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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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Dr

Date: **MAY 04 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:

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,

for *Michael T. Kelly*
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner appealed the director's denial to the Administrative Appeals Office (AAO) and, on June 1, 2010, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed.

On the Form I-129 visa petition, the petitioner described itself as a [REDACTED]. In order to continue to employ the beneficiary in what it designates as transportation clerk 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, finding that the petitioner failed to establish that the beneficiary was eligible for an extension of status at the time the petition was submitted, in accordance with the applicable statutory and regulatory provisions.

Thereafter, the petitioner submitted an appeal of the director's decision to the AAO. The AAO reviewed the record and determined that the petitioner had not established that the beneficiary was exempt from the maximum six-year period of stay as set forth in the applicable statutory and regulatory provisions. The AAO affirmed the director's denial and dismissed the appeal. Beyond the decision of the director, the AAO noted several additional issues that precluded the approval of the petition, including that the Form I-129 was submitted after the expiration of the prior H-1B petition validity period.

Thereafter, the petitioner submitted a Form I-290B. As indicated by the check mark at Box E of Part 2 of the Form I-290B, the petitioner stated that it was filing a motion to reconsider.

Title 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although the petitioner has requested that its Form I-290B submission be treated as a motion to reconsider, it has not submitted any document that would meet the requirements of a motion to reconsider. The petitioner claims that it has been "trying to help [the beneficiary] gain permanent status and US Citizenship He is an excellent worker, and an asset to our company, acting in our Warehouse/Transportation department." The petitioner states that due to a series of missteps, it does not have an application for labor certification (or an immigrant petition) pending or approved on behalf of the beneficiary. The petitioner acknowledges that "[a]ny denials and withdrawals were for our paperwork errors and had nothing to do with [the beneficiary]."

The petitioner does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. The petitioner does not argue that the previous decisions were based on an incorrect application of law or Service policy. Moreover, the petitioner does not assert that the decision was incorrect based on the evidence of record at the time of the initial decision. The petitioner does not claim that the beneficiary is, in fact, eligible to extend his H-1B status based upon a statutory or regulatory exemption.¹ Thus, the motion must be dismissed.

Moreover, the AAO again notes, as mentioned in the dismissal of the appeal, the record demonstrates a 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 (EAC 07 176 54655) expired on May 20, 2008. The instant petition was filed on June 12, 2008, twenty-four days after the expiration of the validity of the original petition.²

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension. As previously mentioned, USCIS does not have the 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). 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);

¹ It must be noted that U.S. Citizenship and Immigration Services (USCIS) does not have the 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).

² 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.

Black's Law Dictionary 563 (7th Ed., West 1999) (defining the term "harmless error" and stating that it is not grounds for reversal).

There is no discretion to grant a late-filed petition extension. The AAO acknowledges that the Form I-129 petition was previously submitted to USCIS on April 29, 2008; however, it was properly rejected because it was not completed and executed in accordance with the applicable regulations and/or the form instructions. The rejection notice specifically stated the following (emphasis added):

Your I-129 petition, supporting documents and fee are being returned to you for the following reason:

X The petitioner's signature is missing in part H (or I for older editions) of the Labor Condition Application.

X The Department of Labor official's signature is missing in part J (or K for older editions) of the Labor Condition Application.

X The starting and/or ending dates are missing in part J (or part K for older editions) of the Labor Condition Application.

If you believe that your case has been rejected in error, you may submit it along with an explanation to [the Vermont Service Center]

It is noted that upon resubmission of the case, the petitioner did not assert that the case "had been rejected in error." The petitioner resubmitted the petition, supporting documents and fee and wrote on the rejection notice "See attached copy of approved Labor Condition Application [(LCA)], effective 5/21/07 -5/21/10. Thank you."

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(I). The instructions that accompany the Form I-129 also specify that an H-1B petition must be filed with evidence that an LCA has been certified by DOL.

Furthermore, the general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a), in pertinent part, as follows:

- (1) Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. . . .
- (2) An applicant or petitioner must sign his or her benefit request. . . .

* * *

(7) Receipt date-

- (i) A benefit request which is not signed and submitted with the correct fee(s) will be rejected. . . .

* * *

- (iii) Rejected benefit requests. A benefit request which is rejected will not retain a filing date. There is no appeal from such rejection.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part (emphasis added):

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. *Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.*

A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. *See* 8 C.F.R. § 103.2(b)(1). Rejected petitions will not retain a filing date. *See* 8 C.F.R. § 103.2(a)(7)(iii).

Thus, 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, as well, the motion must be dismissed and the petition denied.³

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed.

ORDER: The motion is dismissed.

³ The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the case is moot, the AAO will not further discuss any additional issues or deficiencies it observes in the record for this proceeding.