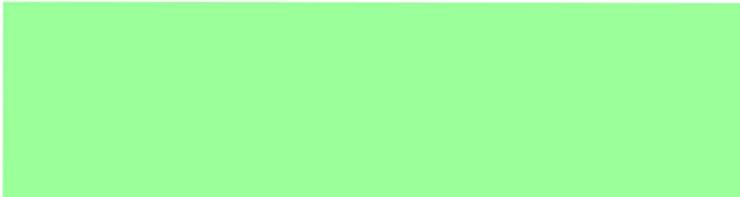


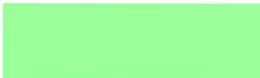


U.S. Citizenship
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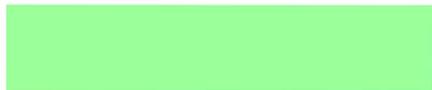
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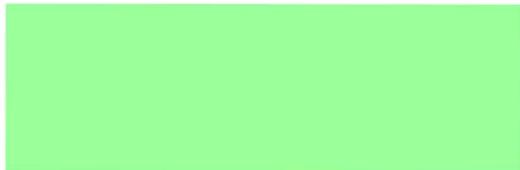
Petitioner:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. However, upon subsequent review, the director revoked the approval of the petition. Counsel for the petitioner appealed the director's revocation to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The motion to reconsider will be dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on October 13, 2009. In the Form I-129 visa petition, the petitioner describes itself as a wholesaler and retailer of area rugs established in 2006. In order to continue to employ the beneficiary in what it designated as a business development analyst position, the petitioner sought 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 petition was approved on October 21, 2009. Thereafter, a site visit was conducted, and the petition was returned to the director for review. The director reviewed the record of proceeding and the information provided in the site visit report and issued a notice of intent to revoke (NOIR) the approval of the petition. The NOIR contained a detailed statement regarding the new information that U.S. Citizenship and Immigration Services (USCIS) had obtained and notified the petitioner that it was being afforded an opportunity to submit evidence in support of the petition and in opposition to the grounds identified for revocation of the approval of the petition. The petitioner did not respond to the NOIR. Subsequently, the director revoked the approval of the petition, finding that the petitioner violated the terms and conditions of the approved petition.

The petitioner's counsel submitted an appeal of the decision to the AAO. The AAO reviewed the evidence and found that the instant petition was filed after the expiration of the petition it sought to extend. The AAO issued an NOIR, giving the petitioner notice of this additional ground for revocation, and counsel responded by submitting a brief, along with additional evidence. The AAO reviewed counsel's submission and found that it did not overcome the additional basis for the revocation. The AAO dismissed the appeal and notified the petitioner that this non-discretionary basis for revocation of the approval of the petition rendered the remaining issues in this proceeding moot. Thereafter, counsel submitted a motion to reconsider the decision. In support of the motion to reconsider, counsel submitted a brief.

The record of proceeding before the AAO contains: (1) the Form I-129 petition and supporting documentation; (2) the director's NOIR; (3) the revocation notice; (4) the Form I-290B appeal; (5) the AAO's NOIR; (6) the response to the AAO's NOIR; (7) the AAO's decision dismissing the appeal; and (8) the Form I-290B motion to reconsider. The AAO reviewed the record in its entirety before issuing its decision.

As a preliminary matter, the AAO notes that a review of USCIS records indicates that this beneficiary is also the beneficiary of an approved immigrant petition and has adjusted status to that of a U.S. permanent resident as of June 26, 2012. While the petitioner has not withdrawn the

motion to reconsider, it would appear that the beneficiary is presently a permanent resident and the issues in this proceeding are moot.

Nevertheless, the AAO reviewed the submission. However, upon review of the motion to reconsider, the AAO has determined that it does not satisfy the requirements of a motion under the applicable regulatory provisions and must be dismissed.

Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

(iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

* * *

(C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the petitioner and counsel failed to comply with the requirements as set by the regulations for properly filing a motion.

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 as stated at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed, and the AAO's prior decision dismissing the appeal and revoking the petition will not be disturbed.

In the instant case, counsel's submission does not satisfy the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed, and the approval of the petition will remain revoked. Nevertheless, the AAO will address the issue pertaining to the petitioner's eligibility to extend its employment of the beneficiary in H-1B status. The AAO notes that the discussion on this issue is provided to assist the petitioner and its counsel in understanding the deficiencies in the record of proceeding. It must be emphasized that the issue is moot as the motion does not satisfy the requirements of a motion to reconsider as required by the regulations. Therefore, the AAO's prior decision will not be disturbed.

The Form I-129 consists of three separate benefit requests. As a change of status was not requested in this matter, the remaining two benefit requests are: (1) a petitioner's request to classify the employment offer as appropriate for the H-1B category (the basis for classification); and (2) a request for the procedural benefit relevant to the beneficiary's authorized stay in the United States (requested action).¹ Therefore, a request for a petition extension and a request for an extension of

¹ These functions previously required two separate filings: one by the petitioner (Form I-129H) and the other

stay are both filed together on the Form I-129. The regulations are clear, however, that even though the request to extend the petition and the request to extend the beneficiary's stay are combined on the Form I-129, the director shall make a separate determination on each. *See* 8 C.F.R. § 214.2(h)(15)(i).

Title 8 C.F.R. § 214.2(h) states, in pertinent part, the following about petition extensions:

(14) *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.*

(Emphasis added.) As noted above, 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*.

Title 8 C.F.R. § 214.2(h) provides the following information regarding extension of stay requests:

(15) *Extension of stay--*

(i) 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

by the beneficiary. For example, the regulations in 1991 state that a petitioner "shall file a petition in duplicate on Form I-129H with the service center which has jurisdiction over I-129H petitions in the area where the alien will perform services or receive training or as further prescribed in this section." 8 C.F.R. § 214.2(h)(2)(i)(A) (1991). Further, the 1991 regulations state that "[a]n alien . . . shall apply for an extension of stay on Form I-539. . . . [E]ach alien seeking an extension of stay generally must execute and submit a separate application for extension of stay to the district office having jurisdiction over the alien's place of temporary residence in the United States." 8 C.F.R. § 214.1(c)(1)(1991). In implementing the Immigration Act of 1990 (IMMACT90) Pub. L. No. 101-649, 104 Stat. 4978, these functions were combined to more efficiently process the Form I-129. *See* 56 Fed. Reg. 61111 (Dec. 2, 1991).

for a visa. When the total period of stay in an H classification has been reached, no further extensions may be granted.

(Emphasis added.) As previously mentioned, while the regulations state that the request to extend the petition and the request to extend the beneficiary's stay are combined on the Form I-129, a separate determination is made on each request.

Notably, 8 C.F.R. § 214.1 states, in pertinent part, the following about *extension of stay* requests:

(c) *Extension of stay* –

* * *

(4) Timely filing and maintenance of status. An *extension of stay* may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

(i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;

(ii) The alien has not otherwise violated his or her nonimmigrant status;

(iii) The alien remains a bona fide nonimmigrant; and

(iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

(Emphasis added.) As evident from the above regulations, a request for a petition extension can be distinguished from a request for an *extension of stay* in that the late filing of a request for an extension of stay may be excused at the discretion of the director under certain circumstances. In contrast, as noted earlier, the regulations clearly state that a "*request for a petition extension may be filed only if the validity of the original petition has not expired.*" See 8 C.F.R. § 214.2(h)(14) (emphasis added).

The distinct aspects of a request for a *petition extension* and a request for an *extension of stay* are further illustrated by the regulations regarding the denials of these separate requests.

Title 8 C.F.R. § 214.2(h)(10)(ii) provides the following with regard to denials:

(ii) Notice of denial. The petitioner shall be notified of the reasons for the denial and of the right to appeal the denial of the petition under 8 CFR part 103. The petition will be denied if it is determined that the statements on the petition were inaccurate, fraudulent, or misrepresented a material fact. *There is no appeal from a decision to deny an extension of stay to the alien.*

(Emphasis added.) The regulations limit the AAO's jurisdiction over petitions for temporary workers to those described under 8 C.F.R. §§ 214.2 and 214.6. *See* 8 C.F.R. § 103.1(f)(3)(iii)(J) (2003). While a petitioner may appeal the denial of certain petitions (including a timely filed H-1B extension petition), the regulations state that "[t]here is no appeal from a decision to deny an extension of stay to the alien."

Furthermore, 8 C.F.R. § 214.1 states, in pertinent part, the following:

(c) *Extension of stay* –

* * *

(5) Decision in Form I-129 or I-539 extension proceedings. Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. There is *no appeal from the denial of an application for extension of stay* filed on Form I-129 or I-539.

(Emphasis added.) Notably, the regulation at 8 C.F.R. § 214.1(c)(5) refers to an "application for extension of stay filed on Form I-129 or I-539." That is, the regulation does not refer to the request for an extension of stay filed on a Form I-129 as a petition, but rather as an application. Thus, the distinct aspects of the request for an extension petition and a request for an extension of stay are further clarified. A request for an extension of stay in an H-1B submission is not a petition within the meaning of section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1), and does not confer any of the appeal rights normally associated with a petition. The Form I-129 in this context is merely the vehicle by which information is collected to make a discretionary determination on the request (i.e., application) for an extension of 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 2.3) the petitioner marked "Extend the stay of the person(s) since they now hold this status."

Notably, the petition that the petitioner sought to extend (EAC 06 186 52720) expired on September 30, 2009. The instant petition was filed on Tuesday, October 13, 2009, thirteen days after the original petition's expiration. As previously mentioned, the petition was initially approved. Thereafter, the director revoked the approval of the petition, on a separate and independent issue.

(More specifically, after a site visit was conducted, the director determined that the petitioner violated the terms and conditions of the approved petition.)

Counsel submitted an appeal of the director's decision to the AAO. The AAO reviewed the evidence and found that the instant petition was filed after the expiration of the petition it sought to extend. On November 3, 2012, the AAO issued a NOIR that contained a detailed statement regarding the late filing of the petition extension identified by the AAO on appeal and notifying the petitioner that it was afforded an opportunity to submit evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval of the petition. The AAO requested the petitioner submit evidence that the instant petition was filed prior to the expiration of the original petition it sought to extend (

On December 5, 2012, in response to the AAO's NOIR, counsel submitted a brief and additional evidence. In the brief, counsel claimed that "once the Director uses its legal authority to exercise its discretion to favorably excuse late filed extension of stay same discretion is applied to extension of the petition." In addition, counsel stated that "[t]o apply the late filing regulation only to extension of stay request but not to extension of petition request would create an absurd situation for petitioners and beneficiaries." Counsel further claimed that the "[w]hole idea behind the giving statutory power to USCIS and its Director to exercise favorable exercise of discretion is to avoid creating unnecessary burden to employers and beneficiaries where the circumstances beyond their control created a problem which made them unable to file their applications and/or petitions with the USCIS." In addition, counsel asserted that "[t]he USCIS as a temporary measure and a matter of policy, decided to accept late filed petitions under the power and authority given to the USCIS under 8 CFR §214.1 (c) (4)." Counsel further claimed that the "[l]ate filing occurred because of problems in obtaining LCA's (Labor Condition Applications) using [the U.S. Department of Labor's] iCert electronic system" and, therefore, the late filing is excused pursuant to the temporary public accommodation implemented by USCIS on November 5, 2009.

The AAO reviewed counsel's submission and found that it did not overcome the ground specified by the AAO for revoking the approval of the petition. The AAO noted that the temporary public accommodation referenced by counsel does not apply to the instant matter as the H-1B petition was not filed between November 5, 2009 and March 4, 2010.² The AAO dismissed the appeal and notified the petitioner that this non-discretionary basis for revocation rendered the remaining issues in the proceeding moot.

Thereafter, counsel submitted a motion to reconsider the decision. In the brief, counsel claims that "[b]y failing to declare the Neufeld Memo unlawful or illegal, the AAO inadvertently admits to the

² It must be noted that the Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Temporary Acceptance of H-1B Petitions Without Department of Labor (DOL)-Certified Labor Condition Applications (LCAs)* (Nov. 05, 2009) (hereinafter referred to as the Neufeld Memo) states that the temporary public accommodation applies to H-1B petitions filed between November 5, 2009 and March 4, 2010.

point that the petitioner was arguing all along that the USCIS has authority to accept and approve late-filed H-1B petitions." In addition, counsel claims that the section entitled "Guidance for Adjudicating Untimely Extension of Stay (EOS) or Change of Status (COS) H-1B Specialty Occupation Petition" of the Neufeld Memo clearly demonstrates "[t]he USCIS power to approve late-filed petitions." Counsel further asserts that "USCIS [has] given its officers authority to exercise favorable discretion to approve late-filed H-1B petitions only if the petitioner provides sufficient evidence to warrant favorable discretion." Moreover, counsel claims that "[t]he AAO overstepped its authority by sua sponte review of District Director's decision to favorably exercise discretion" and cites 8 C.F.R. § 214.1(c)(5).

Upon review of the Neufeld Memo, the AAO finds that it is not applicable to the instant matter. The subject of the Neufeld Memorandum is "Temporary Acceptance of H-1B Petitions Without Department of Labor (DOL)-Certified Labor Condition Applications." The memorandum further states, "This memorandum provides guidance regarding the temporary acceptance of Form I-129, *Petition for a Nonimmigrant Worker*, for H-1B specialty occupations that have been filed with a Labor Condition Application (LCA), ETA Form 9035, that has not yet been certified by the Department of Labor (DOL)." Thus, the primary purpose of the document is with regard to petitions that are filed without certified LCAs. Notably, in the instant case, the H-1B petition was submitted *with a certified LCA*.

Furthermore, the Neufeld Memo states that "[a]djudicators should follow the . . . guidance when reviewing an H-1B petition filed between November 5, 2009 and March 4, 2010" The instant Form I-129 was filed on October 13, 2009, which is 24 days prior to period covered in the memorandum.

Counsel claims that the section entitled "Guidance for Adjudicating Untimely Extension of Stay (EOS) or Change of Status (COS) H-1B Specialty Occupation Petition" demonstrates that USCIS has authority to accept late-filed petitions. The AAO notes that counsel's reliance on this section of the memorandum is misplaced. The section does not address late-filed petition extensions. Specifically, the section title is "Guidance for Adjudicating Untimely *Extension of Stay (EOS) or Change of Status (COS) H-1B Specialty Occupation Petition* [emphasis added]." The section further states that "[i]f the petitioner submits evidence to establish that the sole reason for the failure to timely file an *EOS or COS H-1B Petition* was due to delay in DOL certification of the LCA, the adjudicator should review the totality of circumstances to determine whether USCIS can excise discretion and excuse the late filing under 8 CFR 214.1(c)(4) or 8 CFR 248.1(b)(1) [emphasis added]." Notably, the section does not refer to a request for a petition extension." As discussed at length *supra*, 8 C.F.R. § 214.1(c) relates solely to *extension of stay* requests. Furthermore, 8 CFR § 248.1(b)(1) refers to *change of status* requests (thus it is not relevant in the instant case).

The AAO will now address counsel's claim that "[t]he AAO overstepped its authority by sua sponte review of District Director's decision to favorably exercise discretion." The AAO observes that counsel cites 8 C.F.R. § 214.1(c)(5).

As previously discussed, 8 C.F.R. § 214.1 states, in pertinent part, the following:

(c) *Extension of stay* –

* * *

(5) Decision in Form I-129 or I-539 extension proceedings. Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. There is *no appeal from the denial of an application for extension of stay* filed on Form I-129 or I-539.

Notably, the regulation at 8 C.F.R. § 214.1(c)(5) refers to an "application for *extension of stay* filed on Form I-129 or I-539 [emphasis added]." This regulation does not refer to a request for an extension petition.

The AAO again notes that a request to extend the petition and the request to extend the beneficiary's stay are combined on the Form I-129, and the director makes a separate determination on each. *See* 8 C.F.R. § 214.2(h)(15)(i). Moreover, the AAO reiterates that a request for a petition extension can be distinguished from a request for an extension of stay in that the late filing of a request for an extension of stay may be excused in the discretion of the director under certain circumstances but that no such discretion is provided by the regulations with regard to a late petition extension. *See* 8 C.F.R. §§ 214.1(c)(4) and 214.2(h)(14). Thus, the AAO finds no merit in counsel's assertion. Furthermore, counsel cites no statutory or regulatory authority, case law, or precedent decision to support these statements. Rather, a review of the relevant statutes and regulations indicates that counsel's analysis is an incorrect and an improper interpretation of the relevant statutes, regulations and materials.³

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 USCIS policy. In addition, a motion to reconsider a decision on an application or petition must, when filed, 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.⁴

³ The number of relevant documents that discuss extension petitions in connection with H-1B petitions is too voluminous to list. However, the AAO notes that it reviewed Title 8 of the Code of Federal Regulations from 1991 to the present and observes that every edition discusses the requirements/methods for extending a visa petition under section 101(a)(15)(H) of the Act. Moreover, the AAO notes that extension petitions for H-1B petitions are addressed in case law, precedent decisions, government policy memoranda, as well as such materials as the U.S. Department of State Foreign Affairs Manual and other related sources.

⁴ The provision at 8 C.F.R. § 103.5(a)(3) provides 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

In the instant matter, counsel has not submitted any document that would meet the requirements of a motion to reconsider. Counsel cites no statutory or regulatory authority, case law, or precedent decision that supports his assertions. Furthermore, counsel fails to establish that the decision was based on an incorrect application of law or USCIS policy. Moreover, counsel does not assert that the AAO's decision was incorrect based on the evidence of record that was before the AAO at the time of its initial decision. The petitioner and counsel have failed to comply with the procedural requirements of a motion to reconsider as stated at 8 C.F.R. § 103.5(a)(3). Accordingly, the motion to reconsider must be dismissed for this additional reason. This constitutes an independent and alternate basis for dismissing the motion to reconsider.

Moreover, even if the submitted motion met the procedural requirements for a motion to reconsider (which it does not), the petition could not be approved. That is, 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"). 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).

As discussed above, the AAO notes once again that an "extension of stay" must be distinguished from an extension of H-1B status, which occurs through a "petition extension." Although those seeking H-1B classification are currently permitted to file one form to request a petition extension, extension of stay, and change of status, they are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). In addition, 8 C.F.R. § 214.2(h)(15)(i) specifically states that, "[e]ven 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." Thus, 8 C.F.R. § 214.1(c) relates solely 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.

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 counsel states the following:

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, the following:

[E]very 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.

extension of stay requests, 8 C.F.R. § 214.2(h)(14) deals with H-1B petition extensions, and 8 C.F.R. § 248.3(a) addresses change of status requests to H-1B classification.⁵

Therefore, even if counsel had complied with the procedural requirements as set by the regulations for properly filing a motion (which he did not), the AAO did not err in revoking the approval of this extension petition on the merits pursuant to the notice provided. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) and (B). In accordance with the relevant regulatory provisions, the approval of the extension petition must be revoked as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). Accordingly, as the petitioner and counsel have failed to establish that the AAO's prior decision in this matter was incorrect based on the evidence of record at the time it was issued, the motion to reconsider requirements of 8 C.F.R. § 103.5(a)(3) have not been satisfied, and the motion must be dismissed for this additional reason pursuant to 8 C.F.R. § 103.5(a)(4).

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. The previous decision of the AAO, dated December 21, 2012, shall not be disturbed. The approval of the petition remains revoked.

⁵ It must be noted that the H-1B regulations equate the word "status" to the word "classification" and not to the period of authorized stay in the United States. *See* 8 C.F.R. § 248.3(b) (2000); *see also* 8 C.F.R. §§ 214.1(c)(2), 245.2(a)(4)(ii)(C), and 103.6(c)(2) (2000). Furthermore, as the phrase "previously accorded status" is not defined in the regulations and as its use in 8 C.F.R. § 214.1(c)(4) is not distinguished from its use in 8 C.F.R. § 248.1(b), it must be interpreted as having the same meaning – the status previously held by the alien, not the same prior status held by the alien.

In addition, if the same meaning of "previously accorded status" as it is used in 8 C.F.R. § 248.1(b) were not applied to 8 C.F.R. § 214.1(c)(4), it would create the situation where an alien could change status and be approved for a specific classification but be unable to extend his or her stay. As an example, an employer files an initial I-129 requesting H-1B classification, change of status, and extension of stay on behalf of an alien in B-2 visitor status whose authorized stay is about to expire but who has not previously spent time in the United States in H or L status. If otherwise qualified and if "previously accorded status" in 8 C.F.R. § 214.1(c)(4) meant the same prior status, USCIS would be permitted to grant the H-1B petition approval and change of status but be prohibited from granting the extension of stay request, solely because the alien was not in H-1B status at the time the petition was filed, even though the alien had never held H-1B status at any time in the past. Not only is this result contrary to current and past practices, it would be contrary to logic and the intent of the relevant sections of the Act.