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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

DATE: FEB 01 2013

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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:

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,

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. Prior 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 filed by current counsel for the petitioner. The motion to reconsider will be dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on March 24, 2009. In the Form I-129 visa petition, the petitioner describes itself as a network infrastructure company established in 2000. In order to continue to employ the beneficiary in what it designated as a project leader 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 May 22, 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 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's prior counsel responded to the NOIR. The director reviewed the evidence submitted and determined that it did not overcome the basis for revocation of the petition. 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 prior 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 new counsel responded by submitting a brief. 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 and additional evidence.

The record of proceeding before the AAO contains: (1) the Form I-129 petition and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's NOIR; (5) the response to the director's NOIR; (6) the revocation notice; (7) the Form I-290B appeal; (8) the AAO's NOIR; (9) the response to the AAO's NOIR; (10) the AAO's decision dismissing the appeal; and (11) the Form I-290B motion to reconsider. The AAO reviewed the record in its entirety before issuing its decision.

I. Failure to Meet General Motion Requirements

Counsel submitted additional evidence and a brief in support of the motion to reconsider. The AAO reviewed the submission and determined that it does not satisfy the requirements of a motion to reconsider. Accordingly, the motion 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.

II. Motion to Reconsider: Failure to Establish Error in the Dismissal of the Prior Appeal

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.¹

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

¹ 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. However, 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 may not be disturbed pursuant to this dismissed motion.

request for the procedural benefit relevant to the beneficiary's authorized stay in the United States (requested action).² Therefore, a request for a petition extension and a request for an extension of 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

² These functions previously required two separate filings: one by the petitioner (Form I-129H) and the other 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).

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.

(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 [REDACTED] expired on March 18, 2009. The instant petition was filed on Tuesday, March 24, 2009, six days after the original

petition's expiration. As previously mentioned, the petition was initially approved.³ 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.)

The petitioner's prior 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 May 8, 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 (EAC 08 109 51145).

On June 5, 2012, in response to the AAO's NOIR, new counsel for the petitioner submitted a brief claiming that the director exercised discretion "in approving the H-1B extension petition." Notably, counsel makes several references to the petitioner's extension petition. For example, in a section entitled "Statement of Facts" counsel reported that the petitioner "filed a *petition to extend* its H-1B classification on behalf of its employee." Additionally, counsel asserted that the statement of issue is "[w]hether the Director acted within his discretion under 8 C.F.R. § 214.1(c)(4) in approving the *extension petition*." Counsel continued by claiming that "[t]he director acted within the scope of his discretion under 8 C.F.R. § 214.1(c)(4) in approving the *H-1B extension petition*." Moreover, counsel asserted that the director "elected to favorably exercise its lawful discretion to approve the *H-1B petition*." (Emphasis added in all examples.) The record of proceeding indicates, and counsel repeatedly acknowledged in his response to the NOIR, that the petitioner filed a request for a petition extension and a request for an extension of stay.

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 dismissed the appeal and notified the petitioner that this non-discretionary basis for revocation rendered the remaining issues in the proceeding moot.

³ In this matter, the AAO finds that the approval of the petition with regard to this issue was in violation of 8 C.F.R. § 214.2(h)(14). In the appeal, counsel claims that "had the director elected not to exercise his or her discretion at the time, the Petitioner and employer could have taken steps to address the issue at that time, without facing significant bars to [the beneficiary's] ability to re-enter the U.S. which relief is not available to him should the Petition be revoked at this time." However, as will be discussed later in the decision, the petitioner and its prior counsel submitted documentation in an effort to mislead USCIS on an element material to the beneficiary's eligibility for the benefit sought under the immigration laws of the United States. That is, the petitioner and its prior counsel failed to notify the director of material information, e.g., facts that would impact the eligibility for the nonimmigrant classification sought. Had the petitioner and its former counsel been forthcoming, the petition would not have been approved. Moreover, for a separate and independent reason, the approval of the petition was revoked by the director because it was determined that the petitioner violated the terms and conditions of the approved petition. See 8 C.F.R. 214.2(h)(11)(iii).

Thereafter, counsel submitted a motion to reconsider the decision. Notably, in the motion brief, counsel *for the first time* claims that the petitioner "was not applying for an extension of its original petition, but rather for a new H-1B petition." According to counsel, the petitioner "did not request an extension of [sic] petition." Counsel provides no explanation for the discrepancy in his prior statements repeatedly claiming in the response to the NOIR that the petitioner had submitted an extension petition to claiming in the subsequent motion that the petitioner had not. In the instant case, the record of proceeding and counsel's statements in response to the NOIR indicate that the petition was submitted as a request for an extension petition, not a new petition.⁴

In the brief, counsel further asserts that an extension of a petition is inapplicable for H-1B petitions. He states that "there is no extension of the initial three-year petition." Additionally, counsel asserts that the "approval of petitions filed after the expiration of a previously submitted petition has been

⁴ In any event, the record of proceeding does not support counsel's claim that the instant petition was submitted as a new petition. The petitioner's responses on the Form I-129 petition do not correspond with the filing of a new petition. Specifically and as noted above, the petitioner marked box b in Part 2, requesting continuation of previously approved employment without change with the same employer. Box a in Part 2, requesting new employment as the basis for the requested classification, was not checked. Additionally, in Part 4 (question 8), the petitioner did not indicate that it was filing a new petition.

Moreover, the AAO observes that the Form I-129 instructions are divided into various sections, including a section regarding initial evidence necessary for petitions and a section regarding initial evidence required for extension of stay requests. With regard to the initial evidence for petitions, the instructions state that the listed documents are required for a *new* petition but not for an *extension* petition (unchanged, previously approved employment). Notably, the petitioner did not submit the required initial documentation (as described in the instructions for the version of the Form I-129 utilized by the petitioner) for a *new* petition. For example, the petitioner did not submit evidence with the Form I-129 petition demonstrating that the proposed position qualifies as a specialty occupation; the beneficiary has the required degree; a copy of any required licenses; and a written contract or summary of the terms of the oral agreement under which the beneficiary would be employed.

In the motion, counsel mentions that the petitioner submitted an LCA with the Form I-129. Notably, the LCA is listed as initial evidence in the section regarding petitions *and* in the section regarding extension of stay requests. The AAO notes that the instructions (again, for the version of the form utilized by the petitioner) specifically state in the section entitled "*Extension of Stay*", that "[i]f the petition is for H-1B status, submit an approved labor condition application for the specialty occupation valid for the period of time requested." Thus, the petitioner's submission of an LCA does not support the assertion that the petition was a new petition rather than an extension petition.

The AAO acknowledges counsel's new claim in the motion to reconsider that the petitioner submitted a new petition rather than an extension petition. However, counsel fails to provide any documentary evidence to support the assertion and the record of proceeding does not corroborate his claim. The assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

and continues to be a standard practice for USCIS." Counsel references an April 23, 2004 memorandum authored by William R. Yates and claims that the memorandum supports his claim. See Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (Apr. 23, 2004).

Upon review of the memorandum, the AAO notes that the "Purpose" section indicates that the guidance applies "during adjudication of a . . . request for petition extension."⁵ Thus, from the onset, the memorandum does not support counsel's assertion that an extension of a petition is inapplicable for H-1B petitions. Furthermore, it must be noted that the Yates memo specifically states as follows:

In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference. A case where a prior approval of the petition need not be given deference includes where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility.

Upon review of the memorandum, it appears that counsel misunderstands its purpose.⁶ The memorandum makes repeated references to the extension of petitions for nonimmigrant cases and there is no indication that petition extensions are not applicable to H-1B filings.

It appears that counsel highlighted the section of the memorandum stating that an adjudicator may "deny, in the exercise of his or her discretion, the beneficiary's simultaneous request to extend his or her stay in the United States in the same classification. See 8 CFR 214.1(c)(5)." The AAO has repeatedly stated (both in the NOIR and in the dismissal of the appeal) 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

⁵ The memorandum's "Purpose" section states, in full:

This memorandum provides guidance on the process by which an adjudicator, during adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of a petition where there is no material change in the underlying facts.

⁶ With regard to the memorandum, the AAO also notes that in the instant case the extension petition was initially approved. Thereafter, two NOIRs were issued. Each NOIR provided a detailed statement as to the reason the approval of the petition should be revoked, and afforded the petitioner an opportunity to submit arguments and/or evidence in rebuttal.

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). The memorandum indicates that a "split" decision may be appropriate in some cases in which the petition is approved and the extension of stay request is denied. Notably, there is no indication that this "split" decision is in reference to late-filed extension petitions. The AAO finds no merit in counsel's contention that a request for a petition extension is inapplicable for H-1B petitions or in his assertion that "there is no extension of the initial three-year petition." 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 related materials on extension petitions.⁷

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.⁸

⁷ 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.

⁸ 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 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:

In the instant case, counsel claims that the AAO's decision should be reversed, but provides inconsistent statements as to the basis of his disagreement with the decision. Moreover, 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. 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 status 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 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.⁹

[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.

⁹ 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

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 has 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).

III. Additional Grounds of Ineligibility

A. Period of Authorized Admission – Limited to Six Years

Furthermore, even if the petitioner and counsel overcame the issues discussed above (which they have not), the AAO observes several additional matters in the record of proceeding not identified by the director that prohibit a determination that the petitioner and beneficiary are eligible for the benefit sought. The AAO will now briefly discuss these matters. However, as the approval of the petition has been properly revoked for the reasons stated above, the AAO finds no purpose in USCIS initiating the revocation on notice procedures at this time with regard to the approval of this petition in these matters as the issues are moot.

In the instant matter, the petitioner requested the beneficiary be granted an extension of stay. In general, section 214(g)(4) of the Act provides: "In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years." In the Form I-129 petition, the petitioner was asked to provide the beneficiary's prior period of stay in H classification in the United States for the past six years. The petitioner was notified that it should list only those periods in which the beneficiary was actually in the United States in an H classification. The petitioner provided the following information on the Form I-129 petition (page 8):

From: **March 2002** To: **present**

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.

Based upon the petitioner's statement, the beneficiary reached the maximum period of authorized stay permitted for H-1B classification in March 2008. The AAO observes that the petitioner's vice president/CFO signed the Form I-129, certifying, under penalty of perjury under the laws of the United States of America, that the "petition and the evidence submitted with it is all true and correct."

Notably, records indicate that the beneficiary's H-1B status was previously extended in a one-year increment based upon a Form I-129 petition that was filed on March 6, 2008 by the petitioner. The petitioner provided a Form I-797A, Notice of Action, indicating that the petitioner's prior H-1B petition extension and extension of stay requests for the beneficiary were approved with validity dates of March 19, 2008 to March 18, 2009.

Again, section 214(g)(4) of the Act provides that the period of authorized admission of an H-1B nonimmigrant may not exceed six years. However, section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision. *See* Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002).

As amended by section 11030A(a) of DOJ21, section 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act* (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since *the filing of any of the following*:

(1) *Any application for labor certification under section 212(a)(5)(A) of such Act* (8 U.S.C. § 1182(a)(5)(A)), *in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act* (8 U.S.C. § 1153(b)).

(2) *A petition described in section 204(b) of such Act* (8 U.S.C. § 1154(b)) *to accord the alien a status under section 203(b) of such Act.*

Section 11030A(b) of DOJ21 amended section 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Pub. L. No. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

Upon review of the record of proceeding, the petitioner appears to be relying upon section 106 of AC21 for the beneficiary to qualify for a one-year extension of stay in H-1B status. Specifically, with the Form I-129 petition, the petitioner submitted a U.S. Department of Labor (DOL) Employment and Training Administration document entitled Center Receipt Notification Letter, which is dated May 11, 2006. The notice is addressed to [REDACTED] in care of [REDACTED] (the same counsel who submitted the instant Form I-129 petition and subsequent appeal).¹⁰ The letter notifies [REDACTED] that the Application for Alien Employment Certification (Form ETA 750) submitted on behalf of the beneficiary on August 10, 2004 was forwarded to the Backlog Elimination Center and that in order to continue processing the application, [REDACTED] must return the Selection of Continuation Option Letter and respond to each issue on the corrections list. The notice indicates that [REDACTED] response must be received by the Backlog Elimination Center by June 26, 2006. The petitioner also submitted to USCIS a copy of a signed Selection of Continuation Option Letter dated May 18, 2006. Furthermore, the petitioner provided a cover letter dated June 22, 2006 from prior counsel to the Backlog Elimination Center stating that [REDACTED] wishes to continue processing the labor certification application. It further indicates that a courtesy copy was sent to the beneficiary. The AAO observes that all of the above documents contain the case number of the labor certification application.

The instant H-1B petition was submitted to USCIS on March 24, 2009. The documentation provided by the petitioner and its counsel suggested that the labor certification application had been pending since August 10, 2004 – and, therefore, more than 365 days had elapsed since the filing of the application on the beneficiary's behalf. No further information or documentation regarding the status of the labor certification application was provided.

Upon review of the submission, the AAO notes that the petitioner failed to indicate that the labor certification application was actually closed on July 20, 2006. More specifically, DOL mailed a

¹⁰ The Center Receipt Notification indicates that a courtesy copy of the letter was also sent to [REDACTED]

Notice of Case Closure to [REDACTED] in care of [REDACTED] (as previously mentioned, the same counsel who submitted *the instant Form I-129 petition and subsequent appeal for the petitioner*) stating that the labor certification application was closed.¹¹ The notice is dated July 20, 2006. In addition, a review of DOL's Backlog Public Disclosure System website indicates that the application was withdrawn.¹² Thus, information regarding the final status of the labor certification application was easily obtainable by the petitioner, prior counsel, new counsel and the beneficiary. Although the labor certification application was closed almost *three years prior* to the submission of the instant H-1B petition, the petitioner submitted documentation suggesting that the labor certification application was still pending. Furthermore, the petitioner requested that the beneficiary's status be extended for a one-year period even though the beneficiary was not eligible for an extension of stay beyond the six-year limitation under 106(a) of AC21.¹³ In the instant case, a final determination had been made on the labor certification application approximately three years prior to the H-1B submission.

¹¹ A courtesy copy of the Notice of Case Closure was also sent to [REDACTED]

¹² In 2006, the Department of Labor, Employment and Training Administration instituted an online public disclosure system to allow the public to obtain information on cases pending at Backlog Elimination Centers. Specifically, DOL provides the following information regarding the Backlog Public Disclosure System:

In order to provide basic case status information on specific cases, OFLC introduces the Backlog Public Disclosure System (PDS). The purpose of the PDS is to provide a vehicle for employers, attorneys, agents, and aliens to determine the status of an application filed at a Backlog Elimination Center (BEC).

See DOL, Employment and Training Administration, Foreign Labor Certification, Backlog Centers, regarding the Public Disclosure System on the Internet at <http://www.foreignlaborcert.doleta.gov/times.cfm> (last visited January 31, 2013).

The Backlog Public Disclosure System is available on the Internet at <http://pds.pbpls.doleta.gov>. The AAO notes that the only information needed to access the status of a labor certification application is the case number. No further information or special authorization is necessary.

¹³ USCIS provided the following guidance regarding false claims in connection with the filing and pendency of labor certification applications:

In the event the alien beneficiary, the petitioning H-1B employer or its authorized representative has made a false claim that a labor certification was filed with DOL and is pending at the Backlog Elimination Center in connection with an application to extend the stay of an alien beneficiary beyond the 6th year in H-1B status, USCIS may in its discretion deny a pending Form I-129 H-1B petition and extension request or revoke the approved Form I-129 H-1B petition.

See Memorandum from William R. Yates, Associate Director, Operations, *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity*,

There is no indication that [REDACTED] disagreed with the decision to close the labor certification application by filing an appeal or motion. The closure constituted a final determination on the labor certification application. Notably, the petitioner and counsel chose not to provide information regarding the current status of the labor certification application to the director when submitting the H-1B petition – or thereafter in response to the director's NOIR, with the appeal, in response to the AAO's NOIR or with the motion to reconsider. Furthermore, the closure of a labor certification application is evidence that DOL has completed its process of adjudicating the labor certification application and that the beneficiary's application process for obtaining lawful permanent resident status in the United States by way of that labor certification application has ended. Thus, the closure of a labor certification application precludes USCIS from further processing a nonimmigrant extension of stay request based upon section 106 of AC21. To accept a contrary interpretation, USCIS would be required to indefinitely extend an individual's stay in the United States in one-year increments. Nothing in the AC21 or DOJ21 legislative history serves to suggest that Congress intended that petitioners on behalf of individual aliens retain the ability to have those aliens remain in the United States indefinitely, e.g., for twenty or thirty years, simply by a labor certification application having been filed but thereafter being deemed closed. Rather, the legislative intent reflects only a desire to shield individual aliens from the inequities of government bureaucratic inefficiency, and does not include a mandate for an infinite extension of stay in a nonimmigrant status.

In the instant case, a final determination on the labor certification application was made almost three years prior to the filing of the H-1B petition. Nonetheless, the petitioner and its prior counsel submitted documentation suggesting that the application was pending. Under BIA precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). The federal courts state the general rule is that a concealment or misrepresentation is material if it "has a natural tendency to influence or was capable of influencing, the decision of the decision-making body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988); *Monter v. Gonzales*, 430 F.3d 546 (2d Cir. 2005). The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

It appears prior counsel in this matter knowingly submitted the Center Receipt Notification Letter, the Selection of Continuation Option Letter and his cover letter in an effort to mislead USCIS on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of

the United States. See 18 U.S.C. §§ 1001, 1546. Pertinent to the issue before it, however, this submission not only identifies how USCIS was initially deceived into granting the requested benefit, but it also brings into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In light of the above findings, the AAO notes that there is no probative evidence in the record of proceeding to establish that the beneficiary is exempt from the six-year limitation of authorized stay in H-1B status under section 106 of AC21. Accordingly, the petitioner has failed to establish that the beneficiary was entitled to an extension of stay beyond the six years normally permitted.

As discussed above, section 214(g)(4) of the Act provides that the period of authorized admission of an H-1B nonimmigrant may not exceed six years. In the Form I-129 and supporting documents, the petitioner did not claim or provide any evidence to indicate that the beneficiary was exempt from this requirement based upon periods of being physically outside the United States. Although the issue is moot, the AAO will nevertheless now discuss the maximum period of authorized admission under 8 C.F.R. § 214.2(h)(13)(iii)(A).

For determining the beneficiary's maximum period of authorized admission as an H-1B nonimmigrant, the AAO now turns to 8 C.F.R. § 214.2(h)(13)(iii)(A), which states, in pertinent part, the following:

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." The plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by USCIS that adopts *Mutter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005), as formal policy. See Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005).

The regulation indicates that "the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception" to the limitation on admission. 8 C.F.R. § 214.2(h)(13)(v). Such proof may include copies of passport stamps and Form I-94 arrival-departure records, accompanied by a statement or chart of the dates the beneficiary spent outside the country. In other words, the petitioner must submit probative evidence of the beneficiary's

departures from and reentries into the United States.¹⁴

Generally in this context, the term "recapture" is used in reference to the period of time spent outside the United States that an alien beneficiary seeks to have subtracted from the maximum period of stay in H-1B status, as governed by INA § 214(g)(4), in order to have that period of time added back (i.e., "recaptured") when seeking an extension of H-1B status. In response to the RFE, counsel *for the first time* raised the issue of recapturing time the beneficiary had spent outside the United States. Specifically, in a letter dated May 7, 2009, counsel stated that the "Beneficiary is seeking to recapture time under the H-1B classification due to trips abroad and a period of 6 months when he was disabled."¹⁵ No explanation was provided for failing to previously assert that the petitioner sought to extend the beneficiary's status on this basis. Moreover, counsel failed to acknowledge that the petitioner previously stated in the Form I-129 petition under penalty of perjury that the beneficiary's prior period of stay in H classification "in the United States" was from March 2002 through the submission of the H-1B petition (without interruption). It appears that either the petitioner or its prior counsel provided an inaccurate statement in support of the H-1B petition and extension of stay, which was material to determining the beneficiary's eligibility for the benefit sought. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

The AAO reviewed the record in its entirety and notes that, despite counsel's claim to the contrary, the petitioner and counsel failed to submit evidence documenting any periods of physical presence outside the United States by the beneficiary in the last six years. The AAO notes again that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

¹⁴ The petitioner must submit supporting documentary evidence to meet its burden of proof. The petitioner and beneficiary are in the best position to organize and submit evidence of the beneficiary's departures from and reentry into the United States. Copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of the dates the beneficiary spent outside the country, could be subject to error in interpretation, might not be considered probative, and may be rejected by USCIS. Similarly, a statement of dates the beneficiary spent outside of the country must be accompanied by consistent, clear and corroborating evidence of departures from and reentries into the United States. Lastly, it is noted that the standard of proof, as stated by this regulation, is the clear and convincing standard and not the normal preponderance of the evidence standard applicable to the remaining evidence in this record of proceeding. *See id.*; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (noting that the standard of proof to be applied in administrative immigration proceedings is the preponderance of the evidence standard, "except where a different standard is specified by law").

¹⁵ Although counsel claims that there was "a period of 6 months when [the beneficiary] was disabled," the petitioner and counsel fail to explain how they believe this would affect the extension of stay request for the beneficiary. Moreover, no documentary evidence was submitted to substantiate counsel's claim.

Upon review of the record of proceeding, the AAO finds that the petitioner has failed to demonstrate that the beneficiary is eligible to recapture any time in order to extend the beneficiary's H-1B status. The record of proceeding contains no evidence of any time spent outside of the United States during the validity of the H-1B petition.

B. Prior H-1B Petition – Revocation on Notice

As previously mentioned, the record of proceeding indicates that the beneficiary has resided in the United States in H-1B classification since March 2002. As previously mentioned, the petitioner provided a Form I-797A, Notice of Action, indicating that the petitioner's prior H-1B petition and extension of stay request for the beneficiary were approved with validity dates of March 19, 2008 to March 18, 2009. However, there is no evidence in the record of proceeding to indicate that the beneficiary was eligible for this extension of stay in H-1B status under section 106 of AC21 or that the beneficiary qualified for an exception to the limitation on admission due to any period of time spent outside the United States. Accordingly, the AAO will further order that the director review the previously approved H-1B petition (EAC 08 109 51145) and consider whether initiation of revocation action on the affected petition is appropriate. Moreover, the AAO notes that if the director determines that revocation of the prior petition is warranted, this would constitute another basis for revocation of the instant petition.

C. Terms and Conditions of Employment

As previously discussed, the motion to reconsider is dismissed for failing to meet applicable requirements, and the petition will remain revoked on the basis that it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). Although the issue is moot, the AAO will nevertheless now address the director's basis for revoking the approval of the H-1B petition.

The petitioner submitted the Form I-129 petition and supporting documents to USCIS on March 24, 2009. In this matter, the petitioner stated in the Form I-129 and supporting documents that it sought the beneficiary's services as a project leader to work on a full-time basis at annual salary of \$49,000. In the Form I-129 petition, the petitioner listed its address as [REDACTED]. The petitioner indicated that the beneficiary would be working at the same location, and no other locations were listed (on page 3 of the Form I-129). The petitioner listed its gross annual income as \$8 million.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational category "Network Systems and Data Communications Analysts" – SOC (ONET/OES Code) 15-1081, at a Level I (entry) position.¹⁶

¹⁶ The AAO observes that the beneficiary had been working for the petitioner for a number of years in H-1B status when the instant petition was filed. Notably, in the LCA, the petitioner designated the proffered position as a Level I (entry) position, which is the lowest of four assignable wage levels. The "Prevailing

In the LCA, the petitioner again stated its address as [REDACTED] and listed the beneficiary's work location as [REDACTED]. The petitioner listed the prevailing wage as \$48,693. The petitioner stated the wage source as the 2008 Online Wage Library.¹⁷ The AAO reviewed the Online Wage Library and notes that a Level I wage was \$23.41 per hour – \$48,693 per year, for this occupational category at the time the LCA was filed.¹⁸

The petition was approved on May 22, 2009. Thereafter, on August 14, 2009, an administrative site visit was conducted at [REDACTED] (the location listed on the Form I-129 and LCA). The officer spoke with the human resources manager, who provided information regarding the beneficiary's employment with the petitioner. The officer asked to speak with the beneficiary but was told by the human resources manager that the beneficiary works out of the office located at [REDACTED]. During the course of the site visit, the human resources manager indicated that the beneficiary was being paid \$19.47 per

Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

¹⁷ The wage source is listed as the 2008 Online Wage Library. The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/> (last visited January 31, 2013). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatcenter.com/>.

¹⁸ For more information regarding the prevailing wage for Network Systems and Data Communications Analysts in Glen Burnie, Maryland, see the All Industries Database for 7/2008 - 6/2009 for "Network Systems and Data Communications Analysts" – SOC (ONET/OES Code) 15-1081 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?area=12580&code=15-1081&year=9&source=1> (last visited January 31, 2013).

hour, but further indicated that the beneficiary can make up to \$49,000 per year with overtime and bonuses.

After the site visit, the H-1B 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 the approval of the petition. The NOIR contained a detailed statement regarding the new information that USCIS had obtained and notified 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 director discussed the issue of overtime wages and also notified the petitioner that payments to the beneficiary, including any bonuses and similar compensation, may be credited toward satisfying the required wage obligation if their payment is assured (i.e., not conditional or contingent on some event) in order to meet the petitioner's wage obligations under the applicable regulatory provisions. *See* 20 C.F.R. § 655.731(c)(2)(v). The petitioner was given an opportunity to provide evidence to overcome the grounds for revocation.

The petitioner's counsel responded to the NOIR by submitting a brief and additional evidence, including pay statements issued to the beneficiary from May 22, 2009 to December 31, 2009. Based upon the documentation presented, the beneficiary is paid bi-weekly on an hourly basis. Furthermore, the pay statements indicate that until September 2009, the beneficiary's regular salary was \$19.47 per hour. In September 2009 (a few weeks after the site visit), the beneficiary's rate of pay increased to \$20.50 per hour. The last pay statement provided to the director (pay date December 31, 2009), indicates that the beneficiary received \$38,674.24 in regular wages, \$7,318.45 in overtime wages, \$1,745.84 in holiday wages, \$2,184.25 in paid time off, and \$98.40 in commission. The gross pay was \$50,021.18

In response to the director's NOIR, counsel claimed that the beneficiary's "compensation for calendar year 2009 totals \$50,021.18." According to counsel, the amount did not include a bonus. Counsel asserts that the "overtime hours were a regular part of [the beneficiary's] employment" and that such payments satisfy the petitioner's wage obligations.

The director reviewed the evidence submitted and determined that it did not overcome the grounds for revocation. Subsequently, the director revoked the approval of the petition, finding that the petitioner violated the terms and conditions of the approved petition. Thereafter, counsel for the petitioner submitted an appeal of the decision. In the appeal, counsel reiterated his prior assertion that the overtime payments satisfied the petitioner's wage obligations.

The AAO reviewed the appeal but is not persuaded by counsel's assertion. Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The unsupported statements of counsel on appeal

or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The pertinent part of 20 C.F.R. § 655.731(c) states the following:

Satisfaction of required wage obligation.

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due. . . .
- (2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:
 - (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;
 - (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, et seq.);
 - (iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid except that when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.
 - (iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.
 - (v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through

(iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

* * *

- (3) For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly except that, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. . . .
- (4) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly.

As stated above, the regulations require a petitioner to pay the required wage to the beneficiary, "cash in hand, free and clear, when due." *Id.* The regulations further indicate that for salaried employees, wages are due in prorated installments. To meet the wage obligation, a petitioner may use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay, such as a bonus. However, the employer's documentation of wage payments (including such supplemental payments) must demonstrate the petitioner's commitment to make such payment and the petitioner's method for determining the amount due. Moreover, the documentation must "show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period." *Id.* According to the above regulations regarding hourly-wage employees, the required wages are due for all hours worked and/or for any nonproductive time at the end of the employee's ordinary pay period. In addition, the regulation at 20 C.F.R. § 655.731(c)(7) states, in pertinent part, that "[i]n all cases the H-1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*" Furthermore, pursuant to 20 C.F.R. § 655.731(a)(2)(vi), conversions from an hourly rate to an annual rate and vice versa are obtained by respectively multiplying and dividing those rates by 2080 (40 hours per week by 52 weeks per year), and remunerated overtime hours are not included in those calculations.

As previously mentioned, the Online Wage Library indicates that for the occupational category "Network Systems and Data Communications Analysts" for a Level I position, the prevailing wage was \$23.41 per hour – \$48,693 per year at the time the petition was submitted. The petitioner

claimed in the Form I-129 petition and LCA that it would pay the beneficiary \$49,000 per year (which is \$23.58 per hour). Notably, by submitting and signing the Form I-129 and LCA, the petitioner's vice president/CFO obliged the petitioner to comply with the wage requirements.

The beneficiary's salary of \$19.47 per hour (until September 2009) and \$20.50 (thereafter) is below the prevailing wage of \$23.41 per hour and below the petitioner's stated wage in the H-1B submission. The petitioner has not demonstrated compliance with the regulations under the provisions relating to salaried employees or hourly-wage employees. That is, the petitioner has not demonstrated that the stated annual salary of \$49,000 was prorated into installments.¹⁹ The documentation does not demonstrate some other form of nondiscretionary payment and the petitioner's commitment to make such payments as well as the petitioner's method for determining the amount due. Moreover, the documentation does not establish that the required wage obligation was met for prior pay periods and will be met for each current or future pay period. Additionally, the petitioner has not demonstrated that the **required wage rate for all hours worked** were paid at the end of the beneficiary's ordinary pay period.²⁰ As such, the petitioner has failed to establish that it paid the beneficiary an adequate salary for his work, as required under the Act. The AAO therefore agrees with the director that the petitioner failed to establish that it complied with the terms and conditions of the approved petition.

Furthermore, although not addressed by the director, the AAO will briefly note that during the site visit, the officer asked to speak with the beneficiary. The petitioner's human resources manager indicated that the beneficiary works out of the office located at [REDACTED]

As previously mentioned, under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification *in the area of employment*, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act.

¹⁹ Moreover, the petitioner and counsel do not claim that the beneficiary is exempt from overtime pay as provided by Section 13(a)(1) of the Fair Labor Standards Act (FLSA) as defined by 29 C.F.R. § 541. The FLSA imposes certain standards regarding federal minimum wages and overtime pay for most employees in the United States. However, section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who serve as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and meet certain salary requirements. The petitioner and its counsel do not assert that the beneficiary is an exempt employee.

²⁰ Again, the required wage rate must be the *higher* of the actual wage rate (the rate the petitioner pays to all other individuals with similar experience and qualifications who are performing the same job), or the prevailing wage (a wage that is predominantly paid to workers in the same occupational classification in the area of intended employment at the time the application is filed). See section 212(n)(1)(A) of the Act.

The prevailing wage for the occupational category "Network Systems and Data Communications Analysts" for a Level I position in [REDACTED] was \$26.42 per hour – \$54,974 per year when the application was filed.²¹ The beneficiary's salary of \$19.47 per hour (until September 2009) and \$20.50 (thereafter) is below the prevailing wage of \$26.42 per hour – \$54,974 per year. As such, it appears that for this reason also the petitioner has failed to establish that it paid the beneficiary an adequate salary for his work, as required under the Act.²²

IV. Conclusion

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 and the proceedings will not be reconsidered. The previous decision of the AAO will not be disturbed.

ORDER: The motion is dismissed.

FURTHER ORDERED: The service center director shall review the approval of the prior H-1B petition with receipt number EAC 08 109 51145 for possible revocation consistent with the eligibility issues identified in this decision.

²¹ For more information regarding the prevailing wage for Network Systems and Data Communications Analysts in [REDACTED] see the All Industries Database for 7/2008 - 6/2009 for "Network Systems and Data Communications Analysts" – SOC (ONET/OES Code) 15-1081 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1081&area+47894&year=9&source=1> (last visited January 31, 2013).

²² Notably, the statement by the petitioner's human resources manager that the beneficiary works out of the office located at [REDACTED] raises several additional issues, including whether the petitioner submitted a valid LCA for all work locations and complied with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). However, as the motion must be dismissed and the petition revoked for the reasons already discussed, the AAO will not further discuss this or the additional issues and deficiencies it observes in the record of proceeding.