



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 02 2013**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for 
Ron Rosenberg
Acting 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 December 13, 2012, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The motion to reconsider will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a tennis camp established in 1996. In order to employ the beneficiary in what it designates as a finance manager 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 proffered position qualifies as a specialty occupation in accordance with the statutory and regulatory provisions. The petitioner submitted an appeal of the director's decision to the AAO.

The AAO reviewed the evidence and found a more critical issue pertaining to the petitioner's eligibility to extend its employment of the beneficiary in H-1B status. Specifically, the AAO found that the instant petition was filed after the expiration of the petition it sought to extend and that there is no discretion for the AAO to grant a late-filed petition extension.

Thereafter, counsel for the petitioner submitted a Form I-290B, a brief, and a copy of the I-797A, Notice of Action Approval Notice. As indicated by the check mark at Box E of Part 2 of the Form I-290B, counsel stated that the petitioner was filing a motion to reconsider the decision. Counsel claims that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous.

As will be discussed below, the motion does not satisfy the requirements of a motion to reconsider. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Accordingly, this motion to reconsider will be dismissed.

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) 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. *See* 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.¹

¹ The provision at 8 C.F.R. § 103.5(a)(3) states the following:

Requirements for motion to reconsider. 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

The AAO stated the crux of its decision as follows:

The director denied the petition on July 8, 2011, finding that the proffered position was not a specialty occupation. On August 5, 2011, counsel for the petitioner filed an appeal with the AAO.

Upon review of the record, the AAO found a more critical issue pertaining to the petitioner's eligibility to extend its employment of the beneficiary in H-1B status. Specifically, the AAO found that the instant petition 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 ([REDACTED]) expired on April 21, 2011, but the extension petition was not filed until April 29, 2011.

The AAO finds that there is no discretion to grant a late-filed petition extension. Therefore, the extension 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 will be denied.

Footnote 1 of the decision expanded upon the AAO's conclusion as follows:

The AAO acknowledges the petitioner's statement that the approval notice for the petition that the petitioner sought to extend arrived after that petition's validity period had expired. However, the arrival date of the approval notice is not a factor

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.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

bearing upon the expiration of the validity of that petition. In this regard, the determinative fact is that the validity period of the petition that the petitioner sought to extend expired eight days before the filing of the extension petition that is the subject of this appeal.

As previously mentioned, counsel contends that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous. Counsel asserts that the AAO has discretion to grant a late-filed petition extension and cites to the Adjudicator's Field Manual (AFM) section 30.2(d)(3)(C) as stating that "the adjudicator has discretion to grant an extension based on an untimely application."

The AAO notes that the provision cited by counsel, AFM § 30.2(d)(3)(C), expressly pertains to the *extension of stay* for nonimmigrants. The heading of this part of the AFM indicates this fact by its very heading, which reads:

30.2 Extension of Stay for Nonimmigrants.

Likewise, the subheading for section 30.2(d) reads:

Use of Form I-129 for Extension of Stay.

Likewise, the main paragraphs of section 30.2(d)(3) - that is, those preceding the alphabetized subsections of section 30.2(d)(3) - and the specific alphabetized subsection cited by counsel on motion - that is 30.2(d)(3)(C) - read together indicate that here the AFM is addressing the beneficiary's extension of stay - which is *not* the issue upon which the AAO dismissed the appeal. That issue was the petitioner's filing a request for an extension of the validity of the previously approved petition after the validity period of that previously approved petition had expired. Combined, the main paragraphs of the AFM's section 30.2(d)(3) and their subparagraph 30.2(d)(3)(C) read as follows:

Adjudication

Nonimmigrant extensions on Form I-129 are ordinarily fairly simple to adjudicate, unless there is a change in previously authorized employment. Because the benefit sought is short-lived, these applications should be processed as quickly as possible, to insure the request is acted upon while it is still relevant.

Extensions of stay filed on Form I-129 must be divided into two categories. Extensions involving aliens in E, R or TN status are single-step requests, although it is necessary to consider eligibility both in terms of requirements relating to the employer and those relating only to the alien. There is no separate adjudication of a petition extension, technically filed by an employer on the alien's behalf.

Extensions involving H, L, O, P or Q aliens are, in reality, a two-step adjudication:

consideration of the employer's request to extend the petition to classify the alien as a nonimmigrant worker and consideration of the alien's request for additional time as a nonimmigrant. This distinction is an important one, since a denial of the employer's petition extension may be appealed to the Administrative Appeals Office while a denial of the extension of stay may not be appealed. The issues relating to the petition extension are the same as those for an initial petition. These requirements are discussed separately in Chapters 31-33 and 35. The issues surrounding an alien worker's request to extend his or her nonimmigrant stay in the U.S. are generally the same as for any other nonimmigrant category. . . .

In addition to the general procedures described in Chapter 10.3, the following actions are ordinarily required during the adjudicative process:

(C) Determine if the Form I-129 was timely filed.

Although timely filing is ordinarily required, the adjudicator has discretion to grant an extension based on an untimely application. In deciding such a case, determine the reasons for late filing and whether the reasons were beyond the alien's control, the degree of lateness, whether there is any indication that the applicant may have violated status in some other way, whether the applicant is otherwise a *bona fide* nonimmigrant and whether the applicant has been apprehended and placed in proceedings by the Service.

The above-quoted sections of the AFM appear to correctly mirror the provisions at 8 C.F.R. § 214.2(h)(15)(i) (*Extension of stay*) which provides the following information regarding requests for extensions of stay (emphasis added):

General. The petitioner shall apply for extension of an alien's stay in the United States by filing a petition extension on Form I-129 accompanied by the documents described for the particular classification in paragraph (h)(15)(ii) of this section. *The petitioner must also request a petition extension.* The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. *Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each.* If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa. When the total period of stay in an H classification has been reached, no further extensions may be granted.

However, the regulation at 8 C.F.R. § 214.2(h)(14) - which is the regulation cited by the AAO in its decision on appeal - states, in pertinent part, the following about petition extensions (emphasis

added):

Extension of visa petition validity. The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. *A request for a petition extension may be filed only if the validity of the original petition has not expired.*

As noted in that regulation, a request for a *petition extension* may be filed only if the *validity of the original petition has not expired*. Thus, the regulations do not permit for the late filing of a *petition extension*. Accordingly, the AAO's decision was a correct application of the controlling regulation to the record of proceeding before the AAO when it issued its decision. Therefore, the motion presents no grounds for reconsideration of the AAO's decision on appeal.

Clearly, the motion fails to recognize the material distinction between petition extensions and extensions of a beneficiary's stay.

In the instant case, the petitioner stated on the Form I-129 (in Part 2.1) that it was requesting H-1B nonimmigrant classification. The petitioner marked (in Part 2.2) the "Basis for Classification" as "Continuation of previously approved employment without change with the same employer." In the section entitled "Requested Action" (Part 2.4) the petitioner marked "Extend the stay of each beneficiary since he, she, or they now hold this status."

In the instant case, counsel has not submitted any document that would meet the requirements of a motion to reconsider. He cites no statutory or regulatory authority, case law, or precedent decision that supports his assertions. Counsel fails to establish that the decision was based on an incorrect application of law or USCIS policy. In fact, it is undisputed that the extension petition was filed after the expiration of the petition it sought to extend: the petition that the petitioner sought to extend (EAC 11 035 50669) expired on April 21, 2011; the instant petition to extend the validity of the prior petition was filed on Friday, April 29, 2011, eight days after the original petition's expiration. Again, *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"). There is no discretion to grant a late-filed petition extension. 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). Thus, the petitioner failed to satisfy the requirements for a motion to reconsider as stated at 8 C.F.R. § 103.5(a)(3).

As already noted, a motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Accordingly, this motion will be dismissed.

In addition, the motion shall be dismissed for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a

statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the submissions constituting the motion do not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decision of the AAO will not be disturbed.

ORDER: The motion is dismissed.