary to submit the I-129 in a timely fashion but rather the petitioner." In this matter, the director did not specifically state that the petition must be denied as it was filed after the expiration of the petition it sought to extend. However, the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its

discretion to disregard its own regulations, even if it would benefit a petitioner. *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (C.A.D.C. 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

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.²

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.

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., it did not change the outcome of this case. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 a petition *nunc pro tunc*.

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). 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 does not possess the authority to grant a petition *nunc pro tunc* in this matter.

² The director indicated that the petition was denied because the petitioner had not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. No other reasons were provided by the director for the denial. As previously mentioned, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143. However, as the case is moot, the AAO will not further discuss the director's decision to deny the petition and the additional issues or deficiencies in the record of proceeding.